HansonBridgett

2023 Annual Labor & Employment Seminar

JANUARY 2023

Agenda

2023 ANNUAL LABOR & EMPLOYMENT SEMINAR

10:00 - 10:10 AM **Introduction and Welcome**

10:10 - 11:30 AM **What's New For 2023? California Employment Law Compliance Update**

Presenters: Kate Bowles, Kendall Fisher-Wu, Dorothy Liu, Rachel Vinson and Alison Wright

11:30 AM - 12:30 PM **Brave New World: Navigating Employment Laws In The Age Of Pay Transparency & Employee Cannabis Use**

Presenters: Josue Aparicio, Maribel Lopez and Michael Turner

12:30 - 1:30 PM **Lunch Provided for All Attendees**

PART II

1:30 - 2:30 PM **Trends In Wage & Hour Litigation (And More)**

Presenters: Alexa Galloway, Diane Marie O'Malley and Gymmel Trembly

2:30 - 2:45 PM **Break**

2:45 - 3:45 PM ***Bailey v. Sutter Health*** **Litigation Review – Lessons Learned**

Presenters: Jahmal Davis and Kristianne Seargeant (Deputy General Counsel, Sutter Health)

4:00 - 6:00 PM **Reception**

Hanson Bridgett Speaker Information

Josue Aparicio
Associate | San Francisco, CA
415.955.5094
japaricio@hansonbridgett.com

Maribel Lopez
Associate | San Francisco, CA
415.955.6332
mlopez@hansonbridgett.com

Kate Bowles
Partner | Los Angeles, CA
213.839.7700
kbowles@hansonbridgett.com

Diane Marie O'Malley
Partner | San Francisco, CA
415.955.5045
domalley@hansonbridgett.com

Jahmal Davis
Partner | San Francisco, CA
415.995.5815
jdavis@hansonbridgett.com

Gymmel Trembly
Associate | San Francisco, CA
415.955.5809
gtrembly@hansonbridgett.com

Alexa Galloway
Associate | Los Angeles, CA
213.839.7714
agalloway@hansonbridgett.com

Michael Turner
Counsel | San Francisco, CA
415.955.5808
mturner@hansonbridgett.com

Kendall Fisher-Wu
Associate | Sacramento, CA
916.551.2814
kfisherwu@hansonbridgett.com

Rachel Vinson
Associate | Los Angeles, CA
213.839.7719
rvinson@hansonbridgett.com

Dorothy Liu
Partner | San Francisco, CA
415.995.5046
dliu@hansonbridgett.com

Alison Wright
Partner | San Francisco, CA
415.995.5083
awright@hansonbridgett.com

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What's New for 2023?
CA Employment Compliance Update

KATE BOWLES / KENDALL FISHER-WU / DOROTHY LIU / RACHEL VINSON / ALISON WRIGHT

JANUARY 2023

Agenda

Kicking Off The New Year With New Holidays
- Lunar New Year (AB 2596)
- Juneteenth (AB 1655)
- Genocide Remembrance Day (AB 1801)

Time Off & Accommodation
- Bereavement Leave (AB 1949)
- Pregnant Workers Fairness Act (HR 1065)
- California Family Rights Act & Paid Sick Days (AB 1041)

COVID-19
- COVID-19 Supplemental Paid Sick Leave?
- Notice Requirements (AB 2693)
- Rebuttable Presumption (AB 1751)

State of Emergency (SB 1044)
- Anti-Retaliation Protections

Minimum Wage Increases (SB 3)

Data Privacy - CCPA/CPRA

Public Sector
- Meal and Rest Periods for Public Sector Healthcare (SB 1334)
- Brown Act/Open Meetings: Orderly Conduct (SB 1100)

Other Notable New Developments
- Employer Restrictions on Vehicle Tracking (AB 984)
- The DFEH Is Now the Civil Rights Department (SB 189)
- Expanded Human Trafficking (AB 1661)
- Sexual Abuse and Cover Up Accountability Act (AB 2777)

Reproductive Health
- Contraceptive Equity Act of 2022 (SB 523)
- Response to Dobbs (AB 2091, 657)
- Social Worker Access (SB 1002)
- Medical Travel Benefits

And Stay Tuned For More….

- **Pay Transparency** (SB 1162): Amending Government Code § 12999 and Labor Code § 432.4.
  - *Pay Data Reporting*
  - *Pay Scale Disclosure Requirements*
- **Off-Duty Cannabis Use** (AB 2188)
  - *A new protected class…*

Kicking Off The New Year With New Holidays

Welcome!

New State Holidays

- No requirement to provide State holidays unless you're a government employer
- But if you provide floating holidays, employees typically can use them for State holidays, subject to your policies
- **Lunar New Year** (AB 2596):
  - Generally corresponds with the second new moon following the winter solstice
  - This Lunar New Year falls on January 22, 2023
- **Genocide Remembrance Day** (AB1801):
  - Governor designates April 24 as Genocide Remembrance Day
  - Date stems from Armenian genocide of 1915
  - "[A] day for all to reflect on past and present genocides, but especially those that have felt the impact of these atrocities and groups that have found refuge in California, including, but not limited to, the Holocaust, Holodomor, and the Genocides of the Armenian, Assyrian, Greek, Cambodian, and Rwandan communities."
- **Juneteenth** (AB 1655):
  - June 19 designated as Juneteenth
  - To commemorate the end of slavery in the United States after the Civil War

Time Off & Accommodation

Bereavement Leave (AB 1949; Gov't Code § 12945.7)

- Applies to public and private employers with 5 or more employees; effective Jan. 1, 2023
- A separate entitlement to leave
- Eligible if employed for at least 30 days prior to commencement of the leave
- Must provide 5 days of bereavement leave upon death of a family member
  - Spouse, child, parent, sibling, grandparent, grandchild, domestic partner, or parent-in-law
  - If no existing bereavement leave policy, leave is unpaid
  - Employee may use vacation, personal leave, accrued and available sick leave, or compensatory time off
  - Employee must use within 3 months of date of the death; but need not be consecutive
  - Employer may request documentation; employee must provide within 30 days of first day of leave

Bereavement Leave (AB 1949; Gov't Code § 12945.7)

- Establishes anti-discrimination and anti-retaliation rights. It is an unlawful to:
  - Refuse to grant up to 5 days of bereavement leave upon death of a family member
  - Interfere with, restrain, or deny the exercise of, or attempt to exercise, any right under this section
  - Refuse to hire, or to discharge, demote, fine, suspend, expel, or discriminate against, an individual because of either of the following:
    - An individual's exercise of the right to bereavement leave; or
    - An individual's giving information or testimony as to their own bereavement leave, or another person's bereavement leave, in an inquiry or proceeding related to rights under this section.
- CBA Exemption:
  - If CBA expressly provides for bereavement leave equivalent to that required by this section
  - If CBA provides premium wage rates for all overtime hours worked, where applicable, and a regular hourly rate of pay for those employees of not less than 30 percent above the state minimum wage

Bereavement Leave (AB 1949; Gov't Code § 12945.7)

- Must maintain confidentiality of employee requests in confidential file
- Remedies for alleged violation of new bereavement law?
  - Same as for other violations of CFRA and FEHA, and can include the following:
  - Monetary damages, such as compensatory and punitive damages
  - Non-monetary damages, such as reinstatement

Pregnant Workers Fairness Act (H.R. 1065) Catching Up to California?

- Federal law that applies to public and private employers with 15 or more employees; effective June 27, 2023
- No eligibility requirement for employees
- Prohibits employers from discriminating against employees and job applicants because of need for a pregnancy-related accommodation
- Places employee and job applicant accommodation requests related to pregnancy, childbirth, or related conditions on the same level as requests related to disabilities under the Americans with Disabilities Act (ADA).
  - Under federal law, while discrimination based on an individual's pregnancy was prohibited, employers were not affirmatively required to accommodate pregnancy or pregnancy-related conditions
    - The ADA does not include pregnancy in its definition of an "impairment," so it does not consider pregnancy on its own to be a disability
  - PWFA accommodations can be temporary; examples include light duty, more frequent breaks, and temporary leave of absence

Pregnant Workers Fairness Act (H.R. 1065)

- Under the PWFA, it is unlawful for an employer to do any of the following with respect to an employee/job applicant with a medical condition relating to pregnancy or childbirth:
  - Fail to make reasonable accommodations to known limitations unless accommodation would impose an undue hardship on the employer's business operation;
  - Require employee to accept an accommodation other than any reasonable accommodation arrived at through an interactive process;
  - Deny employment opportunities based on the employer's need to make such reasonable accommodations to the employee;
  - Require the employee to take paid or unpaid leave if another reasonable accommodation can be provided; and
  - Take adverse action in terms, conditions, or privileges of employment against the employee requesting or using such reasonable accommodations (retaliation and discrimination prohibited).

Pregnant Workers Fairness Act (H.R. 1065)

- The PWFA provides that employees and job applicants that experienced a violation of the law may be entitled to the same remedies available for disability discrimination under the ADA, such as:
  - Monetary relief, including back pay, front pay, compensatory damages, and punitive damages;
  - Non-monetary relief, such as reinstatement/instatement, reasonable accommodations, and modified policies

Pregnant Workers Fairness Act (H.R. 1065)

- The PWFA does not make any noticeable changes for California employers.
  - California employers with 5 or more employees are covered by the Fair Employment and Housing Act (FEHA), which already provides that it is unlawful for an employer "to refuse to provide reasonable accommodation for an employee for a condition related to pregnancy, childbirth, or a related medical condition." (Gov't Code § 12945(a)(3)(A).)
  - Because the PWFA applies to employers with 15 or more employees, any employer covered by the PWFA is already covered by FEHA.
  - California employers' obligations under the California Family Rights Act (CFRA) and Pregnancy Disability Leave Law (PDLL) remain the same.
  - Employers should be aware that a failure to accommodate an employee with a medical condition related to pregnancy or childbirth could be a violation of not only FEHA but the PWFA as well (on and after the PWFA's effective date of June 27, 2023)

California Family Rights Act (CFRA) & Paid Sick Days: Leave for Care of a "Designated Person" (AB 1041)

- CFRA leave to care for a family member with a serious health condition has been expanded to include more family members in recent years
  - "Grandparent, grandchild, sibling" added in 2021
  - "Parent-in-law" added to the definition of "family member" in 2022
- CFRA leave expanded to care for "designated person" (Gov't Code §12945.2)
  - Any individual related by blood or whose association with the employee is the equivalent of a family relationship
- Employer may limit one designated person per 12-month period
- Designation can be made at the time the employee requests the leave

Healthy Workplaces, Healthy Families Act of 2014 - Paid Sick Days: Care for "Designated Person" (AB 1041)

- AB 1041 also expands definition of "family member" for Paid Sick Days:
  - Healthy Workplaces, Healthy Families Act of 2014 (Labor Code § 245.5)
  - Now includes a "designated person" for whom employee may use Paid Sick Days
  - Diagnosis, care, or treatment of an existing health condition of, or preventive care for, an employee or an employee's family member.
  - "Designated person" for this purpose means a person identified by the employee at the time the employee requests to use Paid Sick Days.
  - Employer may limit an employee to one designated person per 12-month period for Paid Sick Days.

COVID-19

COVID-19 Paid Supplemental Sick Leave?

City/County	COVID-19 Supplemental Paid Sick Leave Extension
City of Los Angeles	The LA City Council voted to end the city's SPSL ordinance effective February 15, 2023.
County of Los Angeles	Tracks AB152. COVID-19 SPSL expired on December 31, 2022.
Marin County	Tracks AB152. COVID-19 SPSL expired on December 31, 2022.
City of Oakland	Tracks AB152. COVID-19 SPSL expired on December 31, 2022.
City of Sacramento	Tracks AB152. COVID-19 SPSL expired on December 31, 2022.
Sacramento County	Tracks AB152. COVID-19 SPSL expired on December 31, 2022.
City of San Diego	Tracks AB152. COVID-19 SPSL expired on December 31, 2022.
City/County of San Francisco	Tracks AB152 and also provides for paid leave relating to Public Health Emergencies per the Public Health Emergency Leave Ordinance.

COVID-19 Update: Notice Requirements; Rebuttable Presumption Extended

- Potential COVID-19 exposure notice requirements extended to January 1, 2024 (AB 2693)
  - Notice is satisfied by display at the workplace with other notices, with dates and location of exposure, contact information for employees to receive information regarding COVID-19 benefits, CDC cleaning and disinfection plan and Cal/OSHA COVID-19 prevention program
  - Post within 1 business day and for 15 days
  - Or, employer can provide written notice to all employees who were on the premises at the same time as the confirmed case of COVID-19, but need not provide information about COVID-19-related benefits, the cleaning and disinfection plan, or the prevention plan
  - Must keep log of dates of all notices
  - No need to report cases to local health departments
- Rebuttable Workers' Compensation presumption extended to January 1, 2024 (AB 1751)

State of Emergency (SB 1044)

"Emergency Conditions" (SB 1044): Anti-Retaliation Protections – New Labor Code §1139

- Anti-retaliation protections during an "emergency condition" for private and public employees
- Unlawful to take or threaten adverse action against employee for refusing to report to work or to leave a workplace or worksite within affected area when employee has reasonable belief workplace or worksite is unsafe
- "Emergency Condition"
  - Condition of disaster or extreme peril to the safety of persons or property at the workplace or worksite caused by natural forces or a criminal act; or
  - An order to evacuate a workplace, a worksite, a worker's home, or the school of a worker's child due to natural disaster or a criminal act.
  - Does **not** include a health pandemic.

"Emergency Conditions" (SB 1044): Anti-Retaliation Protections – New Labor Code §1139

- "A reasonable belief that the workplace or worksite is unsafe" means:
  - A reasonable person, under the circumstances known to the employee at the time,
  - Would conclude there is a real danger of death or serious injury if that person enters or remains on the premises.
  - The existence of any health and safety regulations specific to the emergency condition and an employer's compliance or noncompliance with those regulations shall be a relevant factor if this information is known to the employee at the time of the emergency condition or the employee received training on the health and safety regulations mandated by law specific to the emergency condition.

"Emergency Conditions" (SB 1044): Anti-Retaliation Protections – New Labor Code §1139

- Does not apply to certain job positions. For example:
  - First responders
  - Employee or contractor of a health care facility who provides direct patient care
  - Employee of licensed residential care facility
  - Employee of a company providing utility, communications, energy, or roadside assistance while actively called to aid in emergency response

Also unlawful to prevent employee from accessing mobile device or other communications devices in event of emergency condition

Minimum Wage Increases (SB 3)

Minimum Wage Increases (SB 3)

- Statewide minimum wage increases to $15.50 per hour but see local ordinances
- Effect on Overtime Exemption: Salary basis threshold $64,480 per year

City/County	Minimum wage provision, if any
City of Los Angeles	$16.04, effective July 1, 2022
County of Los Angeles	$15.96, effective July 1, 2022; bumps to $16.90 on July 1, 2023
Marin County	$16.80, effective January 1, 2023
City of Oakland	$15.97, effective January 1, 2023; the Oakland Hotel Minimum Wage Rate goes up to $17.37 per hour (with Health Benefits), and $23.15 per hour (without Health Benefits), effective January 1, 2023
City of Sacramento	Same as the California state requirement
City of San Diego	$16.30, effective January 1, 2023
Sacramento County	Same as the California state requirement
City/County of San Francisco	$16.99 through June 30, 2023; will raise on July 1, 2023 in an amount to be determined based on the Consumer Price Index for urban wage earners and clerical workers in the area. (See Sec. 12R.4, Minimum Wage Ordinance, available at https://codelibrary.amlegal.com/codes/san_francisco/latest/sf_admin/0-0-0-8564#JD_12R.4)

Data Privacy - CCPA/CPRA

Data Privacy - CCPA/CPRA

- CCPA (California Consumer Privacy Act) – passed by Legislature in 2018, effective January 1, 2020
- CPRA (Consumer Privacy Rights Act) – passed by voters on the 2020 ballot, effective January 1, 2023 (enforcement starts July 1, 2023)
- The laws now coexist – the CPRA builds on and amends the CCPA

Data Privacy - CCPA/CPRA

- Together, the CCPA and CPRA protect the "personal information" of a covered business' "consumers" (generally does not apply to nonprofits or government entities)
  - Apply to businesses that, as of January 1 of the calendar year, had annual gross revenues more than $25,000,000 in the preceding calendar year (other ways for the laws to apply)
  - "Personal information" is essentially any information that can be reasonably linked to an individual
  - "Consumer" is defined as "a natural person who is a California resident" – very broad (includes a business' employees!)

Data Privacy - CCPA/CPRA

- Businesses are required to give consumers notice of what types of personal information they collect about consumers, as well as why they collect it, how long they keep it for, and why they keep it for that long
- Consumers have several rights under the laws, including the right to request that a business delete their personal information (with exceptions), disclose what information it has collected, and correct inaccurate personal information, among others

Data Privacy - CCPA/CPRA

- The CCPA included a temporary exception, providing that businesses largely did not have to comply with the law with respect to their employees
- The CPRA ended that exception, so as of January 1, 2023, businesses must provide the same notices and rights to their employees as to any other "consumer"
  - Practically speaking, this means that businesses should update their employee handbooks to include CCPA/CPRA notices and/or distribute a notice to their employees, and ensure that they have a procedure in place to respond to "consumer requests" under the CCPA/CPRA coming from their employees

Data Privacy - CCPA/CPRA

- While consumers have the right to request deletion and correction, several exceptions can apply that relieve the business from complying with the request, including:
  - Compliance with legal obligations (e.g., Labor Code section 226(a)'s requirement that an employer keep a copy of an employee's paystub for at least three years)
  - Internal uses "reasonably aligned with the expectations of the consumer based on the consumer's relationship with the business"
    - An employer cannot comply with a current employee's request to delete all information about them; the employment relationship could not continue

Data Privacy - CCPA/CPRA

- The CPRA's changes, including the expansion to the employer-employee relationship, went "live" on January 1, 2023
- Enforcement does not begin until July 1, 2023 and only applies to violations that occurred on or after that date, so there is still time to get compliant – it is not too late!
- Review your current CCPA policies and notices to update them to comply with the CPRA; if you don't have any, check whether your company is covered by the laws, and then work with counsel to get a compliance plan in place

Public Sector

Public Sector: Meal & Rest Periods to Public Employees in Healthcare (SB 1334) – New Labor Code §512.1

- Meal and rest period provisions extended to public sector employees who:
  - Provide direct patient care or support direct patient care in a general acute care hospital, clinic, or public health setting
- Entitled to one unpaid 30-minute meal period on shifts > 5 hours and
- Entitled to a 2nd unpaid 30-minute meal period on shifts > 10 hours
- Entitled to 10-minute rest period per 4 hours or major fraction thereof

Public Sector: Meal & Rest Periods to Public Employees in Healthcare (SB 1334)

- Employees are authorized to waive meal periods or enter into on-duty meal period agreements, as provided by Wage Orders 4 and 5
- Failure to provide meal or rest period entitles the employee to one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest period is not provided
- CBA Exemption: For CBAs that provide for meal and rest periods, including the same monetary remedy

Public Sector: Brown Act/Open Meetings: Orderly Conduct! (SB 1100)

- Authorizes presiding member of legislative body to remove, or cause the removal of, an individual for "disrupting" the meeting, following a warning to the individual.
- "Disrupting" means "actually disrupts, disturbs, impedes, or renders infeasible the orderly conduct of the meeting" and includes, but is not limited to:
  - Failure to comply with reasonable and lawful regulations; or
  - Engaging in behavior that constitutes use of force or a true threat of force
    - i.e., a "threat that has sufficient indicia of intent and seriousness, that a reasonable observer would perceive it to be an actual threat to use force by the person making the threat"

Other Notable New Developments

Other Notable Developments

- **The DFEH Is Now the Civil Rights Department (SB 189)**
  - As of July 1, 2022, California's former Department of Fair Employment and Housing is now known as the California Civil Rights Department ("CRD"), with a new website address to match: https://calcivilrights.ca.gov/
  - This does not functionally change any of the Department's duties or how employers interact with the Department. The change was intended to more accurately capture the broad range of issues the Department addresses.

- **Employer Restrictions on Vehicle Tracking (AB 984; Vehicle Code §4854)**
  - Employer prohibited from using an alternative device equipped with tracking technology to monitor employees (i.e., fleet and commercial vehicles), except to locate, track, watch, listen to, or surveil employee during work hours if strictly necessary for the performance of the employee's duties.
  - Must provide notice before conducting any monitoring
  - May not retaliate against an employee for removing or disabling device's monitoring capabilities outside of work hours

Other Notable Developments

- **Expanded Human Trafficking Notice Posting Requirements** (AB 1661)
  - Barbers, hair salons, nail salons, and electrolysis centers must post Department of Justice notice re slavery and human trafficking, including nonprofit organizations for services or support
- **Sexual Abuse and Cover Up Accountability Act** (AB 2777)
  - Re-opens statute of limitation for sexual assault claims commenced on or after January 1, 2019, for acts of sexual assault that occurred on or after January 1, 2009, if those claims were barred solely because of the expiration of the statute of limitations. A plaintiff has until December 31, 2026, to bring a claim.
  - Also opened 1-year window (Jan. 1, 2023-Dec. 31, 2023) to bring a claim as to employers that would otherwise be barred because the statute of limitations expired if the plaintiff alleges the following: (1) the plaintiff was sexually assaulted; (2) one or more entities are legally responsible for damages arising out of the sexual assault, which can be established through, inter alia, negligence, intentional torts, and vicarious liability; and (3) the entities, including their officers, directors, representatives, employees, or agents, engaged in a cover up or attempted cover up of a previous instance or allegation of sexual assault by an alleged perpetrator of such abuse. A plaintiff has until December 31, 2023.
  - "Cover up" defined as "a concerted effort to hide evidence relating to a sexual assault that incentivizes individuals to remain silent or prevents information relating to a sexual assault from becoming public or being disclosed to the plaintiff, including, but not limited to, the use of nondisclosure agreements or confidentiality agreements."
  - Revives related claims for wrongful termination and sexual harassment where a plaintiff asserts sexual assault was the basis for the claims.

Reproductive Health

Reproductive Health: Contraceptive Equity Act of 2022 (SB 523)

- Expands coverage of contraceptives by health care service plan eff. Jan. 1, 2024
- Also adds new class under FEHA protected from discrimination, eff. Jan, 1, 2023:
  - Reproductive health decision-making (Gov't Code §12940(a))
- "Reproductive health decision-making" includes, but is not limited to:
  - "A decision to use or access a particular drug, device, product, or medical service for reproductive health" (Gov't Code §12926(y))
- Unlawful to require, as a condition of employment, continued employment, or a benefit of employment:
  - Disclosure of information relating to applicant's or employee's reproductive health decision-making or to engage in discriminatory practices based on reproductive health decision (Gov't Code §12940(p))

Reproductive Health (AB 2091)

- In response to the U.S. Supreme Court's decision in *Dobbs, State Health Officer Of The Mississippi Department Of Health, et al. v. Jackson Women's Health Organization et al*, this new law prohibits employers, among others, from releasing medical information that would identify an individual or that is related to an individual seeking or obtaining an abortion in response to a subpoena or law enforcement request if that request is:
  - (1) based on another state's law that would interfere with a person's rights under the Reproductive Privacy Act (Article 2.5 (commencing with Section 123460) of Chapter 2 of Part 2 of Division 106 of the Health and Safety Code).
  - (2) Enforcement of a foreign penal civil action, as defined in Section 2029.200 of the Code of Civil Procedure.
- This law became effective immediately upon signing, on September 27, 2022.

Reproductive Health (AB 657)

- Another law in response to *Dobbs*, this law requires that the Medicare Board, Osteopathic Medical Board and Board of Registered Nursing expedite the licensure process of providers demonstrating that they intend to provide abortions within their scope of practice.
- Employee healthcare providers may ask their employers to write a letter to their respective board (Medical Board, Nursing Board, etc.) indicating that they have been hired to provide abortions, the start date, the location, and that providing abortions will be within the applicable scope of practice of the healthcare provider's license. It adds Bus. & Prof. Code section 870.

Medical Travel Benefits

- Following the Supreme Court decision in *Dobbs v. Jackson Women's Health Organization*, employers are implementing medical travel benefits to provide employees and their dependents with access to medical care
- Four different approaches
  - Include the travel benefit under the self-insured major group medical plan
  - Include the travel benefit under the Employee Assistance Plan (EAP)
  - Adopt a taxable reimbursement policy
  - Adopt a Health Reimbursement Arrangement (HRA)

Medical Travel Benefits

- Other issues to consider
  - COBRA compliance
  - HIPAA compliance
  - Mental Health Parity and Addiction Equity Act compliance
  - High deductible health plans and HSA compliance
  - Out-of-network provider coverage
- Potential risks for employers
  - Shareholder activism
  - State law violations, including licensing and regulatory issues
  - Civil or criminal liability

Questions?

Kate Bowles
Partner | Los Angeles, CA
213.839.7700
kbowles@hansonbridgett.com

Rachel Vinson
Associate | Los Angeles, CA
213.839.7719
rvinson@hansonbridgett.com

Kendall Fisher-Wu
Associate | Sacramento, CA
916.551.2814
kfisherwu@hansonbridgett.com

Alison Wright
Partner | San Francisco, CA
415.995.5083
awright@hansonbridgett.com

Dorothy Liu
Partner | San Francisco, CA
415.995.5046
dliu@hansonbridgett.com

Assembly Bill No. 1949

CHAPTER 767

An act to amend Sections 12945.21 and 19859.3 of, and to add Section 12945.7 to, the Government Code, relating to employment.

[Approved by Governor September 29, 2022. Filed with Secretary of State September 29, 2022.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1949, Low. Employees: bereavement leave.

Existing law, commonly known as the California Family Rights Act, which is a part of the California Fair Employment and Housing Act, makes it an unlawful employment practice for an employer, as defined, to refuse to grant a request by an eligible employee to take up to 12 workweeks of unpaid protected leave during any 12-month period for family care and medical leave, as specified.

This bill would additionally make it an unlawful employment practice for an employer to refuse to grant a request by an eligible employee to take up to 5 days of bereavement leave upon the death of a family member, as defined. The bill would require that leave be completed within 3 months of the date of death. The bill would require that leave be taken pursuant to any existing bereavement leave policy of the employer. Under the bill, in the absence of an existing policy, the bereavement leave may be unpaid. However, the bill would authorize an employee to use certain other leave balances otherwise available to the employee, including accrued and available paid sick leave.

This bill would require, if an existing leave policy provides for less than 5 days of bereavement leave, a total of at least 5 days of bereavement leave for the employee, as prescribed. The bill would make it an unlawful employment practice for an employer to engage in specified acts of discrimination, interference, or retaliation relating to an individual's exercise of rights under the bill. The bill would require the employer to maintain employee confidentiality relating to bereavement leave, as specified. The bill would not apply to an employee who is covered by a valid collective bargaining agreement that provides for prescribed bereavement leave and other specified working conditions.

Existing law requires the Department of Fair Employment and Housing to create a small employer family leave mediation pilot program for alleged violations of specified family care and medical leave provisions, applicable to employers with between 5 and 19 employees.

This bill would require the Department of Fair Employment and Housing to expand the program to include mediation for alleged violations of these provisions.

Existing law grants specified permanent employees of the state up to 3 days of bereavement leave, with up to 2 additional days of bereavement leave upon request if the death is out of state. Existing law specifies that these 2 additional days are to be without pay or are to be charged against existing sick leave credits.

This bill would recast those provisions to specify that the first 3 days of bereavement leave are to be paid leave, and to remove the condition that the death be out of state for the additional 2 days.

Existing constitutional provisions require that a statute that limits the right of access to the meetings of public bodies or the writings of public officials and agencies be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

This bill would make legislative findings to that effect.

The people of the State of California do enact as follows:

SECTION 1. Section 12945.7 is added to the Government Code, to read:

12945.7. (a) As used in this section:

(1) (A) "Employee" means a person employed by the employer for at least 30 days prior to the commencement of the leave.

(B) "Employee" does not include a person who is covered by Section 19859.3.

(2) "Employer" means either of the following:

(A) A person who employs five or more persons to perform services for a wage or salary.

(B) The state and any political or civil subdivision of the state, including, but not limited to, cities and counties.

(3) "Family member" means a spouse or a child, parent, sibling, grandparent, grandchild, domestic partner, or parent-in-law as defined in Section 12945.2.

(b) It shall be an unlawful employment practice for an employer to refuse to grant a request by any employee to take up to five days of bereavement leave upon the death of a family member.

(c) The days of bereavement leave need not be consecutive.

(d) The bereavement leave shall be completed within three months of the date of death of the family member.

(e) (1) The bereavement leave shall be taken pursuant to any existing bereavement leave policy of the employer.

(2) If there is no existing bereavement leave policy, the bereavement leave may be unpaid, except that an employee may use vacation, personal leave, accrued and available sick leave, or compensatory time off that is otherwise available to the employee.

(3) If an existing leave policy provides for less than five days of paid bereavement leave, the employee shall be entitled to no less than a total of five days of bereavement leave, consisting of the number of days of paid leave under the existing policy, and the remainder of days of leave may be

unpaid, except that an employee may use vacation, personal leave, accrued and available sick leave, or compensatory time off that is otherwise available to the employee.

(4) If an existing leave policy provides for less than five days of unpaid bereavement leave, the employee shall be entitled to no less than five days of unpaid bereavement leave, except that an employee may use vacation, personal leave, accrued and available sick leave, or compensatory time off that is otherwise available to the employee.

(f) The employee, if requested by the employer, within 30 days of the first day of the leave, shall provide documentation of the death of the family member. As used in this subdivision, "documentation" includes, but is not limited to, a death certificate, a published obituary, or written verification of death, burial, or memorial services from a mortuary, funeral home, burial society, crematorium, religious institution, or governmental agency.

(g) It shall be an unlawful employment practice for an employer to refuse to hire, or to discharge, demote, fine, suspend, expel, or discriminate against, an individual because of either of the following:

(1) An individual's exercise of the right to bereavement leave provided by subdivision (b).

(2) An individual's giving information or testimony as to their own bereavement leave, or another person's bereavement leave, in an inquiry or proceeding related to rights guaranteed under this section.

(h) It shall be an unlawful employment practice for an employer to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right provided under this section.

(i) The employer shall maintain the confidentiality of any employee requesting leave under this section. Any documentation provided to the employer pursuant to subdivision (f) or subdivision (g) shall be maintained as confidential and shall not be disclosed except to internal personnel or counsel, as necessary, or as required by law.

(j) An employee's right to leave under this section shall be construed as separate and distinct from any right under Section 12945.2.

(k) The section does not apply to an employee who is covered by a valid collective bargaining agreement if the agreement expressly provides for bereavement leave equivalent to that required by this section and for the wages, hours of work, and working conditions of the employees, and if the agreement provides premium wage rates for all overtime hours worked, where applicable, and a regular hourly rate of pay for those employees of not less than 30 percent above the state minimum wage.

SEC. 2. Section 12945.21 of the Government Code is amended to read:

12945.21. (a) The department shall create a small employer family leave mediation pilot program for employers with between 5 and 19 employees. Under the pilot program, when an employee requests an immediate right to sue alleging a violation of Section 12945.2 or Section 12945.7 by an employer having between 5 and 19 employees, the department shall notify the employee in writing of the requirement for mediation prior to filing a civil action if mediation is requested by the employer or employee. The

employee shall contact the department's dispute resolution division prior to filing a civil action.

(b) (1) Under the pilot program, the employee shall contact the department's dispute resolution division prior to filing a civil action in the manner specified by the department. The employee shall also indicate whether they are requesting mediation.

(2) Upon contacting the dispute resolution division regarding the intent to pursue a legal action for a violation of Section 12945.2 or Section 12945.7 by an employer having between 5 and 19 employees, the department shall notify all named respondents of the alleged violation and the requirement for mediation, if mediation is requested by the employee or employer, in writing.

(3) The department shall terminate its activity if neither the employee nor the employer requests mediation within 30 days of receipt by all named respondents of the notification specified in paragraph (2).

(4) If the department receives a request for mediation from the employee or employer within 30 days of receipt by all named respondents of the notification specified in paragraph (2), the department shall initiate the mediation within 60 days of the department's receipt of the request or the receipt of the notification by all named respondents, whichever is later.

(5) Once the mediation has been initiated, no later than seven days before the mediation date, the mediator shall notify the employee of their right to request information pursuant to Sections 226 and 1198.5 of the Labor Code. The mediator shall also help facilitate any other reasonable requests for information that may be necessary for either party to present their claim in mediation.

(c) (1) The employee shall not pursue any civil action under Section 12945.2 or Section 12945.7 unless the mediation is not initiated by the department within the time period specified in subdivision (b) or until the mediation is complete or the mediation is deemed unsuccessful.

(2) The statute of limitations applicable to the employee's claim, including for all related claims under Section 12945.2 or Section 12945.7 and not under Section 12945.2 or Section 12945.7, shall be tolled from the date the employee contacts the department's dispute resolution division regarding the intent to pursue a legal action until the mediation is complete or the mediation is deemed unsuccessful.

(d) (1) For purposes of this section, the following shall apply:

(2) A mediation is deemed complete when any of the following occur:

(A) Neither the employee nor the employer requests the mediation within 30 days of receipt by all named respondents of the notification or both parties agree not to participate in the mediation.

(B) The employer fails to respond to the notification or mediation request within 30 days of receipt.

(C) The department fails to initiate the mediation within 60 days of the department's receipt of the request for mediation or the receipt by all named respondents of the notification, whichever is later.

(D) The department notifies the parties that it has determined that further mediation would be fruitless, both parties agree that further mediation would be fruitless, one of the parties failed to submit information requested by the other party and deemed by the mediator to be reasonably necessary or fair for the other party to obtain, or the mediator determines that the core facts of the employee's complaint are unrelated to Section 12945.2 or Section 12945.7.

(3) A mediation is unsuccessful if the claim is not resolved within 30 days of the department's initiation of mediation, unless the department notifies the parties that it has determined more time is needed to make the mediation successful.

(e) A respondent or defendant in a civil action that did not receive a notification pursuant to subdivision (b) as a result of the employee's failure to contact the department's alternative dispute resolution division prior to filing a civil action, and who had between 5 and 19 employees at the time that the alleged violation occurred, shall, upon a timely request, be entitled to a stay of any pending civil action or arbitration until mediation is complete or is deemed unsuccessful.

(f) If a request for an immediate right to sue includes other alleged violations under this part, this section shall only apply to the claim alleging a violation of Section 12945.2 or Section 12945.7. Notwithstanding this subdivision, nothing in this section prohibits the parties from voluntarily choosing to mediate all alleged violations.

(g) This section shall remain in effect only until January 1, 2024, and as of that date is repealed.

SEC. 3. Section 19859.3 of the Government Code is amended to read:

19859.3. (a) Any permanent employee who is either excluded from the definition of state employee in subdivision (c) of Section 3513, or is a nonelected officer or employee of the executive branch of government who is not a member of the civil service, shall be granted bereavement leave with pay for the death of a person related by blood, adoption, or marriage, or any person residing in the immediate household of the employee at the time of death. The employee shall give advance notice to the employee's immediate supervisor and shall provide substantiation to support the request.

(b) For any one occurrence, the bereavement leave shall not exceed three days with pay. However, a request for two additional days of bereavement leave shall be granted, at the option of the employee, as either without pay or as a charge against any accrued sick leave credit.

(c) If additional bereavement leave is necessary, the employee may use accrued vacation, compensating time off, or take an authorized leave without pay, subject to the approval of the appointing power.

SEC. 4. The Legislature finds and declares that Section 1 of this act, which adds Section 12945.7 to the Government Code, imposes a limitation on the public's right of access to the meetings of public bodies or the writings of public officials and agencies within the meaning of Section 3 of Article I of the California Constitution. Pursuant to that constitutional provision,

the Legislature makes the following findings to demonstrate the interest protected by this limitation and the need for protecting that interest:

The confidentiality provisions set forth in Section 1 further the need to protect the privacy rights of employees regarding the passing of a family member, and to protect the enforcement process related to violations of the bereavement provisions. These limitations are needed in order to strike the proper balance between the privacy interests of the employee and the employee's family, and the public's right to access.

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Assembly Bill No. 1041

CHAPTER 748

An act to amend Section 12945.2 of the Government Code, and to amend Section 245.5 of the Labor Code, relating to employment.

[Approved by Governor September 29, 2022. Filed with Secretary of State September 29, 2022.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1041, Wicks. Employment: leave.

(1) Existing law, commonly known as the California Family Rights Act, makes it an unlawful employment practice for a California public employer or an employer with 5 or more employees to refuse to grant a request from an employee who meets specified requirements to take up to a total of 12 workweeks in any 12-month period for family care and medical leave, as defined.

This bill would expand the class of people for whom an employee may take leave to care for to include a designated person. The bill would define "designated person" to mean any individual related by blood or whose association with the employee is the equivalent of a family relationship. The bill would authorize a designated person to be identified at the time the employee requests the leave. The bill would authorize an employer to limit an employee to one designated person per 12-month period.

(2) Existing law, the Healthy Workplaces, Healthy Families Act of 2014, generally entitles an employee who works in California for the same employer for 30 or more days within a year to paid sick days, as specified, including the use of paid sick days for diagnosis, care, or treatment of an existing health condition of, or preventive care for, an employee or an employee's family member. Existing law defines "family member" for this purpose to include individuals who share a prescribed relationship with the employee.

This bill would expand the definition of the term "family member" to include a designated person, which, for purposes of these provisions, would mean a person identified by the employee at the time the employee requests paid sick days, subject to limitation by the employer, as prescribed.

The people of the State of California do enact as follows:

SECTION 1. Section 12945.2 of the Government Code is amended to read:

12945.2. (a) It shall be an unlawful employment practice for any employer, as defined in paragraph (4) of subdivision (b), to refuse to grant

a request by any employee with more than 12 months of service with the employer, and who has at least 1,250 hours of service with the employer during the previous 12-month period or who meets the requirements of subdivision (r), to take up to a total of 12 workweeks in any 12-month period for family care and medical leave. Family care and medical leave requested pursuant to this subdivision shall not be deemed to have been granted unless the employer provides the employee, upon granting the leave request, a guarantee of employment in the same or a comparable position upon the termination of the leave. The council shall adopt a regulation specifying the elements of a reasonable request.

(b) For purposes of this section:

(1) "Child" means a biological, adopted, or foster child, a stepchild, a legal ward, a child of a domestic partner, or a person to whom the employee stands in loco parentis.

(2) "Designated person" means any individual related by blood or whose association with the employee is the equivalent of a family relationship. The designated person may be identified by the employee at the time the employee requests the leave. An employer may limit an employee to one designated person per 12-month period for family care and medical leave.

(3) "Domestic partner" has the same meaning as defined in Section 297 of the Family Code.

(4) "Employer" means either of the following:

(A) Any person who directly employs five or more persons to perform services for a wage or salary.

(B) The state, and any political or civil subdivision of the state and cities.

(5) "Family care and medical leave" means any of the following:

(A) Leave for reason of the birth of a child of the employee or the placement of a child with an employee in connection with the adoption or foster care of the child by the employee.

(B) Leave to care for a child, parent, grandparent, grandchild, sibling, spouse, domestic partner, or designated person who has a serious health condition.

(C) Leave because of an employee's own serious health condition that makes the employee unable to perform the functions of the position of that employee, except for leave taken for disability on account of pregnancy, childbirth, or related medical conditions.

(D) Leave because of a qualifying exigency related to the covered active duty or call to covered active duty of an employee's spouse, domestic partner, child, or parent in the Armed Forces of the United States, as specified in Section 3302.2 of the Unemployment Insurance Code.

(6) "Employment in the same or a comparable position" means employment in a position that has the same or similar duties and pay that can be performed at the same or similar geographic location as the position held prior to the leave.

(7) "FMLA" means the federal Family and Medical Leave Act of 1993 (P.L. 103-3).

(8) "Grandchild" means a child of the employee's child.

(9) "Grandparent" means a parent of the employee's parent.

(10) "Health care provider" means any of the following:

(A) An individual holding either a physician's and surgeon's certificate issued pursuant to Article 4 (commencing with Section 2080) of Chapter 5 of Division 2 of the Business and Professions Code, an osteopathic physician's and surgeon's certificate issued pursuant to Article 4.5 (commencing with Section 2099.5) of Chapter 5 of Division 2 of the Business and Professions Code, or an individual duly licensed as a physician, surgeon, or osteopathic physician or surgeon in another state or jurisdiction, who directly treats or supervises the treatment of the serious health condition.

(B) Any other person determined by the United States Secretary of Labor to be capable of providing health care services under the FMLA.

(11) "Parent" means a biological, foster, or adoptive parent, a parent-in-law, a stepparent, a legal guardian, or other person who stood in loco parentis to the employee when the employee was a child.

(12) "Parent-in-law" means the parent of a spouse or domestic partner.

(13) "Serious health condition" means an illness, injury, impairment, or physical or mental condition that involves either of the following:

(A) Inpatient care in a hospital, hospice, or residential health care facility.

(B) Continuing treatment or continuing supervision by a health care provider.

(14) "Sibling" means a person related to another person by blood, adoption, or affinity through a common legal or biological parent.

(c) An employer shall not be required to pay an employee for any leave taken pursuant to subdivision (a), except as required by subdivision (d).

(d) An employee taking a leave permitted by subdivision (a) may elect, or an employer may require the employee, to substitute, for leave allowed under subdivision (a), any of the employee's accrued vacation leave or other accrued time off during this period or any other paid or unpaid time off negotiated with the employer. If an employee takes a leave because of the employee's own serious health condition, the employee may also elect, or the employer may also require the employee, to substitute accrued sick leave during the period of the leave. However, an employee shall not use sick leave during a period of leave in connection with the birth, adoption, or foster care of a child, or to care for a child, parent, grandparent, grandchild, sibling, spouse, domestic partner, or designated person with a serious health condition, unless mutually agreed to by the employer and the employee.

(e) (1) During any period that an eligible employee takes leave pursuant to subdivision (a) or takes leave that qualifies as leave taken under the FMLA, the employer shall maintain and pay for coverage under a "group health plan," as defined in Section 5000(b)(1) of the Internal Revenue Code, for the duration of the leave, not to exceed 12 workweeks in a 12-month period, commencing on the date leave taken under the FMLA commences, at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of the leave. Nothing in the preceding sentence shall preclude an employer from maintaining and paying for coverage under a "group health plan"

beyond 12 workweeks. An employer may recover the premium that the employer paid as required by this subdivision for maintaining coverage for the employee under the group health plan if both of the following conditions occur:

(A) The employee fails to return from leave after the period of leave to which the employee is entitled has expired.

(B) The employee's failure to return from leave is for a reason other than the continuation, recurrence, or onset of a serious health condition that entitles the employee to leave under subdivision (a) or other circumstances beyond the control of the employee.

(2) Any employee taking leave pursuant to subdivision (a) shall continue to be entitled to participate in employee health plans for any period during which coverage is not provided by the employer under paragraph (1), employee benefit plans, including life insurance or short-term or long-term disability or accident insurance, pension and retirement plans, and supplemental unemployment benefit plans to the same extent and under the same conditions as apply to an unpaid leave taken for any purpose other than those described in subdivision (a). In the absence of these conditions an employee shall continue to be entitled to participate in these plans and, in the case of health and welfare employee benefit plans, including life insurance or short-term or long-term disability or accident insurance, or other similar plans, the employer may, at the employer's discretion, require the employee to pay premiums, at the group rate, during the period of leave not covered by any accrued vacation leave, or other accrued time off, or any other paid or unpaid time off negotiated with the employer, as a condition of continued coverage during the leave period. However, the nonpayment of premiums by an employee shall not constitute a break in service, for purposes of longevity, seniority under any collective bargaining agreement, or any employee benefit plan.

For purposes of pension and retirement plans, an employer shall not be required to make plan payments for an employee during the leave period, and the leave period shall not be required to be counted for purposes of time accrued under the plan. However, an employee covered by a pension plan may continue to make contributions in accordance with the terms of the plan during the period of the leave.

(f) During a family care and medical leave period, the employee shall retain employee status with the employer, and the leave shall not constitute a break in service, for purposes of longevity, seniority under any collective bargaining agreement, or any employee benefit plan. An employee returning from leave shall return with no less seniority than the employee had when the leave commenced, for purposes of layoff, recall, promotion, job assignment, and seniority-related benefits such as vacation.

(g) If the employee's need for a leave pursuant to this section is foreseeable, the employee shall provide the employer with reasonable advance notice of the need for the leave.

(h) If the employee's need for leave pursuant to this section is foreseeable due to a planned medical treatment or supervision, the employee shall make

a reasonable effort to schedule the treatment or supervision to avoid disruption to the operations of the employer, subject to the approval of the health care provider of the individual requiring the treatment or supervision.

(i) (1) An employer may require that an employee's request for leave to care for a child, parent, grandparent, grandchild, sibling, spouse, domestic partner, or designated person who has a serious health condition be supported by a certification issued by the health care provider of the individual requiring care. That certification shall be sufficient if it includes all of the following:

(A) The date on which the serious health condition commenced.

(B) The probable duration of the condition.

(C) An estimate of the amount of time that the health care provider believes the employee needs to care for the individual requiring the care.

(D) A statement that the serious health condition warrants the participation of a family member to provide care during a period of the treatment or supervision of the individual requiring care.

(2) Upon expiration of the time estimated by the health care provider in subparagraph (C) of paragraph (1), the employer may require the employee to obtain recertification, in accordance with the procedure provided in paragraph (1), if additional leave is required.

(j) (1) An employer may require that an employee's request for leave because of the employee's own serious health condition be supported by a certification issued by the employee's health care provider. That certification shall be sufficient if it includes all of the following:

(A) The date on which the serious health condition commenced.

(B) The probable duration of the condition.

(C) A statement that, due to the serious health condition, the employee is unable to perform the function of the employee's position.

(2) The employer may require that the employee obtain subsequent recertification regarding the employee's serious health condition on a reasonable basis, in accordance with the procedure provided in paragraph (1), if additional leave is required.

(3) (A) In any case in which the employer has reason to doubt the validity of the certification provided pursuant to this section, the employer may require, at the employer's expense, that the employee obtain the opinion of a second health care provider, designated or approved by the employer, concerning any information certified under paragraph (1).

(B) The health care provider designated or approved under subparagraph (A) shall not be employed on a regular basis by the employer.

(C) In any case in which the second opinion described in subparagraph (A) differs from the opinion in the original certification, the employer may require, at the employer's expense, that the employee obtain the opinion of a third health care provider, designated or approved jointly by the employer and the employee, concerning the information certified under paragraph (1).

(D) The opinion of the third health care provider concerning the information certified under paragraph (1) shall be considered to be final and shall be binding on the employer and the employee.

(4) As a condition of an employee's return from leave taken because of the employee's own serious health condition, the employer may have a uniformly applied practice or policy that requires the employee to obtain certification from the employee's health care provider that the employee is able to resume work. Nothing in this paragraph shall supersede a valid collective bargaining agreement that governs the return to work of that employee.

(k) It shall be an unlawful employment practice for an employer to refuse to hire, or to discharge, fine, suspend, expel, or discriminate against, any individual because of any of the following:

(1) An individual's exercise of the right to family care and medical leave provided by subdivision (a).

(2) An individual's giving information or testimony as to the individual's own family care and medical leave, or another person's family care and medical leave, in any inquiry or proceeding related to rights guaranteed under this section.

(*l*) This section shall not be construed to require any changes in existing collective bargaining agreements during the life of the contract, or until January 1, 1993, whichever occurs first.

(m) The amendments made to this section by Chapter 827 of the Statutes of 1993 shall not be construed to require any changes in existing collective bargaining agreements during the life of the contract, or until February 5, 1994, whichever occurs first.

(n) This section shall be construed as separate and distinct from Section 12945.

(o) Leave provided for pursuant to this section may be taken in one or more periods. The 12-month period during which 12 workweeks of leave may be taken under this section shall run concurrently with the 12-month period under the FMLA, and shall commence the date leave taken under the FMLA commences.

(p) Leave taken by an employee pursuant to this section shall run concurrently with leave taken pursuant to the FMLA, except for any leave taken under the FMLA for disability on account of pregnancy, childbirth, or related medical conditions. The aggregate amount of leave taken under this section or the FMLA, or both, except for leave taken for disability on account of pregnancy, childbirth, or related medical conditions, shall not exceed 12 workweeks in a 12-month period. An employee is entitled to take, in addition to the leave provided for under this section and the FMLA, the leave provided for in Section 12945, if the employee is otherwise qualified for that leave.

(q) It shall be an unlawful employment practice for an employer to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right provided under this section.

(r) (1) An employee employed by an air carrier as a flight deck or cabin crew member meets the eligibility requirements specified in subdivision (a) if all of the following requirements are met:

(A) The employee has 12 months or more of service with the employer.

(B) The employee has worked or been paid for 60 percent of the applicable monthly guarantee, or the equivalent annualized over the preceding 12-month period.

(C) The employee has worked or been paid for a minimum of 504 hours during the preceding 12-month period.

(2) As used in this subdivision, the term "applicable monthly guarantee" means both of the following:

(A) For employees described in this subdivision other than employees on reserve status, the minimum number of hours for which an employer has agreed to schedule those employees for any given month.

(B) For employees described in this subdivision who are on reserve status, the number of hours for which an employer has agreed to pay those employees on reserve status for any given month, as established in the collective bargaining agreement or, if none exists, in the employer's policies.

(3) The department may provide, by regulation, a method for calculating the leave described in subdivision (a) with respect to employees described in this subdivision.

SEC. 2. Section 245.5 of the Labor Code is amended to read:

245.5. As used in this article:

(a) "Employee" does not include the following:

(1) An employee covered by a valid collective bargaining agreement if the agreement expressly provides for the wages, hours of work, and working conditions of employees, and expressly provides for paid sick days or a paid leave or paid time off policy that permits the use of sick days for those employees, final and binding arbitration of disputes concerning the application of its paid sick days provisions, premium wage rates for all overtime hours worked, and regular hourly rate of pay of not less than 30 percent more than the state minimum wage rate.

(2) An employee in the construction industry covered by a valid collective bargaining agreement if the agreement expressly provides for the wages, hours of work, and working conditions of employees, premium wage rates for all overtime hours worked, and regular hourly pay of not less than 30 percent more than the state minimum wage rate, and the agreement either (A) was entered into before January 1, 2015, or (B) expressly waives the requirements of this article in clear and unambiguous terms. For purposes of this subparagraph, "employee in the construction industry" means an employee performing work associated with construction, including work involving alteration, demolition, building, excavation, renovation, remodeling, maintenance, improvement, repair work, and any other work as described by Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, and other similar or related occupations or trades.

(3) An individual employed by an air carrier as a flight deck or cabin crew member that is subject to Title II of the federal Railway Labor Act (45 U.S.C. Sec. 151 et seq.), provided that the individual is provided with compensated time off equal to or exceeding the amount established in paragraph (1) of subdivision (b) of Section 246.

(4) An employee of the state, city, county, city and county, district, or any other public entity who is a recipient of a retirement allowance and employed without reinstatement into the employee's respective retirement system pursuant to either Article 8 (commencing with Section 21220) of Chapter 12 of Part 3 of Division 5 of Title 2 of the Government Code, or Article 8 (commencing with Section 31670) of Chapter 3 of Part 3 of Division 4 of Title 3 of the Government Code.

(b) "Employer" means any person employing another under any appointment or contract of hire and includes the state, political subdivisions of the state, and municipalities.

(c) "Family member" means any of the following:

(1) A child, which for purposes of this article means a biological, adopted, or foster child, stepchild, legal ward, or a child to whom the employee stands in loco parentis. This definition of a child is applicable regardless of age or dependency status.

(2) A biological, adoptive, or foster parent, stepparent, or legal guardian of an employee or the employee's spouse or registered domestic partner, or a person who stood in loco parentis when the employee was a minor child.

(3) A spouse.

(4) A registered domestic partner.

(5) A grandparent.

(6) A grandchild.

(7) A sibling.

(8) A designated person, which, for purposes of this article, means a person identified by the employee at the time the employee requests paid sick days. An employer may limit an employee to one designated person per 12-month period for paid sick days.

(d) "Health care provider" has the same meaning as defined in Section 12945.2 of the Government Code.

(e) "Paid sick days" means time that is compensated at the same wage as the employee normally earns during regular work hours and is provided by an employer to an employee for the purposes described in Section 246.5.

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117TH CONGRESS
1ST SESSION

H. R. 1065

IN THE SENATE OF THE UNITED STATES

MAY 17, 2021

Received; read twice and referred to the Committee on Health, Education, Labor, and Pensions

AN ACT

To eliminate discrimination and promote women's health and economic security by ensuring reasonable workplace accommodations for workers whose ability to perform the functions of a job are limited by pregnancy, childbirth, or a related medical condition.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Pregnant Workers Fairness Act''.

SEC. 2. NONDISCRIMINATION WITH REGARD TO REASONABLE ACCOMMODATIONS RELATED TO PREGNANCY.

It shall be an unlawful employment practice for a covered entity to—

(1) not make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity;

(2) require a qualified employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than any reasonable accommodation arrived at through the interactive process referred to in section 5(7);

(3) deny employment opportunities to a qualified employee if such denial is based on the need of the covered entity to make reasonable accommoda-

tions to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee;

(4) require a qualified employee to take leave, whether paid or unpaid, if another reasonable accommodation can be provided to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee; or

(5) take adverse action in terms, conditions, or privileges of employment against a qualified employee on account of the employee requesting or using a reasonable accommodation to the known limitations related to the pregnancy, childbirth, or related medical conditions of the employee.

SEC. 3. REMEDIES AND ENFORCEMENT.

(a) EMPLOYEES COVERED BY TITLE VII OF THE CIVIL RIGHTS ACT OF 1964.—

(1) IN GENERAL.—The powers, remedies, and procedures provided in sections 705, 706, 707, 709, 710, and 711 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–4 et seq.) to the Commission, the Attorney General, or any person alleging a violation of title VII of such Act (42 U.S.C. 2000e et seq.) shall be the powers, remedies, and procedures this Act provides to the Commission, the Attorney General,

or any person, respectively, alleging an unlawful employment practice in violation of this Act against an employee described in section 5(3)(A) except as provided in paragraphs (2) and (3) of this subsection.

(2) COSTS AND FEES.—The powers, remedies, and procedures provided in subsections (b) and (c) of section 722 of the Revised Statutes (42 U.S.C. 1988) shall be the powers, remedies, and procedures this Act provides to the Commission, the Attorney General, or any person alleging such practice.

(3) DAMAGES.—The powers, remedies, and procedures provided in section 1977A of the Revised Statutes (42 U.S.C. 1981a), including the limitations contained in subsection (b)(3) of such section 1977A, shall be the powers, remedies, and procedures this Act provides to the Commission, the Attorney General, or any person alleging such practice (not an employment practice specifically excluded from coverage under section 1977A(a)(1) of the Revised Statutes).

(b) EMPLOYEES COVERED BY CONGRESSIONAL ACCOUNTABILITY ACT OF 1995.—

(1) IN GENERAL.—The powers, remedies, and procedures provided in the Congressional Accountability Act of 1995 (2 U.S.C. 1301 et seq.) to the

Board (as defined in section 101 of such Act (2 U.S.C. 1301)) or any person alleging a violation of section 201(a)(1) of such Act (2 U.S.C. 1311(a)(1)) shall be the powers, remedies, and procedures this Act provides to the Board or any person, respectively, alleging an unlawful employment practice in violation of this Act against an employee described in section 5(3)(B) except as provided in paragraphs (2) and (3) of this subsection.

(2) COSTS AND FEES.—The powers, remedies, and procedures provided in subsections (b) and (c) of section 722 of the Revised Statutes (42 U.S.C. 1988) shall be the powers, remedies, and procedures this Act provides to the Board or any person alleging such practice.

(3) DAMAGES.—The powers, remedies, and procedures provided in section 1977A of the Revised Statutes (42 U.S.C. 1981a), including the limitations contained in subsection (b)(3) of such section 1977A, shall be the powers, remedies, and procedures this Act provides to the Board or any person alleging such practice (not an employment practice specifically excluded from coverage under section 1977A(a)(1) of the Revised Statutes).

(4) OTHER APPLICABLE PROVISIONS.—With respect to a claim alleging a practice described in paragraph (1), title III of the Congressional Accountability Act of 1995 (2 U.S.C. 1381 et seq.) shall apply in the same manner as such title applies with respect to a claim alleging a violation of section 201(a)(1) of such Act (2 U.S.C. 1311(a)(1)).

(c) EMPLOYEES COVERED BY CHAPTER 5 OF TITLE 3, UNITED STATES CODE.—

(1) IN GENERAL.—The powers, remedies, and procedures provided in chapter 5 of title 3, United States Code, to the President, the Commission, the Merit Systems Protection Board, or any person alleging a violation of section 411(a)(1) of such title shall be the powers, remedies, and procedures this Act provides to the President, the Commission, the Board, or any person, respectively, alleging an unlawful employment practice in violation of this Act against an employee described in section 5(3)(C) except as provided in paragraphs (2) and (3) of this subsection.

(2) COSTS AND FEES.—The powers, remedies, and procedures provided in subsections (b) and (c) of section 722 of the Revised Statutes (42 U.S.C. 1988) shall be the powers, remedies, and procedures

this Act provides to the President, the Commission, the Board, or any person alleging such practice.

(3) DAMAGES.—The powers, remedies, and procedures provided in section 1977A of the Revised Statutes (42 U.S.C. 1981a), including the limitations contained in subsection (b)(3) of such section 1977A, shall be the powers, remedies, and procedures this Act provides to the President, the Commission, the Board, or any person alleging such practice (not an employment practice specifically excluded from coverage under section 1977A(a)(1) of the Revised Statutes).

(d) EMPLOYEES COVERED BY GOVERNMENT EMPLOYEE RIGHTS ACT OF 1991.—

(1) IN GENERAL.—The powers, remedies, and procedures provided in sections 302 and 304 of the Government Employee Rights Act of 1991 (42 U.S.C. 2000e–16b; 2000e–16c) to the Commission or any person alleging a violation of section 302(a)(1) of such Act (42 U.S.C. 2000e–16b(a)(1)) shall be the powers, remedies, and procedures this Act provides to the Commission or any person, respectively, alleging an unlawful employment practice in violation of this Act against an employee de-

scribed in section 5(3)(D) except as provided in paragraphs (2) and (3) of this subsection.

(2) COSTS AND FEES.—The powers, remedies, and procedures provided in subsections (b) and (c) of section 722 of the Revised Statutes (42 U.S.C. 1988) shall be the powers, remedies, and procedures this Act provides to the Commission or any person alleging such practice.

(3) DAMAGES.—The powers, remedies, and procedures provided in section 1977A of the Revised Statutes (42 U.S.C. 1981a), including the limitations contained in subsection (b)(3) of such section 1977A, shall be the powers, remedies, and procedures this Act provides to the Commission or any person alleging such practice (not an employment practice specifically excluded from coverage under section 1977A(a)(1) of the Revised Statutes).

(e) EMPLOYEES COVERED BY SECTION 717 OF THE CIVIL RIGHTS ACT OF 1964.—

(1) IN GENERAL.—The powers, remedies, and procedures provided in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16) to the Commission, the Attorney General, the Librarian of Congress, or any person alleging a violation of that section shall be the powers, remedies, and proce-

dures this Act provides to the Commission, the Attorney General, the Librarian of Congress, or any person, respectively, alleging an unlawful employment practice in violation of this Act against an employee described in section 5(3)(E) except as provided in paragraphs (2) and (3) of this subsection.

(2) COSTS AND FEES.—The powers, remedies, and procedures provided in subsections (b) and (c) of section 722 of the Revised Statutes (42 U.S.C. 1988) shall be the powers, remedies, and procedures this Act provides to the Commission, the Attorney General, the Librarian of Congress, or any person alleging such practice.

(3) DAMAGES.—The powers, remedies, and procedures provided in section 1977A of the Revised Statutes (42 U.S.C. 1981a), including the limitations contained in subsection (b)(3) of such section 1977A, shall be the powers, remedies, and procedures this Act provides to the Commission, the Attorney General, the Librarian of Congress, or any person alleging such practice (not an employment practice specifically excluded from coverage under section 1977A(a)(1) of the Revised Statutes).

(f) PROHIBITION AGAINST RETALIATION.—

(1) IN GENERAL.—No person shall discriminate against any employee because such employee has opposed any act or practice made unlawful by this Act or because such employee made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.

(2) PROHIBITION AGAINST COERCION.—It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of such individual having exercised or enjoyed, or on account of such individual having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this Act.

(3) REMEDY.—The remedies and procedures otherwise provided for under this section shall be available to aggrieved individuals with respect to violations of this subsection.

(g) LIMITATION.—Notwithstanding subsections (a)(3), (b)(3), (c)(3), (d)(3), and (e)(3), if an unlawful employment practice involves the provision of a reasonable accommodation pursuant to this Act or regulations implementing this Act, damages may not be awarded under section 1977A of the Revised Statutes (42 U.S.C. 1981a) if the covered entity demonstrates good faith efforts, in con-

sultation with the employee with known limitations related to pregnancy, childbirth, or related medical conditions who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such employee with an equally effective opportunity and would not cause an undue hardship on the operation of the covered entity.

SEC. 4. RULEMAKING.

Not later than 2 years after the date of enactment of this Act, the Commission shall issue regulations in an accessible format in accordance with subchapter II of chapter 5 of title 5, United States Code, to carry out this Act. Such regulations shall provide examples of reasonable accommodations addressing known limitations related to pregnancy, childbirth, or related medical conditions.

SEC. 5. DEFINITIONS.

As used in this Act—

(1) the term ''Commission'' means the Equal Employment Opportunity Commission;

(2) the term ''covered entity''—

(A) has the meaning given the term ''respondent'' in section 701(n) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(n)); and

(B) includes—

(i) an employer, which means a person engaged in industry affecting commerce who has 15 or more employees as defined in section 701(b) of title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e(b));

(ii) an employing office, as defined in section 101 of the Congressional Accountability Act of 1995 (2 U.S.C. 1301) and section 411(c) of title 3, United States Code;

(iii) an entity employing a State employee described in section 304(a) of the Government Employee Rights Act of 1991 (42 U.S.C. 2000e–16c(a)); and

(iv) an entity to which section 717(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16(a)) applies;

(3) the term ''employee'' means—

(A) an employee (including an applicant), as defined in section 701(f) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(f));

(B) a covered employee (including an applicant), as defined in section 101 of the Con-

gressional Accountability Act of 1995 (2 U.S.C. 1301);

(C) a covered employee (including an applicant), as defined in section 411(c) of title 3, United States Code;

(D) a State employee (including an applicant) described in section 304(a) of the Government Employee Rights Act of 1991 (42 U.S.C. 2000e–16c(a)); or

(E) an employee (including an applicant) to which section 717(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16(a)) applies;

(4) the term ''person'' has the meaning given such term in section 701(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(a));

(5) the term ''known limitation'' means physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee or employee's representative has communicated to the employer whether or not such condition meets the definition of disability specified in section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102);

(6) the term ''qualified employee'' means an employee or applicant who, with or without reason-

able accommodation, can perform the essential functions of the employment position, except that an employee or applicant shall be considered qualified if—

(A) any inability to perform an essential function is for a temporary period;

(B) the essential function could be performed in the near future; and

(C) the inability to perform the essential function can be reasonably accommodated; and

(7) the terms ''reasonable accommodation'' and ''undue hardship'' have the meanings given such terms in section 101 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111) and shall be construed as such terms are construed under such Act and as set forth in the regulations required by this Act, including with regard to the interactive process that will typically be used to determine an appropriate reasonable accommodation.

SEC. 6. WAIVER OF STATE IMMUNITY.

A State shall not be immune under the 11th Amendment to the Constitution from an action in a Federal or State court of competent jurisdiction for a violation of this Act. In any action against a State for a violation of this Act, remedies (including remedies both at law and in equity) are available for such a violation to the same extent

as such remedies are available for such a violation in an action against any public or private entity other than a State.

SEC. 7. RELATIONSHIP TO OTHER LAWS.

Nothing in this Act shall be construed to invalidate or limit the powers, remedies, and procedures under any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for individuals affected by pregnancy, childbirth, or related medical conditions.

SEC. 8. SEVERABILITY.

If any provision of this Act or the application of that provision to particular persons or circumstances is held invalid or found to be unconstitutional, the remainder of this Act and the application of that provision to other persons or circumstances shall not be affected.

Passed the House of Representatives May 14, 2021.

Attest: CHERYL L. JOHNSON,

Clerk.

Assembly Bill No. 1949

CHAPTER 767

An act to amend Sections 12945.21 and 19859.3 of, and to add Section 12945.7 to, the Government Code, relating to employment.

[Approved by Governor September 29, 2022. Filed with Secretary of State September 29, 2022.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1949, Low. Employees: bereavement leave.

Existing law, commonly known as the California Family Rights Act, which is a part of the California Fair Employment and Housing Act, makes it an unlawful employment practice for an employer, as defined, to refuse to grant a request by an eligible employee to take up to 12 workweeks of unpaid protected leave during any 12-month period for family care and medical leave, as specified.

This bill would additionally make it an unlawful employment practice for an employer to refuse to grant a request by an eligible employee to take up to 5 days of bereavement leave upon the death of a family member, as defined. The bill would require that leave be completed within 3 months of the date of death. The bill would require that leave be taken pursuant to any existing bereavement leave policy of the employer. Under the bill, in the absence of an existing policy, the bereavement leave may be unpaid. However, the bill would authorize an employee to use certain other leave balances otherwise available to the employee, including accrued and available paid sick leave.

This bill would require, if an existing leave policy provides for less than 5 days of bereavement leave, a total of at least 5 days of bereavement leave for the employee, as prescribed. The bill would make it an unlawful employment practice for an employer to engage in specified acts of discrimination, interference, or retaliation relating to an individual's exercise of rights under the bill. The bill would require the employer to maintain employee confidentiality relating to bereavement leave, as specified. The bill would not apply to an employee who is covered by a valid collective bargaining agreement that provides for prescribed bereavement leave and other specified working conditions.

Existing law requires the Department of Fair Employment and Housing to create a small employer family leave mediation pilot program for alleged violations of specified family care and medical leave provisions, applicable to employers with between 5 and 19 employees.

This bill would require the Department of Fair Employment and Housing to expand the program to include mediation for alleged violations of these provisions.

Existing law grants specified permanent employees of the state up to 3 days of bereavement leave, with up to 2 additional days of bereavement leave upon request if the death is out of state. Existing law specifies that these 2 additional days are to be without pay or are to be charged against existing sick leave credits.

This bill would recast those provisions to specify that the first 3 days of bereavement leave are to be paid leave, and to remove the condition that the death be out of state for the additional 2 days.

Existing constitutional provisions require that a statute that limits the right of access to the meetings of public bodies or the writings of public officials and agencies be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

This bill would make legislative findings to that effect.

The people of the State of California do enact as follows:

SECTION 1. Section 12945.7 is added to the Government Code, to read:

12945.7. (a) As used in this section:

(1) (A) "Employee" means a person employed by the employer for at least 30 days prior to the commencement of the leave.

(B) "Employee" does not include a person who is covered by Section 19859.3.

(2) "Employer" means either of the following:

(A) A person who employs five or more persons to perform services for a wage or salary.

(B) The state and any political or civil subdivision of the state, including, but not limited to, cities and counties.

(3) "Family member" means a spouse or a child, parent, sibling, grandparent, grandchild, domestic partner, or parent-in-law as defined in Section 12945.2.

(b) It shall be an unlawful employment practice for an employer to refuse to grant a request by any employee to take up to five days of bereavement leave upon the death of a family member.

(c) The days of bereavement leave need not be consecutive.

(d) The bereavement leave shall be completed within three months of the date of death of the family member.

(e) (1) The bereavement leave shall be taken pursuant to any existing bereavement leave policy of the employer.

(2) If there is no existing bereavement leave policy, the bereavement leave may be unpaid, except that an employee may use vacation, personal leave, accrued and available sick leave, or compensatory time off that is otherwise available to the employee.

(3) If an existing leave policy provides for less than five days of paid bereavement leave, the employee shall be entitled to no less than a total of five days of bereavement leave, consisting of the number of days of paid leave under the existing policy, and the remainder of days of leave may be

unpaid, except that an employee may use vacation, personal leave, accrued and available sick leave, or compensatory time off that is otherwise available to the employee.

(4) If an existing leave policy provides for less than five days of unpaid bereavement leave, the employee shall be entitled to no less than five days of unpaid bereavement leave, except that an employee may use vacation, personal leave, accrued and available sick leave, or compensatory time off that is otherwise available to the employee.

(f) The employee, if requested by the employer, within 30 days of the first day of the leave, shall provide documentation of the death of the family member. As used in this subdivision, "documentation" includes, but is not limited to, a death certificate, a published obituary, or written verification of death, burial, or memorial services from a mortuary, funeral home, burial society, crematorium, religious institution, or governmental agency.

(g) It shall be an unlawful employment practice for an employer to refuse to hire, or to discharge, demote, fine, suspend, expel, or discriminate against, an individual because of either of the following:

(1) An individual's exercise of the right to bereavement leave provided by subdivision (b).

(2) An individual's giving information or testimony as to their own bereavement leave, or another person's bereavement leave, in an inquiry or proceeding related to rights guaranteed under this section.

(h) It shall be an unlawful employment practice for an employer to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right provided under this section.

(i) The employer shall maintain the confidentiality of any employee requesting leave under this section. Any documentation provided to the employer pursuant to subdivision (f) or subdivision (g) shall be maintained as confidential and shall not be disclosed except to internal personnel or counsel, as necessary, or as required by law.

(j) An employee's right to leave under this section shall be construed as separate and distinct from any right under Section 12945.2.

(k) The section does not apply to an employee who is covered by a valid collective bargaining agreement if the agreement expressly provides for bereavement leave equivalent to that required by this section and for the wages, hours of work, and working conditions of the employees, and if the agreement provides premium wage rates for all overtime hours worked, where applicable, and a regular hourly rate of pay for those employees of not less than 30 percent above the state minimum wage.

SEC. 2. Section 12945.21 of the Government Code is amended to read:

12945.21. (a) The department shall create a small employer family leave mediation pilot program for employers with between 5 and 19 employees. Under the pilot program, when an employee requests an immediate right to sue alleging a violation of Section 12945.2 or Section 12945.7 by an employer having between 5 and 19 employees, the department shall notify the employee in writing of the requirement for mediation prior to filing a civil action if mediation is requested by the employer or employee. The

employee shall contact the department's dispute resolution division prior to filing a civil action.

(b) (1) Under the pilot program, the employee shall contact the department's dispute resolution division prior to filing a civil action in the manner specified by the department. The employee shall also indicate whether they are requesting mediation.

(2) Upon contacting the dispute resolution division regarding the intent to pursue a legal action for a violation of Section 12945.2 or Section 12945.7 by an employer having between 5 and 19 employees, the department shall notify all named respondents of the alleged violation and the requirement for mediation, if mediation is requested by the employee or employer, in writing.

(3) The department shall terminate its activity if neither the employee nor the employer requests mediation within 30 days of receipt by all named respondents of the notification specified in paragraph (2).

(4) If the department receives a request for mediation from the employee or employer within 30 days of receipt by all named respondents of the notification specified in paragraph (2), the department shall initiate the mediation within 60 days of the department's receipt of the request or the receipt of the notification by all named respondents, whichever is later.

(5) Once the mediation has been initiated, no later than seven days before the mediation date, the mediator shall notify the employee of their right to request information pursuant to Sections 226 and 1198.5 of the Labor Code. The mediator shall also help facilitate any other reasonable requests for information that may be necessary for either party to present their claim in mediation.

(c) (1) The employee shall not pursue any civil action under Section 12945.2 or Section 12945.7 unless the mediation is not initiated by the department within the time period specified in subdivision (b) or until the mediation is complete or the mediation is deemed unsuccessful.

(2) The statute of limitations applicable to the employee's claim, including for all related claims under Section 12945.2 or Section 12945.7 and not under Section 12945.2 or Section 12945.7, shall be tolled from the date the employee contacts the department's dispute resolution division regarding the intent to pursue a legal action until the mediation is complete or the mediation is deemed unsuccessful.

(d) (1) For purposes of this section, the following shall apply:

(2) A mediation is deemed complete when any of the following occur:

(A) Neither the employee nor the employer requests the mediation within 30 days of receipt by all named respondents of the notification or both parties agree not to participate in the mediation.

(B) The employer fails to respond to the notification or mediation request within 30 days of receipt.

(C) The department fails to initiate the mediation within 60 days of the department's receipt of the request for mediation or the receipt by all named respondents of the notification, whichever is later.

(D) The department notifies the parties that it has determined that further mediation would be fruitless, both parties agree that further mediation would be fruitless, one of the parties failed to submit information requested by the other party and deemed by the mediator to be reasonably necessary or fair for the other party to obtain, or the mediator determines that the core facts of the employee's complaint are unrelated to Section 12945.2 or Section 12945.7.

(3) A mediation is unsuccessful if the claim is not resolved within 30 days of the department's initiation of mediation, unless the department notifies the parties that it has determined more time is needed to make the mediation successful.

(e) A respondent or defendant in a civil action that did not receive a notification pursuant to subdivision (b) as a result of the employee's failure to contact the department's alternative dispute resolution division prior to filing a civil action, and who had between 5 and 19 employees at the time that the alleged violation occurred, shall, upon a timely request, be entitled to a stay of any pending civil action or arbitration until mediation is complete or is deemed unsuccessful.

(f) If a request for an immediate right to sue includes other alleged violations under this part, this section shall only apply to the claim alleging a violation of Section 12945.2 or Section 12945.7. Notwithstanding this subdivision, nothing in this section prohibits the parties from voluntarily choosing to mediate all alleged violations.

(g) This section shall remain in effect only until January 1, 2024, and as of that date is repealed.

SEC. 3. Section 19859.3 of the Government Code is amended to read:

19859.3. (a) Any permanent employee who is either excluded from the definition of state employee in subdivision (c) of Section 3513, or is a nonelected officer or employee of the executive branch of government who is not a member of the civil service, shall be granted bereavement leave with pay for the death of a person related by blood, adoption, or marriage, or any person residing in the immediate household of the employee at the time of death. The employee shall give advance notice to the employee's immediate supervisor and shall provide substantiation to support the request.

(b) For any one occurrence, the bereavement leave shall not exceed three days with pay. However, a request for two additional days of bereavement leave shall be granted, at the option of the employee, as either without pay or as a charge against any accrued sick leave credit.

(c) If additional bereavement leave is necessary, the employee may use accrued vacation, compensating time off, or take an authorized leave without pay, subject to the approval of the appointing power.

SEC. 4. The Legislature finds and declares that Section 1 of this act, which adds Section 12945.7 to the Government Code, imposes a limitation on the public's right of access to the meetings of public bodies or the writings of public officials and agencies within the meaning of Section 3 of Article I of the California Constitution. Pursuant to that constitutional provision,

the Legislature makes the following findings to demonstrate the interest protected by this limitation and the need for protecting that interest:

The confidentiality provisions set forth in Section 1 further the need to protect the privacy rights of employees regarding the passing of a family member, and to protect the enforcement process related to violations of the bereavement provisions. These limitations are needed in order to strike the proper balance between the privacy interests of the employee and the employee's family, and the public's right to access.

O

Senate Bill No. 1334

CHAPTER 845

An act to add Section 512.1 to the Labor Code, relating to employment.

[Approved by Governor September 29, 2022. Filed with
Secretary of State September 29, 2022.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1334, Bradford. Meal and rest periods: hospital employees.

Existing law requires an employer to provide an employee with a meal period during a work period of more than 5 hours per day, except as prescribed. Existing law makes a violation of these provisions a misdemeanor. Existing law prohibits an employer from requiring an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health. Existing law requires an employer who fails to provide an employee a mandated meal or rest or recovery period to pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest or recovery period was not provided. Existing law provides certain exemptions from these requirements.

This bill would entitle employees who provide direct patient care or support direct patient care in a general acute care hospital, clinic, or public health setting directly employed by specified public sector employers to one unpaid 30-minute meal period on shifts over 5 hours and a 2nd unpaid 30-minute meal period on shifts over 10 hours, as provided by specified existing law. The bill would authorize these employees to waive those meal periods and would provide for on-duty meal periods, as provided by specified existing law. The bill would entitle these employees to a rest period based on the total hours worked daily at the rate of 10 minutes net rest time per 4 hours or major fraction thereof, as provided. The bill would require these employers, if they fail to provide an employee a meal period or rest period in accordance with the bill, to pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest period is not provided. The bill would exempt employees who are covered by a valid collective bargaining agreement that provides for meal and rest periods and, if the employee does not receive a meal or rest period as required by the agreement, includes a prescribed monetary remedy. By establishing these requirements, the violation of which would be a crime, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares all of the following:

(a) Meal and rest periods are essential worker protections that reduce accidents, improve productivity, and promote employee wellbeing.

(b) In the health care sector, fatigue can adversely impact patient care and meal and rest periods are important to ensuring quality care.

(c) Private sector hospital employees who provide direct patient care in acute care hospitals are guaranteed meal and rest periods and a remedy of one hour premium pay for missed meal and rest breaks while such employees in the public sector lack these basic protections, even though they perform the same duties.

(d) Worker health and safety and high-quality patient care are matters of statewide concern and are the basis of numerous laws and regulations.

(e) This act ensures equity in working conditions and patient care standards for hospital, clinic, or public health employees who provide direct patient care or support direct patient care.

SEC. 2. Section 512.1 is added to the Labor Code, to read:

512.1. (a) An employee directly employed by an employer shall be entitled to one unpaid 30-minute meal period on shifts over 5 hours and a second unpaid 30-minute meal period on shifts over 10 hours, as provided by Section 512.

(1) The employee may waive a meal period in accordance with subdivision (a) of Section 512 and paragraph (D) of Section 11 of Wage Order Number 4 or paragraph (D) of Section 11 of Wage Order Number 5 of the Industrial Welfare Commission.

(2) On-duty meal periods may be provided in accordance with paragraph (A) of Section 11 of Wage Order Number 4 or paragraph (A) of Section 11 of Wage Order Number 5 of the Industrial Welfare Commission.

(b) An employee who is directly employed by an employer shall be entitled to a rest period based on the total hours worked daily at the rate of 10 minutes net rest time per 4 hours or major fraction thereof, as provided by Wage Order Number 4 and Wage Order Number 5 of the Industrial Welfare Commission.

(c) If an employer fails to provide to an employee a meal period or rest period in accordance with this section, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest period is not provided.

(d) This section does not apply to an employee directly employed by an employer who is covered by a valid collective bargaining agreement that

provides for meal and rest periods, and, if the employee does not receive a meal or rest period as required by the agreement, includes a monetary remedy that, at a minimum, is equivalent to one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest period is not provided.

(e) As used in this section:

(1) "Employee" means an employee who provides direct patient care or supports direct patient care in a general acute care hospital, clinic, or public health setting.

(2) "Employer" means the state, political subdivisions of the state, counties, municipalities, and the Regents of the University of California.

(3) "General acute care hospital" means a health facility as defined in subdivision (a) of Section 1250 of the Health and Safety Code.

SEC. 3. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

O

Assembly Bill No. 984

CHAPTER 746

An act to amend Sections 4463 and 4853 of, and to add Section 4854 to, the Vehicle Code, relating to vehicles.

[Approved by Governor September 29, 2022. Filed with Secretary of State September 29, 2022.]

LEGISLATIVE COUNSEL'S DIGEST

AB 984, Wilson. Vehicle identification and registration: alternative devices.

Existing law requires a vehicle to display a license plate, issued by the Department of Motor Vehicles, with tabs that indicate the month and year the vehicle registration expires. Existing law authorizes the department to conduct a pilot program, until January 1, 2023, if certain conditions are met, to evaluate the use of alternatives to stickers, tabs, license plates, and registration cards. Under existing law, a person who alters, forges, counterfeits, or falsifies, among other things, a device issued pursuant to the pilot program, is guilty of a felony.

This bill would require the department to establish a program authorizing an entity to issue alternatives to stickers, tabs, license plates, and registration cards under specified conditions that include, among others, approval of the alternative devices by the Department of the California Highway Patrol. The bill would make this authorization applicable to environmental license plates and specialized license plates displayed on an alternative device, as specified. The bill would allow the failure or malfunction of an alternative device to be deemed a correctable violation, as specified. The bill would require the provider of the device to build into the device a process for frequent notification if the device becomes defective and would require the provider to seek to replace defective devices as soon as possible. The bill would require an entity seeking approval to issue alternative devices or electronic vehicle registration cards to submit a business plan to the Department of Motor Vehicles, as specified. The bill would require the department to adopt regulations to carry out the program, including establishing reasonable fees to reimburse the department for the costs of implementing the program, reporting requirements, and to determine standards necessary for the safe use of alternative products, and would extend the existing authorization for a pilot program described above until the effective date of those regulations. The bill would make alteration, forgery, counterfeit, or falsification of a device issued pursuant to these provisions a felony. By creating a new crime, this bill would impose a state-mandated local program.

The bill would generally prohibit an alternative device from being equipped with GPS or other vehicle location tracking capability, but would allow tracking technology to be installed on alternative devices used by specified vehicles, including fleet and commercial vehicles. The bill would generally prohibit an employer from using an alternative device equipped with tracking technology to monitor employees, except the bill would allow an employer to use an alternative device to locate, track, watch, listen to, or otherwise surveil an employee during work hours if strictly necessary for the performance of the employee's duties. The bill would require the employer to first notify the employee that monitoring will occur, as specified, and would allow an employee to disable the alternative device's monitoring capabilities, including vehicle location technology, outside of work hours. The bill would impose civil penalties for a violation of these requirements and authorize the issuance of citations, as prescribed. The bill would also prohibit retaliation against an employee by an employer or a person acting on the employer's behalf for disabling an alternative device's monitoring capabilities outside of work hours, and would authorize an employee to file a complaint with the Labor Commissioner for a violation of that prohibition.

The bill would require the Department of Motor Vehicles to, by no later than January 1, 2024, recall any alternative devices equipped with GPS or other tracking technology that have been issued, pursuant to the existing pilot program, to vehicles other than those specified vehicles, including fleet and commercial vehicles, for which GPS or other tracking technology is authorized.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

The people of the State of California do enact as follows:

SECTION 1. Section 4463 of the Vehicle Code is amended to read:

4463. (a) A person who, with intent to prejudice, damage, or defraud, commits any of the following acts is guilty of a felony and upon conviction thereof shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for 16 months, or two or three years, or by imprisonment in a county jail for not more than one year:

(1) Alters, forges, counterfeits, or falsifies a certificate of ownership, registration card, certificate, license, license plate, temporary license plate, device issued pursuant to Sections 4853 and 4854, special plate, or permit provided for by this code or a comparable certificate of ownership, registration card, certificate, license, license plate, temporary license plate, device comparable to that issued pursuant to Sections 4853 and 4854, special plate, or permit provided for by a foreign jurisdiction, or alters, forges, counterfeits, or falsifies the document, device, or plate with intent to

represent it as issued by the department, or alters, forges, counterfeits, or falsifies with fraudulent intent an endorsement of transfer on a certificate of ownership or other document evidencing ownership, or with fraudulent intent displays or causes or permits to be displayed or have in their possession a blank, incomplete, canceled, suspended, revoked, altered, forged, counterfeit, or false certificate of ownership, registration card, certificate, license, license plate, temporary license plate, device issued pursuant to Sections 4853 and 4854, special plate, or permit.

(2) Utters, publishes, passes, or attempts to pass, as true and genuine, a false, altered, forged, or counterfeited matter listed in paragraph (1) knowing it to be false, altered, forged, or counterfeited.

(b) A person who, with intent to prejudice, damage, or defraud, commits any of the following acts is guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment in a county jail for six months, a fine of not less than five hundred dollars ($500) and not more than one thousand dollars ($1,000), or both that fine and imprisonment, which penalty shall not be suspended:

(1) Forges, counterfeits, or falsifies a disabled person placard or a comparable placard relating to parking privileges for disabled persons provided for by a foreign jurisdiction, or forges, counterfeits, or falsifies a disabled person placard with intent to represent it as issued by the department.

(2) Passes, or attempts to pass, as true and genuine, a false, forged, or counterfeit disabled person placard knowing it to be false, forged, or counterfeited.

(3) Acquires, possesses, sells, or offers for sale a genuine or counterfeit disabled person placard.

(c) A person who, with fraudulent intent, displays or causes or permits to be displayed a forged, counterfeit, or false disabled person placard, is subject to the issuance of a notice of parking violation imposing a civil penalty of not less than two hundred fifty dollars ($250) and not more than one thousand dollars ($1,000), for which enforcement shall be governed by the procedures set forth in Article 3 (commencing with Section 40200) of Chapter 1 of Division 17, or is guilty of a misdemeanor punishable by imprisonment in a county jail for six months, a fine of not less than two hundred fifty dollars ($250) and not more than one thousand dollars ($1,000), or both that fine and imprisonment, which penalty shall not be suspended.

(d) For purposes of subdivision (b) or (c), “disabled person placard” means a placard issued pursuant to Section 22511.55 or 22511.59.

(e) A person who, with intent to prejudice, damage, or defraud, commits any of the following acts is guilty of an infraction, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars ($100) and not more than two hundred fifty dollars ($250) for a first offense, not less than two hundred fifty dollars ($250) and not more than five hundred dollars ($500) for a second offense, and not less than five hundred dollars ($500) and not more than one thousand dollars ($1,000) for a third or subsequent offense, which penalty shall not be suspended:

(1) Forges, counterfeits, or falsifies a Clean Air Sticker or a comparable clean air sticker relating to high-occupancy vehicle lane privileges provided for by a foreign jurisdiction, or forges, counterfeits, or falsifies a Clean Air Sticker with intent to represent it as issued by the department.

(2) Passes, or attempts to pass, as true and genuine, a false, forged, or counterfeit Clean Air Sticker knowing it to be false, forged, or counterfeited.

(3) Acquires, possesses, sells, or offers for sale a counterfeit Clean Air Sticker.

(4) Acquires, possesses, sells, or offers for sale a genuine Clean Air Sticker separate from the vehicle for which the department issued that sticker.

(f) As used in this section, "Clean Air Sticker" means a label or decal issued pursuant to Sections 5205.5 and 21655.9.

SEC. 2. Section 4853 of the Vehicle Code is amended to read:

4853. (a) The department may issue one or more stickers, tabs, or other suitable devices in lieu of the license plates provided for under this code. Except when the physical differences between the stickers, tabs, or devices and license plates by their nature render the provisions of this code inapplicable, all provisions of this code relating to license plates may apply to stickers, tabs, or devices.

(b) The department may establish a pilot program to evaluate the use of alternatives to the stickers, tabs, license plates, and registration cards authorized by this code, subject to all of the following requirements:

(1) The alternative products shall be approved by the Department of the California Highway Patrol.

(2) The pilot program shall be limited to no more than 0.5 percent of registered vehicles for the purpose of road testing and evaluation.

(3) The alternative products to be evaluated shall be provided at no cost to the state.

(4) Any pilot program established by the department pursuant to this subdivision shall be limited to vehicle owners who have voluntarily chosen to participate in the pilot program.

(c) In the conduct of any pilot program pursuant to this section, any data exchanged between the department and any electronic device or the provider of any electronic device shall be limited to those data necessary to display evidence of registration compliance. The department shall not receive or retain any information generated during the pilot program regarding the movement, location, or use of a vehicle participating in the pilot program.

(d) In the conduct of any pilot program pursuant to this section, the department may evaluate the inclusion of participants in the Business Partner Automation Program, pursuant to Section 1685.

(e) Subdivisions (b) to (d), inclusive, shall become inoperative on the effective date of any regulations adopted pursuant to subdivision (b) of Section 4854.

SEC. 3. Section 4854 is added to the Vehicle Code, to read:

4854. (a) The department shall establish a program authorizing an entity to issue devices as alternatives to the conventional license plates, stickers,

tabs, and registration cards authorized by this code, subject to all of the following requirements:

(1) The alternative device is subject to the approval of the department and the Department of the California Highway Patrol and shall not be used in lieu of a device issued by the Department of Motor Vehicles until that approval has been granted.

(2) (A) Except as specifically authorized in subparagraph (B), an alternate device shall not include vehicle location technology. The department shall, by no later than January 1, 2024, in a manner determined by the department, recall any devices with vehicle location technology that have been issued pursuant to Section 4853, to vehicles other than those described in subparagraph (B). The department may adopt regulations to carry out this requirement.

(B) Vehicle location technology may be offered for vehicles registered as fleet vehicles, pursuant to Article 9.5 (commencing with Section 5301), commercial vehicles, as defined in Section 260, and those operating under an occupational license, pursuant to Division 5 (commencing with Section 11100).

(C) The vehicle location technology, if any, shall be capable of being disabled by the user.

(D) The vehicle location technology, if any, may be capable of being manually disabled by a driver of the vehicle while that driver is in the vehicle.

(3) If the device is equipped with vehicle location technology, an alternative device shall display a visual indication that vehicle location technology is in active use.

(4) Data exchanged between the department and the device, or the provider of the device, is limited to that data necessary to display evidence of registration compliance, including the payment of registration fees, plate configurations, and the information or images displayed on the alternative product.

(5) The department shall not receive or retain directly from an alternative device authorized by this section or the provider of the alternative device any electronic information regarding the movement, location, or use of a vehicle or person with an alternative device.

(6) Use of the alternative device is optional, and users shall affirmatively opt in to using the alternative device instead of a conventional license plate, sticker, tab, or registration card.

(b) (1) The department shall adopt regulations to carry out this program, including, but not limited to, all of the following:

(A) Determining standards necessary for the safe use of alternative products.

(B) Requirements for product oversight and consumer support.

(C) Requirements for product size, design, display, and functionality.

(D) Introduction of new products through a pilot program.

(E) Transitioning pilot products, and approved enhancements to existing alternative products, to a statewide product offering.

(F) Approval of products for statewide use.

(G) Determining data sharing, privacy, and security protocols pursuant to Section 1 of Article I of the California Constitution's right to privacy and other applicable privacy laws.

(H) Processes for revoking an alternative product's authority for use.

(I) Testing enhancements to approved alternative products.

(J) Determining the types of plates eligible to participate and associated approval processes.

(K) Establishing reasonable fees to reimburse the department for the costs to implement the program.

(L) Reporting requirements.

(M) Requirements to ensure registered users of a device are aware of GPS capability and usage and can deactivate the function.

(N) Requirements to ensure nonregistered vehicle operators are aware of GPS capability and usage. This may include, but is not limited to, live notifications of the GPS function, toll-free communication with the device provider for vehicle location function status and deactivation, or visual indicators of GPS capability or usage.

(2) In developing these regulations, the department may consult with the Department of the California Highway Patrol and shall conduct hearings with the opportunity for public comment on the adoption of any regulation applicable to alternative registration products.

(3) In developing these regulations, the department may specify timeframes for compliance and temporary operating authority for products piloted under Section 4853 that are submitted for approval under this section.

(4) An entity seeking approval to issue an alternative device or electronic vehicle registration card for pilot or statewide use under this section shall submit a business plan for the device to the department for approval that includes, but is not limited to, all of the following:

(A) An administrative oversight plan.

(B) A product support plan, including, but not limited to, methods of providing proof of registration that are not subject to technological failures to be used in the event of the alternative device malfunctioning or failing.

(C) Information technology security, privacy, and cybersecurity evaluations and measures to protect against unauthorized access to information and the device.

(D) Procedures to comply with applicable privacy and security requirements, including, but not limited to, the California Consumer Privacy Act of 2018 (Title 1.81.5 (commencing with Section 1798.100) of Part 4 of Division 3 of the Civil Code). For purposes of this section, a provider of the device shall not share or sell the information obtained to provide the device, or any other information obtained by virtue of contracting with the department to provide the device, including, but not limited to, information collected by the device itself, nor shall it use the information for any purpose other than as strictly necessary to provide the device and show proof of vehicle registration.

(E) Ensuring that the information transmitted between the alternative device or electronic vehicle registration card, the department, and the provider, as well as any mobile application required for the alternative device or electronic vehicle registration card, including storage, is encrypted and protected to the highest reasonable security standards broadly available.

(5) An alternative device intended to serve in lieu of a license plate shall be subject to all of the following requirements:

(A) Have a minimum effective viewable area that meets the size specifications of Section 4852.

(B) Provide legibility and visibility according to standards consistent with those applied to license plates.

(C) Be displayed in a manner consistent with Article 9 (commencing with Section 5200).

(D) Display only information and images approved by the department or deemed necessary by the department.

(E) Be readable by automated license plate readers used by the Department of the California Highway Patrol and any other automated enforcement system.

(F) Be readable by the human eye during hours of both daylight and darkness at a distance of no less than 75 feet.

(G) The alphanumeric characters assigned to the vehicle by the department and evidence of valid registration are capable of and shall be displayed on the device whenever a vehicle is in motion, stationary, parked on or off of a road or highway, or unoccupied.

(6) An alternative device intended to serve in lieu of a registration card is subject to both of the following requirements:

(A) Meets the requirements of Section 4453.

(B) May be used to comply with Section 4462.

(7) The department may establish additional requirements it deems necessary to implement this subdivision.

(8) The department may authorize both of the following to be displayed on an alternative device:

(A) Approved environmental license plates pursuant to Article 8.5 (commencing with Section 5100).

(B) Approved specialized license plates pursuant to Article 8.6 (commencing with Section 5151).

(c) An alternative device failure or malfunction may be deemed a correctable violation if all of the provisions of Section 40610 are met.

(d) The provider of the device, if the device has digital capabilities, shall build into the device a process for frequent notification if the device becomes defective. The provider of the device shall seek to replace defective devices as soon as possible.

(e) Alternative devices issued pursuant to this section may emit diffused nonglaring light only to the extent necessary to meet the visibility requirements of Sections 5201 and 24601.

(f) (1) An employer, or a person acting on behalf of the employer, shall not use an alternative device to monitor employees except during work

hours, and only if strictly necessary for the performance of the employee's duties. For purposes of this section, "monitor" includes, but is not limited to, locating, tracking, watching, listening to, or otherwise surveilling the employee.

(2) An employer, or a person acting on behalf of the employer, shall not retaliate against an employee for removing or disabling an alternative device's monitoring capabilities, including vehicle location technology, outside of work hours. An employee who believes they have been subject to a violation of this paragraph may file a complaint with the Labor Commissioner pursuant to Section 98.7 of the Labor Code. In addition to the civil penalties described in this provision, an employee retaliated against in violation of this section shall be entitled to all available penalties, remedies, and compensation, including, but not limited to, reinstatement and reimbursement of lost wages, work benefits, or other compensation caused by the retaliation.

(3) An employer or a person acting on behalf of the employer shall provide an employee with a notice stating that monitoring will occur before conducting any monitoring with an alternative device. The notice shall include, at a minimum, all of the following elements:

(A) A description of the specific activities that will be monitored.

(B) A description of the worker data that will be collected as a part of the monitoring.

(C) A notification of whether the data gathered through monitoring will be used to make or inform any employment-related decisions, including, but not limited to, disciplinary and termination decisions, and, if so, how, including any associated benchmarks.

(D) A description of the vendors or other third parties, if any, to which information collected through monitoring will be disclosed or transferred. The description shall include the name of the vendor or third party and the purpose for the data transfer.

(E) A description of the organizational positions that are authorized to access the data gathered through the alternative device.

(F) A description of the dates, times, and frequency that the monitoring will occur.

(G) A description of where the data will be stored and the length of time it will be retained.

(H) A notification of the employee's right to disable monitoring, including vehicle location technology, outside of work hours.

(4) (A) An employer who violates this subdivision shall be subject to a civil penalty of two hundred fifty dollars ($250) for an initial violation and one thousand dollars ($1,000) per employee for each subsequent violation.

(B) For purposes of determining the penalty described in subparagraph (A), the penalty shall be assessed per employee, per violation, and per day that monitoring without proper notice is conducted.

(C) The Labor Commissioner shall enforce this section using the procedures set forth in Section 1197.1 of the Labor Code, as applicable, including through the issuance of citations against employers who violate

this section. The procedures for issuing and contesting citations, and enforcing judgments for civil penalties, that are issued by the Labor Commissioner pursuant to this section shall be the same as those set forth in Section 1197.1 of the Labor Code.

(D) An employer, and any third-party vendor that contracts with an employer to provide GPS tracking of vehicles through an alternative device as described in this section, upon request, shall furnish any report or information that the Labor Commissioner or the Division of Labor Standards Enforcement requires to carry out this section.

SEC. 4. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

O

Assembly Bill No. 2777

CHAPTER 442

An act to amend Section 340.16 of the Code of Civil Procedure, relating to civil actions.

[Approved by Governor September 19, 2022. Filed with Secretary of State September 19, 2022.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2777, Wicks. Sexual assault: statute of limitations.

Existing law sets the time for commencement of any civil action for recovery of damages suffered as a result of sexual assault, as defined, as the later of within 10 years from the date of the last act, attempted act, or assault with the intent to commit an act of sexual assault against the plaintiff or within 3 years from the date the plaintiff discovers or reasonably should have discovered that an injury or illness resulted from those acts. Under existing law, this provision applies to any action that is commenced on or after January 1, 2019.

This bill would, until December 31, 2026, revive claims seeking to recover damages suffered as a result of a sexual assault that occurred on or after January 1, 2009, that would otherwise be barred solely because the statute of limitations has or had expired. The bill would additionally revive claims seeking to recover damages suffered as a result of a sexual assault that occurred on or after the plaintiff's 18th birthday when one or more entities are legally responsible for damages and the entity or their agents engaged in a cover up, as defined, and any related claims, that would otherwise be barred prior to January 1, 2023, solely because the applicable statute of limitations has or had expired, and would authorize a cause of action to proceed if already pending in court on the effective date of the bill or, if not filed by the effective date of the bill, to be commenced between January 1, 2023, and December 31, 2023. The bill would not revive claims that have been litigated to finality before January 1, 2023, and claims that have been compromised by written settlement agreements entered into before January 1, 2023. The bill would specify the required allegations to state a claim subject to revival under these provisions.

The people of the State of California do enact as follows:

SECTION 1. This act shall be known and may be cited as the Sexual Abuse and Cover Up Accountability Act.

Sexual Abuse and Cover Up Accountability Act

SEC. 2. The Legislature finds and declares as follows:

(a) Every 68 seconds, an American is sexually assaulted.

(b) One out of every six American women has been the victim of an attempted or completed rape in their lifetime.

(c) According to the Rape, Abuse and Incest National Network, only about 300 out of every 1,000 sexual assaults are reported to police. That means more than two out of three go unreported.

(d) Thirty-three percent of women who are raped contemplate suicide; 13 percent attempt it.

(e) A 2016 analysis of 28 studies of nearly 6,000 women and girls 14 years of age or older who had experienced sexual violence found that 60 percent of survivors did not label their experience as "rape."

(f) Women may not define a victimization as a rape or sexual assault for many reasons such as self-blame, embarrassment, not clearly understanding the legal definition of the terms, or not wanting to define someone they know who victimized them as a rapist or because others blame them for their sexual assault.

(g) When the perpetrator is someone a victim trusts, it can take years for the victim even to identify what happened to them as a sexual assault.

(h) For these reasons, it is self-evident that the unique nature of the emotional and psychological consequences of sexual assault, especially on women, can paradoxically permit wrongdoers to escape civil accountability unless statutes of limitation are crafted to prevent this injustice from occurring.

(i) Moreover, when these data are combined with widespread news reports of major companies being accused of covering up sexual assaults by their employees it is self-evident that statutes of limitation for sexual assault need to be crafted in a way that does not cause the covering-up company to enjoy the fruits of their cover-up solely because our statutes of limitation permit, and thus motivate, such behavior.

SEC. 3. Section 340.16 of the Code of Civil Procedure is amended to read:

340.16. (a) In any civil action for recovery of damages suffered as a result of sexual assault, where the assault occurred on or after the plaintiff's 18th birthday, the time for commencement of the action shall be the later of the following:

(1) Within 10 years from the date of the last act, attempted act, or assault with the intent to commit an act, of sexual assault against the plaintiff.

(2) Within three years from the date the plaintiff discovers or reasonably should have discovered that an injury or illness resulted from an act, attempted act, or assault with the intent to commit an act, of sexual assault against the plaintiff.

(b) (1) As used in this section, "sexual assault" means any of the crimes described in Section 243.4, 261, 264.1, 286, 287, or 289, or former Sections

262 and 288a, of the Penal Code, assault with the intent to commit any of those crimes, or an attempt to commit any of those crimes.

(2) For the purpose of this section, it is not necessary that a criminal prosecution or other proceeding have been brought as a result of the sexual assault or, if a criminal prosecution or other proceeding was brought, that the prosecution or proceeding resulted in a conviction or adjudication. This subdivision does not limit the availability of causes of action permitted under subdivision (a), including causes of action against persons or entities other than the alleged person who committed the crime.

(3) This section applies to any action described in subdivision (a) that is based upon conduct that occurred on or after January 1, 2009, and is commenced on or after January 1, 2019, that would have been barred solely because the applicable statute of limitations has or had expired. Such claims are hereby revived and may be commenced until December 31, 2026. This subdivision does not revive any of the following claims:

(A) A claim that has been litigated to finality in a court of competent jurisdiction before January 1, 2023.

(B) A claim that has been compromised by a written settlement agreement between the parties entered into before January 1, 2023.

(c) (1) Notwithstanding any other law, any claim seeking to recover more than two hundred fifty thousand dollars ($250,000) in damages arising out of a sexual assault or other inappropriate contact, communication, or activity of a sexual nature by a physician occurring at a student health center between January 1, 1988, and January 1, 2017, that would otherwise be barred before January 1, 2020, solely because the applicable statute of limitations has or had expired, is hereby revived and, a cause of action may proceed if already pending in court on October 2, 2019, or, if not filed by that date, may be commenced between January 1, 2020, and December 31, 2020.

(2) This subdivision does not revive any of the following claims:

(A) A claim that has been litigated to finality in a court of competent jurisdiction before January 1, 2020.

(B) A claim that has been compromised by a written settlement agreement between the parties entered into before January 1, 2020.

(C) A claim brought against a public entity.

(3) An attorney representing a claimant seeking to recover under this subdivision shall file a declaration with the court under penalty of perjury stating that the attorney has reviewed the facts of the case and consulted with a mental health practitioner, and that the attorney has concluded on the basis of this review and consultation that it is the attorney's good faith belief that the claim value is more than two hundred fifty thousand dollars ($250,000). The declaration shall be filed upon filing the complaint, or for those claims already pending, by December 1, 2019.

(d) (1) Notwithstanding any other law, any claim seeking to recover damages arising out of a sexual assault or other inappropriate contact, communication, or activity of a sexual nature by a physician while employed by a medical clinic owned and operated by the University of California,

Los Angeles, or a physician who held active privileges at a hospital owned and operated by the University of California, Los Angeles, at the time that the sexual assault or other inappropriate contact, communication, or activity of a sexual nature occurred, between January 1, 1983, and January 1, 2019, that would otherwise be barred before January 1, 2021, solely because the applicable statute of limitations has or had expired, is hereby revived, and a cause of action may proceed if already pending in court on January 1, 2021, or, if not filed by that date, may be commenced between January 1, 2021, and December 31, 2021.

(2) This subdivision does not revive either of the following claims:

(A) A claim that has been litigated to finality in a court of competent jurisdiction before January 1, 2021.

(B) A claim that has been compromised by a written settlement agreement between the parties entered into before January 1, 2021.

(e) (1) Notwithstanding any other law, any claim seeking to recover damages suffered as a result of a sexual assault that occurred on or after the plaintiff's 18th birthday that would otherwise be barred before January 1, 2023, solely because the applicable statute of limitations has or had expired, is hereby revived, and a cause of action may proceed if already pending in court on January 1, 2023, or, if not filed by that date, may be commenced between January 1, 2023, and December 31, 2023.

(2) This subdivision revives claims brought by a plaintiff who alleges all of the following:

(A) The plaintiff was sexually assaulted.

(B) One or more entities are legally responsible for damages arising out of the sexual assault.

(C) The entity or entities, including, but not limited to, their officers, directors, representatives, employees, or agents, engaged in a cover up or attempted a cover up of a previous instance or allegations of sexual assault by an alleged perpetrator of such abuse.

(3) Failure to allege a cover up as required by subparagraph (C) of paragraph (2) as to one entity does not affect revival of the plaintiff's claim or claims against any other entity.

(4) For purposes of this subdivision:

(A) "Cover up" means a concerted effort to hide evidence relating to a sexual assault that incentivizes individuals to remain silent or prevents information relating to a sexual assault from becoming public or being disclosed to the plaintiff, including, but not limited to, the use of nondisclosure agreements or confidentiality agreements.

(B) "Entity" means a sole proprietorship, partnership, limited liability company, corporation, association, or other legal entity.

(C) "Legally responsible" means that the entity or entities are liable under any theory of liability established by statute or common law, including, but not limited to, negligence, intentional torts, and vicarious liability.

(5) This subdivision revives any related claims, including, but not limited to, wrongful termination and sexual harassment, arising out of the sexual assault that is the basis for a claim pursuant to this subdivision.

(6) This subdivision does not revive either of the following claims:

(A) A claim that has been litigated to finality in a court of competent jurisdiction before January 1, 2023.

(B) A claim that has been compromised by a written settlement agreement between the parties entered into before January 1, 2023.

(7) This subdivision shall not be construed to alter the otherwise applicable burden of proof, as defined in Section 115 of the Evidence Code, that a plaintiff has in a civil action subject to this section.

(8) Nothing in this subdivision precludes a plaintiff from bringing an action for sexual assault pursuant to subdivisions (a) and (b).

SEC. 4. The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

O

Senate Bill No. 523

CHAPTER 630

An act to amend Sections 12920, 12921, 12926, 12931, 12940, 12944, and 12993 of, and to add Sections 22853.3 and 22853.4 to, the Government Code, to amend Sections 1343 and 1367.25 of, and to add Sections 1367.255 and 1367.33 to, the Health and Safety Code, to amend Section 10123.196 of, and to add Sections 10123.1945 and 10127.09 to, the Insurance Code, and to add Sections 10509.5 and 10828 to the Public Contract Code, relating to reproductive health.

[Approved by Governor September 27, 2022. Filed with Secretary of State September 27, 2022.]

LEGISLATIVE COUNSEL'S DIGEST

SB 523, Leyva. Contraceptive Equity Act of 2022.

(1) Existing law, the Knox-Keene Health Care Service Plan Act of 1975, provides for the licensure and regulation of health care service plans by the Department of Managed Health Care and makes a willful violation of the act a crime. Existing law provides for the regulation of health insurers by the Department of Insurance. Existing law establishes health care coverage requirements for contraceptives, including, but not limited to, requiring a health care service plan, including a Medi-Cal managed care plan, or a health insurance policy issued, amended, renewed, or delivered on or after January 1, 2017, to cover up to a 12-month supply of federal Food and Drug Administration approved, self-administered hormonal contraceptives when dispensed at one time for an enrollee or insured by a provider or pharmacist, or at a location licensed or authorized to dispense drugs or supplies.

This bill, the Contraceptive Equity Act of 2022, would make various changes to expand coverage of contraceptives by a health care service plan contract or health insurance policy issued, amended, renewed, or delivered on and after January 1, 2024, including requiring a health care service plan or health insurer to provide point-of-sale coverage for over-the-counter FDA-approved contraceptive drugs, devices, and products at in-network pharmacies without cost sharing or medical management restrictions. The bill would require health care service plans and insurance policies offered by public or private institutions of higher learning that directly provide health care services only to its students, faculty, staff, administration, and their respective dependents, issued, amended, renewed, or delivered, on or after January 1, 2024, to comply with these contraceptive coverage requirements. The bill would also require coverage for clinical services related to the provision or use of contraception, as specified. The bill would revise provisions applicable when a covered, therapeutic equivalent of a

drug, device, or product is deemed medically inadvisable by deferring to the provider, as specified.

This bill would also prohibit a health care service plan contract or disability insurance policy issued, amended, renewed, or delivered on or after January 1, 2024, with certain exceptions, from imposing a deductible, coinsurance, copayment, or any other cost-sharing requirement on vasectomy services and procedures, as specified, under conditions similar to those applicable to other contraceptive coverage.

This bill would require a health benefit plan or contract with the Board of Public Relations of the Public Employees' Retirement System to provide coverage for contraceptives and vasectomies consistent with the bill's requirements, commencing January 1, 2024. The bill would prohibit the California State University and the University of California from approving a health benefit plan that does not comply with the contraceptive coverage requirements of the bill on and after January 1, 2024.

Because a willful violation of the bill's requirements by a health care service plan would be a crime, the bill would impose a state-mandated local program.

(2) Existing law, the California Fair Employment and Housing Act (FEHA), establishes the Civil Rights Department within the Business, Consumer Services, and Housing Agency, under the direction of the Director of Civil Rights, to enforce civil rights laws with respect to housing and employment and to protect and safeguard the right of all persons to obtain and hold employment without discrimination based on specified characteristics or status, including, but not limited to, race, age, sex, or medical condition.

The FEHA makes certain discriminatory employment and housing practices unlawful, and authorizes a person claiming to be aggrieved by an alleged unlawful practice to file a verified complaint with the Civil Rights Department. The FEHA requires the department to make an investigation in connection with a filed complaint alleging facts sufficient to constitute a violation of the FEHA, and requires the department to endeavor to eliminate the unlawful practice by conference, conciliation, mediation, and persuasion. With regard to unlawful employment practices, if conference, conciliation, mediation, or persuasion fails and the department has required all parties to participate in a mandatory dispute resolution, as specified, the FEHA authorizes the director, in their discretion, to bring a civil action in the name of the department on behalf of the person claiming to be aggrieved.

This bill would revise the FEHA to include protection for reproductive health decisionmaking, as defined, with respect to the opportunity to seek, obtain, and hold employment without discrimination. Among other provisions, the bill would prohibit specified discriminatory practices, based on reproductive health decisionmaking, by employers, labor organizations, apprenticeships and training programs, and licensing boards. The bill also would make it unlawful for an employer to require, as a condition of employment, continued employment, or a benefit of employment, the

disclosure of information relating to an applicant's or employee's reproductive health decisionmaking.

(3) This bill would incorporate additional changes to Section 12926 of the Government Code proposed by AB 1766 to be operative only if this bill and AB 1766 are enacted and this bill is enacted last.

(4) This bill would incorporate additional changes to Section 12931 of the Government Code proposed by AB 2960 to be operative only if this bill and AB 2960 are enacted and this bill is enacted last.

(5) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

The people of the State of California do enact as follows:

SECTION 1. This act shall be known, and may be cited, as the Contraceptive Equity Act of 2022.

SEC. 2. The Legislature finds and declares all of the following:

(a) California has a long history of expanding timely access to birth control to prevent unintended pregnancy. Thanks to a combination of innovative policies and programs enacted statewide, unintended pregnancy rates are at a 30-year low.

(b) Despite the progress made, health disparities in reproductive health outcomes persist among Black, Indigenous and People of Color, including disproportionate unintended pregnancy, infant and maternal mortality, and sexually transmitted infection rates. The Legislature must take action to ensure that all Californians have equitable access to preventive contraceptive care.

(c) The federal Patient Protection and Affordable Care Act (Public Law 111-148) included a mandate that most health insurance plans cover contraception without out-of-pocket costs for patients.

(d) California's Contraceptive Coverage Equity Act of 2014 and the Annual Supply of Contraceptives Act of 2016, built on this federal policy and existing state law to be the first state in the country to require coverage of birth control methods approved by the federal Food and Drug Administration for women without cost sharing or restrictions and a 12-month supply of self-administered birth control dispensed at one time for individuals enrolled in health insurance plans and policies regulated by the Knox-Keene Health Care Service Plan Act of 1975.

(e) Since 2014, several other states have expanded on California's model legislation to create more equitable contraceptive coverage and access by requiring most health insurance plans and policies to cover voluntary sterilization services and all birth control methods available over-the-counter without a prescription for all beneficiaries, regardless of gender.

(f) A report by the Guttmacher Institute shows that vasectomy is among the most effective – and cost-effective contraceptive methods available.

(g) Trump-era attacks on birth control access have underscored the need to codify the expansion of contraceptive coverage for as many Californians as possible under state law.

(h) The COVID-19 public health emergency has also further illuminated the structural inequities that disproportionately affect youth, low-income people and communities of color in accessing birth control services. A report by the Guttmacher Institute revealed that 29 percent of White women, 38 percent of Black women and 45 percent of Latinas now face difficulties accessing birth control as a result of the pandemic.

(i) The Legislature intends to reduce sexual and reproductive health disparities and ensure greater health equity by providing a pathway for more Californians to get the contraceptive care they want, when they need it – without inequitable delays or cost barriers.

(j) The Legislature intends for the relevant California departments and agencies to work in concert to ensure compliance with these provisions.

SEC. 3. Section 12920 of the Government Code is amended to read:

12920. It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, reproductive health decisionmaking, or military and veteran status.

It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment for these reasons foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advancement, and substantially and adversely affects the interests of employees, employers, and the public in general.

Further, the practice of discrimination because of race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, veteran or military status, or genetic information in housing accommodations is declared to be against public policy.

It is the purpose of this part to provide effective remedies that will eliminate these discriminatory practices.

This part shall be deemed an exercise of the police power of the state for the protection of the welfare, health, and peace of the people of this state.

SEC. 4. Section 12921 of the Government Code is amended to read:

12921. (a) The opportunity to seek, obtain, and hold employment without discrimination because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, reproductive health decisionmaking, or veteran or military status is hereby recognized as and declared to be a civil right.

(b) The opportunity to seek, obtain, and hold housing without discrimination because of race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, veteran or military status, genetic information, or any other basis prohibited by Section 51 of the Civil Code is hereby recognized as and declared to be a civil right.

SEC. 5. Section 12926 of the Government Code is amended to read:

12926. As used in this part in connection with unlawful practices, unless a different meaning clearly appears from the context:

(a) "Affirmative relief" or "prospective relief" includes the authority to order reinstatement of an employee, awards of backpay, reimbursement of out-of-pocket expenses, hiring, transfers, reassignments, grants of tenure, promotions, cease and desist orders, posting of notices, training of personnel, testing, expunging of records, reporting of records, and any other similar relief that is intended to correct unlawful practices under this part.

(b) "Age" refers to the chronological age of any individual who has reached a 40th birthday.

(c) Except as provided by Section 12926.05, "employee" does not include any individual employed by that person's parent, spouse, or child or any individual employed under a special license in a nonprofit sheltered workshop or rehabilitation facility.

(d) "Employer" includes any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly, the state or any political or civil subdivision of the state, and cities, except as follows:

"Employer" does not include a religious association or corporation not organized for private profit.

(e) "Employment agency" includes any person undertaking for compensation to procure employees or opportunities to work.

(f) "Essential functions" means the fundamental job duties of the employment position the individual with a disability holds or desires. "Essential functions" does not include the marginal functions of the position.

(1) A job function may be considered essential for any of several reasons, including, but not limited to, any one or more of the following:

(A) The function may be essential because the reason the position exists is to perform that function.

(B) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed.

(C) The function may be highly specialized, so that the incumbent in the position is hired based on expertise or the ability to perform a particular function.

(2) Evidence of whether a particular function is essential includes, but is not limited to, the following:

(A) The employer's judgment as to which functions are essential.

(B) Written job descriptions prepared before advertising or interviewing applicants for the job.

(C) The amount of time spent on the job performing the function.

(D) The consequences of not requiring the incumbent to perform the function.

(E) The terms of a collective bargaining agreement.

(F) The work experiences of past incumbents in the job.

(G) The current work experience of incumbents in similar jobs.

(g) (1) "Genetic information" means, with respect to any individual, information about any of the following:

(A) The individual's genetic tests.

(B) The genetic tests of family members of the individual.

(C) The manifestation of a disease or disorder in family members of the individual.

(2) "Genetic information" includes any request for, or receipt of, genetic services, or participation in clinical research that includes genetic services, by an individual or any family member of the individual.

(3) "Genetic information" does not include information about the sex or age of any individual.

(h) "Labor organization" includes any organization that exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection.

(i) "Medical condition" means either of the following:

(1) Any health impairment related to or associated with a diagnosis of cancer or a record or history of cancer.

(2) Genetic characteristics. For purposes of this section, "genetic characteristics" means either of the following:

(A) Any scientifically or medically identifiable gene or chromosome, or combination or alteration thereof, that is known to be a cause of a disease or disorder in a person or that person's offspring, or that is determined to be associated with a statistically increased risk of development of a disease or disorder, and that is presently not associated with any symptoms of any disease or disorder.

(B) Inherited characteristics that may derive from the individual or family member, that are known to be a cause of a disease or disorder in a person or that person's offspring, or that are determined to be associated with a statistically increased risk of development of a disease or disorder, and that are presently not associated with any symptoms of any disease or disorder.

(j) "Mental disability" includes, but is not limited to, all of the following:

(1) Having any mental or psychological disorder or condition, such as intellectual disability, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity. For purposes of this section:

(A) "Limits" shall be determined without regard to mitigating measures, such as medications, assistive devices, or reasonable accommodations, unless the mitigating measure itself limits a major life activity.

(B) A mental or psychological disorder or condition limits a major life activity if it makes the achievement of the major life activity difficult.

(C) "Major life activities" shall be broadly construed and shall include physical, mental, and social activities and working.

(2) Any other mental or psychological disorder or condition not described in paragraph (1) that requires special education or related services.

(3) Having a record or history of a mental or psychological disorder or condition described in paragraph (1) or (2), which is known to the employer or other entity covered by this part.

(4) Being regarded or treated by the employer or other entity covered by this part as having, or having had, any mental condition that makes achievement of a major life activity difficult.

(5) Being regarded or treated by the employer or other entity covered by this part as having, or having had, a mental or psychological disorder or condition that has no present disabling effect, but that may become a mental disability as described in paragraph (1) or (2).

"Mental disability" does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.

(k) "Veteran or military status" means a member or veteran of the United States Armed Forces, United States Armed Forces Reserve, the United States National Guard, and the California National Guard.

(*l*) "On the bases enumerated in this part" means or refers to discrimination on the basis of one or more of the following: race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, age, sexual orientation, reproductive health decisionmaking, or veteran or military status.

(m) "Physical disability" includes, but is not limited to, all of the following:

(1) Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:

(A) Affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.

(B) Limits a major life activity. For purposes of this section:

(i) "Limits" shall be determined without regard to mitigating measures such as medications, assistive devices, prosthetics, or reasonable accommodations, unless the mitigating measure itself limits a major life activity.

(ii) A physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss limits a major life activity if it makes the achievement of the major life activity difficult.

(iii) "Major life activities" shall be broadly construed and includes physical, mental, and social activities and working.

(2) Any other health impairment not described in paragraph (1) that requires special education or related services.

(3) Having a record or history of a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment described in paragraph (1) or (2), which is known to the employer or other entity covered by this part.

(4) Being regarded or treated by the employer or other entity covered by this part as having, or having had, any physical condition that makes achievement of a major life activity difficult.

(5) Being regarded or treated by the employer or other entity covered by this part as having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical disability as described in paragraph (1) or (2).

(6) "Physical disability" does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.

(n) Notwithstanding subdivisions (j) and (m), if the definition of "disability" used in the federal Americans with Disabilities Act of 1990 (Public Law 101-336) would result in broader protection of the civil rights of individuals with a mental disability or physical disability, as defined in subdivision (j) or (m), or would include any medical condition not included within those definitions, then that broader protection or coverage shall be deemed incorporated by reference into, and shall prevail over conflicting provisions of, the definitions in subdivisions (j) and (m).

(o) "Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, age, sexual orientation, reproductive health decisionmaking, or veteran or military status" includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics.

(p) "Reasonable accommodation" may include either of the following:

(1) Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities.

(2) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(q) "Religious creed," "religion," "religious observance," "religious belief," and "creed" include all aspects of religious belief, observance, and practice, including religious dress and grooming practices. "Religious dress practice" shall be construed broadly to include the wearing or carrying of religious clothing, head or face coverings, jewelry, artifacts, and any other item that is part of an individual observing a religious creed. "Religious grooming practice" shall be construed broadly to include all forms of head, facial, and body hair that are part of an individual observing a religious creed.

(r) (1) "Sex" includes, but is not limited to, the following:

(A) Pregnancy or medical conditions related to pregnancy.

(B) Childbirth or medical conditions related to childbirth.

(C) Breastfeeding or medical conditions related to breastfeeding.

(2) "Sex" also includes, but is not limited to, a person's gender. "Gender" means sex, and includes a person's gender identity and gender expression. "Gender expression" means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.

(s) "Sexual orientation" means heterosexuality, homosexuality, and bisexuality.

(t) "Supervisor" means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(u) "Undue hardship" means an action requiring significant difficulty or expense, when considered in light of the following factors:

(1) The nature and cost of the accommodation needed.

(2) The overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility.

(3) The overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities.

(4) The type of operations, including the composition, structure, and functions of the workforce of the entity.

(5) The geographic separateness or administrative or fiscal relationship of the facility or facilities.

(v) "National origin" discrimination includes, but is not limited to, discrimination on the basis of possessing a driver's license granted under Section 12801.9 of the Vehicle Code.

(w) "Race" is inclusive of traits historically associated with race, including, but not limited to, hair texture and protective hairstyles.

(x) "Protective hairstyles" includes, but is not limited to, such hairstyles as braids, locks, and twists.

(y) "Reproductive health decisionmaking" includes, but is not limited to, a decision to use or access a particular drug, device, product, or medical service for reproductive health. This subdivision and other provisions in this part relating to "reproductive health decisionmaking" shall not be construed to mean that subdivision (r) of this section and other provisions in this part related to "sex" do not include reproductive health decisionmaking.

SEC. 5.5. Section 12926 of the Government Code is amended to read:

12926. As used in this part in connection with unlawful practices, unless a different meaning clearly appears from the context:

(a) "Affirmative relief" or "prospective relief" includes the authority to order reinstatement of an employee, awards of backpay, reimbursement of out-of-pocket expenses, hiring, transfers, reassignments, grants of tenure, promotions, cease and desist orders, posting of notices, training of personnel, testing, expunging of records, reporting of records, and any other similar relief that is intended to correct unlawful practices under this part.

(b) "Age" refers to the chronological age of any individual who has reached a 40th birthday.

(c) Except as provided by Section 12926.05, "employee" does not include any individual employed by that person's parent, spouse, or child or any individual employed under a special license in a nonprofit sheltered workshop or rehabilitation facility.

(d) "Employer" includes any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly, the state or any political or civil subdivision of the state, and cities, except as follows:

"Employer" does not include a religious association or corporation not organized for private profit.

(e) "Employment agency" includes any person undertaking for compensation to procure employees or opportunities to work.

(f) "Essential functions" means the fundamental job duties of the employment position the individual with a disability holds or desires. "Essential functions" does not include the marginal functions of the position.

(1) A job function may be considered essential for any of several reasons, including, but not limited to, any one or more of the following:

(A) The function may be essential because the reason the position exists is to perform that function.

(B) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed.

(C) The function may be highly specialized, so that the incumbent in the position is hired based on expertise or the ability to perform a particular function.

(2) Evidence of whether a particular function is essential includes, but is not limited to, the following:

(A) The employer's judgment as to which functions are essential.

(B) Written job descriptions prepared before advertising or interviewing applicants for the job.

(C) The amount of time spent on the job performing the function.

(D) The consequences of not requiring the incumbent to perform the function.

(E) The terms of a collective bargaining agreement.

(F) The work experiences of past incumbents in the job.

(G) The current work experience of incumbents in similar jobs.

(g) (1) "Genetic information" means, with respect to any individual, information about any of the following:

(A) The individual's genetic tests.

(B) The genetic tests of family members of the individual.

(C) The manifestation of a disease or disorder in family members of the individual.

(2) "Genetic information" includes any request for, or receipt of, genetic services, or participation in clinical research that includes genetic services, by an individual or any family member of the individual.

(3) "Genetic information" does not include information about the sex or age of any individual.

(h) "Labor organization" includes any organization that exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection.

(i) "Medical condition" means either of the following:

(1) Any health impairment related to or associated with a diagnosis of cancer or a record or history of cancer.

(2) Genetic characteristics. For purposes of this section, "genetic characteristics" means either of the following:

(A) Any scientifically or medically identifiable gene or chromosome, or combination or alteration thereof, that is known to be a cause of a disease or disorder in a person or that person's offspring, or that is determined to be associated with a statistically increased risk of development of a disease or disorder, and that is presently not associated with any symptoms of any disease or disorder.

(B) Inherited characteristics that may derive from the individual or family member, that are known to be a cause of a disease or disorder in a person or that person's offspring, or that are determined to be associated with a statistically increased risk of development of a disease or disorder, and that are presently not associated with any symptoms of any disease or disorder.

(j) "Mental disability" includes, but is not limited to, all of the following:

(1) Having any mental or psychological disorder or condition, such as intellectual disability, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity. For purposes of this section:

(A) "Limits" shall be determined without regard to mitigating measures, such as medications, assistive devices, or reasonable accommodations, unless the mitigating measure itself limits a major life activity.

(B) A mental or psychological disorder or condition limits a major life activity if it makes the achievement of the major life activity difficult.

(C) "Major life activities" shall be broadly construed and shall include physical, mental, and social activities and working.

(2) Any other mental or psychological disorder or condition not described in paragraph (1) that requires special education or related services.

(3) Having a record or history of a mental or psychological disorder or condition described in paragraph (1) or (2), which is known to the employer or other entity covered by this part.

(4) Being regarded or treated by the employer or other entity covered by this part as having, or having had, any mental condition that makes achievement of a major life activity difficult.

(5) Being regarded or treated by the employer or other entity covered by this part as having, or having had, a mental or psychological disorder or condition that has no present disabling effect, but that may become a mental disability as described in paragraph (1) or (2).

"Mental disability" does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.

(k) "Veteran or military status" means a member or veteran of the United States Armed Forces, United States Armed Forces Reserve, the United States National Guard, and the California National Guard.

(*l*) "On the bases enumerated in this part" means or refers to discrimination on the basis of one or more of the following: race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, age, sexual orientation, reproductive health decisionmaking, or veteran or military status.

(m) "Physical disability" includes, but is not limited to, all of the following:

(1) Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:

(A) Affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.

(B) Limits a major life activity. For purposes of this section:

(i) "Limits" shall be determined without regard to mitigating measures such as medications, assistive devices, prosthetics, or reasonable accommodations, unless the mitigating measure itself limits a major life activity.

(ii) A physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss limits a major life activity if it makes the achievement of the major life activity difficult.

(iii) "Major life activities" shall be broadly construed and includes physical, mental, and social activities and working.

(2) Any other health impairment not described in paragraph (1) that requires special education or related services.

(3) Having a record or history of a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment described in paragraph (1) or (2), which is known to the employer or other entity covered by this part.

(4) Being regarded or treated by the employer or other entity covered by this part as having, or having had, any physical condition that makes achievement of a major life activity difficult.

(5) Being regarded or treated by the employer or other entity covered by this part as having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical disability as described in paragraph (1) or (2).

(6) "Physical disability" does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.

(n) Notwithstanding subdivisions (j) and (m), if the definition of "disability" used in the federal Americans with Disabilities Act of 1990 (Public Law 101-336) would result in broader protection of the civil rights of individuals with a mental disability or physical disability, as defined in subdivision (j) or (m), or would include any medical condition not included within those definitions, then that broader protection or coverage shall be deemed incorporated by reference into, and shall prevail over conflicting provisions of, the definitions in subdivisions (j) and (m).

(o) "Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, age, sexual orientation, reproductive health decisionmaking, or veteran or military status" includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics.

(p) "Reasonable accommodation" may include either of the following:

(1) Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities.

(2) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(q) "Religious creed," "religion," "religious observance," "religious belief," and "creed" include all aspects of religious belief, observance, and practice, including religious dress and grooming practices. "Religious dress practice" shall be construed broadly to include the wearing or carrying of religious clothing, head or face coverings, jewelry, artifacts, and any other item that is part of an individual observing a religious creed. "Religious grooming practice" shall be construed broadly to include all forms of head, facial, and body hair that are part of an individual observing a religious creed.

(r) (1) "Sex" includes, but is not limited to, the following:

(A) Pregnancy or medical conditions related to pregnancy.

(B) Childbirth or medical conditions related to childbirth.

(C) Breastfeeding or medical conditions related to breastfeeding.

(2) "Sex" also includes, but is not limited to, a person's gender. "Gender" means sex, and includes a person's gender identity and gender expression. "Gender expression" means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.

(s) "Sexual orientation" means heterosexuality, homosexuality, and bisexuality.

(t) "Supervisor" means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(u) "Undue hardship" means an action requiring significant difficulty or expense, when considered in light of the following factors:

(1) The nature and cost of the accommodation needed.

(2) The overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility.

(3) The overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities.

(4) The type of operations, including the composition, structure, and functions of the workforce of the entity.

(5) The geographic separateness or administrative or fiscal relationship of the facility or facilities.

(v) "National origin" discrimination includes, but is not limited to, discrimination on the basis of possessing a driver's license or identification card granted under Section 12801.9 of the Vehicle Code.

(w) "Race" is inclusive of traits historically associated with race, including, but not limited to, hair texture and protective hairstyles.

(x) "Protective hairstyles" includes, but is not limited to, such hairstyles as braids, locks, and twists.

(y) "Reproductive health decisionmaking" includes, but is not limited to, a decision to use or access a particular drug, device, product, or medical service for reproductive health. This subdivision and other provisions in this part relating to "reproductive health decisionmaking" shall not be construed to mean that subdivision (r) of this section and other provisions in this part related to "sex" do not include reproductive health decisionmaking.

SEC. 6. Section 12931 of the Government Code is amended to read:

12931. The department may also provide assistance to communities and persons therein in resolving disputes, disagreements, or difficulties relating to discriminatory practices based on race, religious creed, color, national origin, ancestry, physical disability, mental disability, veteran or military

status, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, familial status, age, reproductive health decisionmaking, or sexual orientation that impair the rights of persons in those communities under the Constitution or laws of the United States or of this state. The services of the department may be made available in cases of these disputes, disagreements, or difficulties only when, in its judgment, peaceful relations among the citizens of the community involved are threatened thereby. The department's services are to be made available only upon the request of an appropriate state or local public body, or upon the request of any person directly affected by any such dispute, disagreement, or difficulty.

The assistance of the department pursuant to this section shall be limited to endeavors at investigation, conference, conciliation, and persuasion.

SEC. 6.5. Section 12931 of the Government Code is amended to read:

12931. The department may also provide assistance to communities and persons therein in resolving disputes, disagreements, or difficulties relating to discriminatory practices based on race, religious creed, color, national origin, ancestry, physical disability, mental disability, veteran or military status, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, familial status, age, reproductive health decisionmaking, or sexual orientation that impair the rights of persons in those communities under the Constitution or laws of the United States or of this state. The services of the department may be made available in cases of these disputes, disagreements, or difficulties only when, in its judgment, peaceful relations among the persons of the community involved are threatened thereby. The department's services are to be made available only upon the request of an appropriate state or local public body, or upon the request of any person directly affected by the dispute, disagreement, or difficulty.

The assistance of the department pursuant to this section shall be limited to endeavors at investigation, conference, conciliation, and persuasion.

SEC. 7. Section 12940 of the Government Code, as amended by Section 36 of Chapter 48 of the Statutes of 2022, is amended to read:

12940. It is an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, reproductive health decisionmaking, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or veteran or military status of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.

(1) This part does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee with a physical or mental disability, if the employee, because of a physical or mental disability, is unable to perform the employee's essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations.

(2) This part does not prohibit an employer from refusing to hire or discharging an employee who, because of the employee's medical condition, is unable to perform the employee's essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations. Nothing in this part shall subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee who, because of the employee's medical condition, is unable to perform the employee's essential duties, or cannot perform those duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations.

(3) Nothing in this part relating to discrimination on account of marital status shall do either of the following:

(A) Affect the right of an employer to reasonably regulate, for reasons of supervision, safety, security, or morale, the working of spouses in the same department, division, or facility, consistent with the rules and regulations adopted by the council.

(B) Prohibit bona fide health plans from providing additional or greater benefits to employees with dependents than to those employees without or with fewer dependents.

(4) Nothing in this part relating to discrimination on account of sex shall affect the right of an employer to use veteran status as a factor in employee selection or to give special consideration to Vietnam-era veterans.

(5) (A) This part does not prohibit an employer from refusing to employ an individual because of the individual's age if the law compels or provides for that refusal. Promotions within the existing staff, hiring or promotion on the basis of experience and training, rehiring on the basis of seniority and prior service with the employer, or hiring under an established recruiting program from high schools, colleges, universities, or trade schools do not, in and of themselves, constitute unlawful employment practices.

(B) The provisions of this part relating to discrimination on the basis of age do not prohibit an employer from providing health benefits or health care reimbursement plans to retired persons that are altered, reduced, or eliminated when the person becomes eligible for Medicare health benefits. This subparagraph applies to all retiree health benefit plans and contractual provisions or practices concerning retiree health benefits and health care reimbursement plans in effect on or after January 1, 2011.

(b) For a labor organization, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, reproductive health decisionmaking, or veteran or military status of any person, to exclude, expel, or restrict from its membership the person, or to provide only second-class or segregated membership or to discriminate against any person because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, reproductive health decisionmaking, or veteran or military status of the person in the election of officers of the labor organization or in the selection of the labor organization's staff or to discriminate in any way against any of its members or against any employer or against any person employed by an employer.

(c) For any person to discriminate against any person in the selection, termination, training, or other terms or treatment of that person in any apprenticeship training program, any other training program leading to employment, an unpaid internship, or another limited duration program to provide unpaid work experience for that person because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, reproductive health decisionmaking, or veteran or military status of the person discriminated against.

(d) For any employer or employment agency to print or circulate or cause to be printed or circulated any publication, or to make any nonjob-related inquiry of an employee or applicant, either verbal or through use of an application form, that expresses, directly or indirectly, any limitation, specification, or discrimination as to race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, reproductive health decisionmaking, or veteran or military status, or any intent to make any such limitation, specification, or discrimination. This part does not prohibit an employer or employment agency from inquiring into the age of an applicant, or from specifying age limitations, if the law compels or provides for that action.

(e) (1) Except as provided in paragraph (2) or (3), for any employer or employment agency to require any medical or psychological examination of an applicant, to make any medical or psychological inquiry of an applicant, to make any inquiry whether an applicant has a mental disability or physical disability or medical condition, or to make any inquiry regarding the nature or severity of a physical disability, mental disability, or medical condition.

(2) Notwithstanding paragraph (1), an employer or employment agency may inquire into the ability of an applicant to perform job-related functions and may respond to an applicant's request for reasonable accommodation.

(3) Notwithstanding paragraph (1), an employer or employment agency may require a medical or psychological examination or make a medical or psychological inquiry of a job applicant after an employment offer has been made but prior to the commencement of employment duties, provided that the examination or inquiry is job related and consistent with business necessity and that all entering employees in the same job classification are subject to the same examination or inquiry.

(f) (1) Except as provided in paragraph (2), for any employer or employment agency to require any medical or psychological examination of an employee, to make any medical or psychological inquiry of an employee, to make any inquiry whether an employee has a mental disability, physical disability, or medical condition, or to make any inquiry regarding the nature or severity of a physical disability, mental disability, or medical condition.

(2) Notwithstanding paragraph (1), an employer or employment agency may require any examinations or inquiries that it can show to be job related and consistent with business necessity. An employer or employment agency may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that worksite.

(g) For any employer, labor organization, or employment agency to harass, discharge, expel, or otherwise discriminate against any person because the person has made a report pursuant to Section 11161.8 of the Penal Code that prohibits retaliation against hospital employees who report suspected patient abuse by health facilities or community care facilities.

(h) For any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.

(i) For any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so.

(j) (1) For an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, reproductive health decisionmaking, or veteran or military status, to harass an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract by an employee, other than an agent or supervisor, shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An employer may also be responsible for the acts of nonemployees, with respect to harassment of employees, applicants, unpaid interns or volunteers, or

persons providing services pursuant to a contract in the workplace, if the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing cases involving the acts of nonemployees, the extent of the employer's control and any other legal responsibility that the employer may have with respect to the conduct of those nonemployees shall be considered. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment.

(2) The provisions of this subdivision are declaratory of existing law, except for the new duties imposed on employers with regard to harassment.

(3) An employee of an entity subject to this subdivision is personally liable for any harassment prohibited by this section that is perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action.

(4) (A) For purposes of this subdivision only, "employer" means any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities. The definition of "employer" in subdivision (d) of Section 12926 applies to all provisions of this section other than this subdivision.

(B) Notwithstanding subparagraph (A), for purposes of this subdivision, "employer" does not include a religious association or corporation not organized for private profit, except as provided in Section 12926.2.

(C) For purposes of this subdivision, "harassment" because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions. Sexually harassing conduct need not be motivated by sexual desire.

(5) For purposes of this subdivision, "a person providing services pursuant to a contract" means a person who meets all of the following criteria:

(A) The person has the right to control the performance of the contract for services and discretion as to the manner of performance.

(B) The person is customarily engaged in an independently established business.

(C) The person has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work.

(k) For an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.

(*l*) (1) For an employer or other entity covered by this part to refuse to hire or employ a person or to refuse to select a person for a training program leading to employment or to bar or to discharge a person from employment

or from a training program leading to employment, or to discriminate against a person in compensation or in terms, conditions, or privileges of employment because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer or other entity covered by this part demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance, including the possibilities of excusing the person from those duties that conflict with the person's religious belief or observance or permitting those duties to be performed at another time or by another person, but is unable to reasonably accommodate the religious belief or observance without undue hardship, as defined in subdivision (u) of Section 12926, on the conduct of the business of the employer or other entity covered by this part. Religious belief or observance, as used in this section, includes, but is not limited to, observance of a Sabbath or other religious holy day or days, reasonable time necessary for travel prior and subsequent to a religious observance, and religious dress practice and religious grooming practice as described in subdivision (q) of Section 12926. This subdivision shall also apply to an apprenticeship training program, an unpaid internship, and any other program to provide unpaid experience for a person in the workplace or industry.

(2) An accommodation of an individual's religious dress practice or religious grooming practice is not reasonable if the accommodation requires segregation of the individual from other employees or the public.

(3) An accommodation is not required under this subdivision if it would result in a violation of this part or any other law prohibiting discrimination or protecting civil rights, including subdivision (b) of Section 51 of the Civil Code and Section 11135 of this code.

(4) For an employer or other entity covered by this part to, in addition to the employee protections provided pursuant to subdivision (h), retaliate or otherwise discriminate against a person for requesting accommodation under this subdivision, regardless of whether the request was granted.

(m) (1) For an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in paragraph (1) or (2) of subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship, as defined in subdivision (u) of Section 12926, to its operation.

(2) For an employer or other entity covered by this part to, in addition to the employee protections provided pursuant to subdivision (h), retaliate or otherwise discriminate against a person for requesting accommodation under this subdivision, regardless of whether the request was granted.

(n) For an employer or other entity covered by this part to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition.

(o) For an employer or other entity covered by this part, to subject, directly or indirectly, any employee, applicant, or other person to a test for the presence of a genetic characteristic.

(p) For an employer to require, as a condition of employment, continued employment, or a benefit of employment, the disclosure of information relating to an applicant's or employee's reproductive health decisionmaking.

(q) Nothing in this section shall be interpreted as preventing the ability of employers to identify members of the military or veterans for purposes of awarding a veteran's preference as permitted by law.

SEC. 8. Section 12944 of the Government Code, as amended by Section 38 of Chapter 48 of the Statutes of 2022, is amended to read:

12944. (a) It shall be unlawful for a licensing board to require any examination or establish any other qualification for licensing that has an adverse impact on any class by virtue of its race, creed, color, national origin or ancestry, sex, gender, gender identity, gender expression, age, medical condition, genetic information, physical disability, mental disability, reproductive health decisionmaking, or sexual orientation, unless the practice can be demonstrated to be job related.

Where the council, after hearing, determines that an examination is unlawful under this subdivision, the licensing board may continue to use and rely on the examination until such time as judicial review by the superior court of the determination is exhausted.

If an examination or other qualification for licensing is determined to be unlawful under this section, that determination shall not void, limit, repeal, or otherwise affect any right, privilege, status, or responsibility previously conferred upon any person by the examination or by a license issued in reliance on the examination or qualification.

(b) It shall be unlawful for a licensing board to fail or refuse to make reasonable accommodation to an individual's mental or physical disability or medical condition.

(c) It shall be unlawful for any licensing board, unless specifically acting in accordance with federal equal employment opportunity guidelines or regulations approved by the council, to print or circulate or cause to be printed or circulated any publication, or to make any non-job-related inquiry, either verbal or through use of an application form, which expresses, directly or indirectly, any limitation, specification, or discrimination as to race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, sex, gender, gender identity, gender expression, age, reproductive health decisionmaking, or sexual orientation or any intent to make any such limitation, specification, or discrimination. Nothing in this subdivision shall prohibit any licensing board from making, in connection with prospective licensure or certification, an inquiry as to, or a request for information regarding, the physical fitness of applicants if that inquiry or request for information is directly related and pertinent to the license or the licensed position the applicant is applying for. Nothing in this subdivision shall prohibit any licensing board, in connection with prospective examinations, licensure, or certification, from inviting

individuals with physical or mental disabilities to request reasonable accommodations or from making inquiries related to reasonable accommodations.

(d) It is unlawful for a licensing board to discriminate against any person because the person has filed a complaint, testified, or assisted in any proceeding under this part.

(e) It is unlawful for any licensing board to fail to keep records of applications for licensing or certification for a period of two years following the date of receipt of the applications.

(f) As used in this section, "licensing board" means any state board, agency, or authority in the Business, Consumer Services, and Housing Agency that has the authority to grant licenses or certificates which are prerequisites to employment eligibility or professional status.

SEC. 9. Section 12993 of the Government Code is amended to read:

12993. (a) The provisions of this part shall be construed liberally for the accomplishment of the purposes of this part. This part does not repeal any of the provisions of civil rights law or of any other law of this state relating to discrimination because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, age, reproductive health decisionmaking, or sexual orientation, unless those provisions provide less protection to the enumerated classes of persons covered under this part.

(b) The provisions in this part relating to discrimination in employment on account of sex or medical condition do not affect the operation of the terms or conditions of any bona fide retirement, pension, employee benefit, or insurance plan, provided the terms or conditions are in accordance with customary and reasonable or actuarially sound underwriting practices.

(c) While it is the intention of the Legislature to occupy the field of regulation of discrimination in employment and housing encompassed by the provisions of this part, exclusive of all other laws banning discrimination in employment and housing by any city, city and county, county, or other political subdivision of the state, this part does not limit or restrict the application of Section 51 of the Civil Code.

SEC. 10. Section 22853.3 is added to the Government Code, to read:

22853.3. Commencing January 1, 2024, a health benefit plan or contract shall provide coverage for contraceptives and related services consistent with the requirements under Section 1367.25 of the Health and Safety Code and Section 10123.196 of the Insurance Code.

SEC. 11. Section 22853.4 is added to the Government Code, to read:

22853.4. Commencing January 1, 2024, a health benefit plan or contract shall provide coverage for vasectomies and related services consistent with the requirements under Section 1367.255 of the Health and Safety Code and Section 10123.1945 of the Insurance Code.

SEC. 12. Section 1343 of the Health and Safety Code is amended to read:

1343. (a) This chapter shall apply to health care service plans and specialized health care service plan contracts as defined in subdivisions (f) and (o) of Section 1345.

(b) The director may by the adoption of rules or the issuance of orders deemed necessary and appropriate, either unconditionally or upon specified terms and conditions or for specified periods, exempt from this chapter any class of persons or plan contracts if the director finds the action to be in the public interest and not detrimental to the protection of subscribers, enrollees, or persons regulated under this chapter, and that the regulation of the persons or plan contracts is not essential to the purposes of this chapter.

(c) The director, upon request of the Director of Health Care Services, shall exempt from this chapter any county-operated pilot program contracting with the State Department of Health Care Services pursuant to Article 7 (commencing with Section 14490) of Chapter 8 of Part 3 of Division 9 of the Welfare and Institutions Code. The director may exempt noncounty-operated pilot programs upon request of the Director of Health Care Services. Those exemptions may be subject to conditions the Director of Health Care Services deems appropriate.

(d) Upon the request of the Director of Health Care Services, the director may exempt from this chapter any mental health plan contractor or any capitated rate contract under Chapter 8.9 (commencing with Section 14700) of Part 3 of Division 9 of the Welfare and Institutions Code. Those exemptions may be subject to conditions the Director of Health Care Services deems appropriate.

(e) This chapter shall not apply to:

(1) A person organized and operating pursuant to a certificate issued by the Insurance Commissioner unless the entity is directly providing the health care service through those entity-owned or contracting health facilities and providers, in which case this chapter shall apply to the insurer's plan and to the insurer.

(2) A plan directly operated by a bona fide public or private institution of higher learning that directly provides health care services only to its students, faculty, staff, administration, and their respective dependents, except that a plan described in this paragraph shall be subject to Section 1367.33.

(3) A person who does all of the following:

(A) Promises to provide care for life or for more than one year in return for a transfer of consideration from, or on behalf of, a person 60 years of age or older.

(B) Has obtained a written license pursuant to Chapter 2 (commencing with Section 1250) or Chapter 3.2 (commencing with Section 1569).

(C) Has obtained a certificate of authority from the State Department of Social Services.

(4) The Major Risk Medical Insurance Board when engaging in activities under Chapter 8 (commencing with Section 10700) of Part 2 of Division 2 of the Insurance Code, Part 6.3 (commencing with Section 12695) of

Division 2 of the Insurance Code, and Part 6.5 (commencing with Section 12700) of Division 2 of the Insurance Code.

(5) The California Small Group Reinsurance Fund.

SEC. 13. Section 1367.25 of the Health and Safety Code is amended to read:

1367.25. (a) A group health care service plan contract, except for a specialized health care service plan contract, that is issued, amended, renewed, or delivered on or after January 1, 2000, to December 31, 2015, inclusive, and an individual health care service plan contract that is amended, renewed, or delivered on or after January 1, 2000, to December 31, 2015, inclusive, except for a specialized health care service plan contract, shall provide coverage for the following, under general terms and conditions applicable to all benefits:

(1) A health care service plan contract that provides coverage for outpatient prescription drug benefits shall include coverage for a variety of federal Food and Drug Administration (FDA)-approved prescription contraceptive methods designated by the plan. In the event the patient's participating provider, acting within the provider's scope of practice, determines that none of the methods designated by the plan is medically appropriate for the patient's medical or personal history, the plan shall also provide coverage for another FDA-approved, medically appropriate prescription contraceptive method prescribed by the patient's provider.

(2) Benefits for an enrollee under this subdivision shall be the same for an enrollee's covered spouse and covered nonspouse dependents.

(b) (1) A health care service plan contract, except for a specialized health care service plan contract, that is issued, amended, renewed, or delivered on or after January 1, 2016, shall provide coverage for all of the following services and contraceptive methods for all subscribers and enrollees:

(A) (i) Except as provided in clause (ii) and in subparagraphs (B) and (C) of paragraph (2), all FDA-approved contraceptive drugs, devices, and other products, including all FDA-approved contraceptive drugs, devices, and products available over the counter, as prescribed by the enrollee's provider.

(ii) For any health care service plan contract described in paragraph (1) that is issued, amended, renewed, or delivered on or after January 1, 2024, both of the following conditions shall apply:

(I) A prescription shall not be required to trigger coverage of over-the-counter FDA-approved contraceptive drugs, devices, and products.

(II) Point-of-sale coverage for over-the-counter FDA-approved contraceptive drugs, devices, and products shall be provided at in-network pharmacies without cost sharing or medical management restrictions.

(B) Voluntary tubal ligation and other similar sterilization procedures.

(C) Clinical services related to the provision or use of contraception, including consultations, examinations, procedures, device insertion, ultrasound, anesthesia, patient education, referrals, and counseling.

(D) Followup services related to the drugs, devices, products, and procedures covered under this subdivision, including, but not limited to,

management of side effects, counseling for continued adherence, and device removal.

(2) (A) Except for a grandfathered health plan, a health care service plan subject to this subdivision shall not impose a deductible, coinsurance, copayment, or any other cost-sharing requirement on the coverage provided pursuant to this subdivision. Cost sharing shall not be imposed on any Medi-Cal beneficiary.

(B) If the FDA has approved one or more therapeutic equivalents, as that term is defined by the FDA, of a contraceptive drug, device, or product, a health care service plan is not required to cover all of those therapeutically equivalent versions in accordance with this subdivision, as long as at least one is covered without cost sharing in accordance with this subdivision. If there is no therapeutic equivalent generic substitute available in the market, a health care service plan shall provide coverage without cost sharing for the original, brand name contraceptive.

(C) If a covered therapeutic equivalent of a drug, device, or product is deemed medically inadvisable by the enrollee's provider, a health care service plan shall defer to the determination and judgment of the provider and provide coverage for the alternative prescribed contraceptive drug, device, product, or service without imposing any cost-sharing requirements. Medical inadvisability may include considerations such as severity of side effects, differences in permanence or reversibility of contraceptives, and ability to adhere to the appropriate use of the drug or item, as determined by the provider. The department may promulgate regulations establishing an easily accessible, transparent, and sufficiently expedient process that is not unduly burdensome, including timeframes, for an enrollee, an enrollee's designee, or an enrollee's provider to request coverage of an alternative prescribed contraceptive. A request for coverage under this subparagraph that is submitted by an enrollee, an enrollee's designee, or provider shall be approved by the health care service plan in compliance with the time limits in Section 1367.241 and, as applicable, with the plan's Medi-Cal managed care contract.

(3) Except as otherwise authorized under this section, a health care service plan shall not infringe upon an enrollee's choice of contraceptive drug, device, or product and shall not impose any restrictions or delays on the coverage required under this subdivision, including prior authorization, step therapy, or other utilization control techniques.

(4) Benefits for an enrollee under this subdivision shall be the same for an enrollee's covered spouse and covered nonspouse dependents.

(5) For purposes of this subdivision, "health care service plan" shall include Medi-Cal managed care plans that contract with the State Department of Health Care Services pursuant to Chapter 7 (commencing with Section 14000) and Chapter 8 (commencing with Section 14200) of Part 3 of Division 9 of the Welfare and Institutions Code, to the extent that the benefits described in this subdivision are made the financial responsibility of the Medi-Cal managed care plan under its comprehensive risk contract with the State Department of Health Care Services. If some or all of the benefits

described in this subdivision are not the financial responsibility of the Medi-Cal managed care plan, as determined by the State Department of Health Care Services, those benefits shall be available to Medi-Cal beneficiaries on a fee-for-service basis pursuant to subdivision (n) of Section 14132 of the Welfare and Institutions Code.

(c) (1) Notwithstanding any other provision of this section, a religious employer may request a health care service plan contract without coverage for FDA-approved contraceptive methods that are contrary to the religious employer's religious tenets. If so requested, a health care service plan contract shall be provided without coverage for contraceptive methods. The exclusion from coverage under this provision shall not apply to a contraceptive drug, device, procedure, or other product that is used for purposes other than contraception.

(2) For purposes of this section, a "religious employer" is an entity for which each of the following is true:

(A) The inculcation of religious values is the purpose of the entity.

(B) The entity primarily employs persons who share the religious tenets of the entity.

(C) The entity serves primarily persons who share the religious tenets of the entity.

(D) The entity is a nonprofit organization as described in Section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

(d) (1) Every health care service plan contract that is issued, amended, renewed, or delivered on or after January 1, 2017, shall cover up to a 12-month supply of FDA-approved, self-administered hormonal contraceptives when dispensed or furnished at one time for an enrollee by a provider, pharmacist, or at a location licensed or otherwise authorized to dispense drugs or supplies.

(2) This subdivision shall not be construed to require a health care service plan contract to cover contraceptives provided by an out-of-network provider, pharmacy, or location licensed or otherwise authorized to dispense drugs or supplies, except as may be otherwise authorized by state or federal law or by the plan's policies governing out-of-network coverage.

(3) This subdivision shall not be construed to require a provider to prescribe, furnish, or dispense 12 months of self-administered hormonal contraceptives at one time.

(4) A health care service plan subject to this subdivision, shall not impose utilization controls or other forms of medical management limiting the supply of FDA-approved, self-administered hormonal contraceptives that may be dispensed or furnished by a provider or pharmacist, or at a location licensed or otherwise authorized to dispense drugs or supplies to an amount that is less than a 12-month supply, and shall not require an enrollee to make any formal request for such coverage other than a pharmacy claim.

(e) This section shall not be construed to exclude coverage for contraceptive supplies as prescribed by a provider, acting within the provider's scope of practice, for reasons other than contraceptive purposes, such as decreasing the risk of ovarian cancer or eliminating symptoms of

menopause, or for contraception that is necessary to preserve the life or health of an enrollee.

(f) This section shall not be construed to deny or restrict in any way the department's authority to ensure plan compliance with this chapter when a plan provides coverage for contraceptive drugs, devices, and products.

(g) This section shall not be construed to require an individual or group health care service plan contract to cover experimental or investigational treatments.

(h) For purposes of this section, the following definitions apply:

(1) "Grandfathered health plan" has the meaning set forth in Section 1251 of PPACA.

(2) "PPACA" means the federal Patient Protection and Affordable Care Act (Public Law 111-148), as amended by the federal Health Care and Education Reconciliation Act of 2010 (Public Law 111-152), and any rules, regulations, or guidance issued thereunder.

(3) With respect to health care service plan contracts issued, amended, or renewed on or after January 1, 2016, "provider" means an individual who is certified or licensed to furnish family planning services within their scope of practice pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, including a pharmacist authorized pursuant to Section 4052 or 4052.3 of the Business and Professions Code, or an initiative act referred to in that division, or Division 2.5 (commencing with Section 1797) of this code.

(4) For purposes of this section, "over-the-counter FDA-approved contraceptive drugs, devices, and products" and "over-the-counter birth control methods" are limited to those included as essential health benefits pursuant to Section 1367.005.

SEC. 14. Section 1367.255 is added to the Health and Safety Code, immediately following Section 1367.25, to read:

1367.255. (a) (1) A health care service plan contract issued, amended, renewed, or delivered on or after January 1, 2024, except for a grandfathered health plan or a qualifying health plan for a health savings account, shall not impose a deductible, coinsurance, copayment, or any other cost-sharing requirement on vasectomy services and procedures. For a qualifying health plan for a health savings account, the carrier shall establish the plan's cost sharing for vasectomy services and procedures at the minimum level necessary to preserve the enrollee's ability to claim tax-exempt contributions and withdrawals from the enrollee's health savings account under Internal Revenue Service laws, regulations, and guidance. Cost sharing shall not be imposed on a Medi-Cal beneficiary.

(2) A health care service plan shall not impose any restrictions or delays, including, but not limited to, prior authorization, on vasectomy services or procedures.

(3) Benefits for an enrollee under this section shall be the same for an enrollee's covered spouse and covered nonspouse dependents.

(4) For purposes of this section, "health care service plan" includes Medi-Cal managed care plans that contract with the State Department of

Health Care Services pursuant to Chapter 7 (commencing with Section 14000) and Chapter 8 (commencing with Section 14200) of Part 3 of Division 9 of the Welfare and Institutions Code, to the extent that the benefits described in this subdivision are made the financial responsibility of the Medi-Cal managed care plan under its comprehensive risk contract with the State Department of Health Care Services. If some or all of the benefits described in this subdivision are not the financial responsibility of the Medi-Cal managed care plan, as determined by the State Department of Health Care Services, those benefits shall be available to Medi-Cal beneficiaries on a fee-for-service basis pursuant to subdivision (n) of Section 14132 of the Welfare and Institutions Code.

(5) Utilization controls applicable to services described in this section provided by a Medi-Cal managed care plan shall be subject to this section.

(b) Notwithstanding any other provision of this section, a religious employer may request a health care service plan contract without coverage for contraceptive methods that are contrary to the religious employer's religious tenets. If so requested, a health care service plan contract shall be provided without coverage for vasectomy services and procedures. The exclusion from coverage under this provision shall not apply to vasectomy services or procedures for purposes other than contraception.

(1) A health care service plan that contracts with a religious employer to provide a health care service plan that does not include coverage and benefits for vasectomy services and procedures shall notify, in writing, upon initial enrollment and annually thereafter upon renewal, each enrollee that vasectomy services and procedures are not included in the enrollee's health care service plan.

(2) For purposes of this section, a "religious employer" is an entity for which each of the following is true:

(A) The inculcation of religious values is the purpose of the entity.

(B) The entity primarily employs persons who share the religious tenets of the entity.

(C) The entity serves primarily persons who share the religious tenets of the entity.

(D) The entity is a nonprofit organization as described in Section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

(c) This section shall not be construed to deny or restrict in any way the department's authority to ensure plan compliance with this chapter when a plan provides coverage for contraceptive drugs, devices, and products.

(d) This section shall not be construed to require an individual or group health care service plan contract to cover experimental or investigational treatments.

(e) For purposes of this section, the following definitions apply:

(1) "Grandfathered health plan" has the meaning set forth in Section 1251 of PPACA.

(2) "PPACA" means the federal Patient Protection and Affordable Care Act (Public Law 111-148), as amended by the federal Health Care and

Education Reconciliation Act of 2010 (Public Law 111-152), and any rules, regulations, or guidance issued thereunder.

SEC. 15. Section 1367.33 is added to the Health and Safety Code, to read:

1367.33. Notwithstanding any other law, a plan directly operated by a bona fide public or private institution of higher learning that directly provides health care services only to its students, faculty, staff, administration, and their respective dependents, and that is issued, amended, renewed, or delivered, on or after January 1, 2024, shall comply with the contraceptive coverage requirements of Sections 1367.25 and 1367.255.

SEC. 16. Section 10123.1945 is added to the Insurance Code, immediately following Section 10123.194, to read:

10123.1945. (a) (1) A disability insurance policy issued, amended, renewed, or delivered on or after January 1, 2024, except for a grandfathered health plan or a qualifying health plan for a health savings account, shall not impose a deductible, coinsurance, copayment, or any other cost-sharing requirement on vasectomy services or procedures. For a qualifying health plan for a health savings account, an insurer shall establish the plan's cost sharing for vasectomy services and procedures at the minimum level necessary to preserve the insured's ability to claim tax-exempt contributions and withdrawals from the insured's health savings account under Internal Revenue Service laws, regulations, and guidance.

(2) An insurer shall not impose any restrictions or delays, including, but not limited to, prior authorization, on vasectomy services and procedures.

(3) Coverage with respect to an insured under this section shall be identical for an insured's covered spouse and covered nonspouse dependents.

(b) This section shall not be construed to deny or restrict in any way an existing right or benefit provided under law or by contract.

(c) This section shall not be construed to require an individual or group disability insurance policy to cover experimental or investigational treatments.

(d) Notwithstanding any other provision of this section, a religious employer may request a disability insurance policy without coverage for contraceptive methods that are contrary to the religious employer's religious tenets. If so requested, a disability insurance policy shall be provided without coverage for vasectomy services and procedures. The exclusion from coverage under this provision shall not apply to vasectomy services or procedures for purposes other than contraception.

(1) An insurer that contracts with a religious employer to provide a disability insurance policy that does not include coverage and benefits for vasectomy services and procedures shall notify, in writing, upon initial enrollment and annually thereafter upon renewal, each enrollee that vasectomy services and procedures are not included in the insured's disability insurance policy.

(2) For purposes of this section, a "religious employer" is an entity for which each of the following is true:

(A) The inculcation of religious values is the purpose of the entity.

(B) The entity primarily employs persons who share the religious tenets of the entity.

(C) The entity serves primarily persons who share the religious tenets of the entity.

(D) The entity is a nonprofit organization pursuant to Section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

(e) This section only applies to disability insurance policies or contracts that are defined as health benefit plans pursuant to subdivision (a) of Section 10198.6, except that for accident only, specified disease, or hospital indemnity coverage, coverage for benefits under this section applies to the extent that the benefits are covered under the general terms and conditions that apply to all other benefits under the policy or contract. This section shall not be construed as imposing a new benefit mandate on accident only, specified disease, or hospital indemnity insurance.

(f) For purposes of this section, the following definitions apply:

(1) "Grandfathered health plan" has the meaning set forth in Section 1251 of PPACA.

(2) "PPACA" means the federal Patient Protection and Affordable Care Act (Public Law 111-148), as amended by the federal Health Care and Education Reconciliation Act of 2010 (Public Law 111-152), and any rules, regulations, or guidance issued thereunder.

SEC. 17. Section 10123.196 of the Insurance Code is amended to read:

10123.196. (a) An individual or group policy of disability insurance issued, amended, renewed, or delivered on or after January 1, 2000, through December 31, 2015, inclusive, that provides coverage for hospital, medical, or surgical expenses, shall provide coverage for the following, under the same terms and conditions as applicable to all benefits:

(1) A disability insurance policy that provides coverage for outpatient prescription drug benefits shall include coverage for a variety of federal Food and Drug Administration (FDA)-approved prescription contraceptive methods, as designated by the insurer. If an insured's health care provider determines that none of the methods designated by the disability insurer is medically appropriate for the insured's medical or personal history, the insurer shall, in the alternative, provide coverage for some other FDA-approved prescription contraceptive method prescribed by the patient's health care provider.

(2) Coverage with respect to an insured under this subdivision shall be identical for an insured's covered spouse and covered nonspouse dependents.

(b) (1) A group or individual policy of disability insurance, except for a specialized health insurance policy, that is issued, amended, renewed, or delivered on or after January 1, 2016, shall provide coverage for all of the following services and contraceptive methods for all policyholders and insureds:

(A) (i) Except as provided in clause (ii) and in subparagraphs (B) and (C) of paragraph (2), all FDA-approved, contraceptive drugs, devices, and other products, including all FDA-approved, contraceptive drugs, devices,

and products available over the counter, as prescribed by the insured's provider.

(ii) For any policy described in paragraph (1) that is issued, amended, renewed, or delivered on or after January 1, 2024, both of the following conditions shall apply:

(I) A prescription shall not be required to trigger coverage of over-the-counter FDA-approved contraceptive drugs, devices, and products.

(II) Point-of-sale coverage for over-the-counter FDA-approved contraceptive drugs, devices, and products shall be provided at in-network pharmacies without cost sharing or medical management restrictions.

(B) Voluntary tubal ligation and other similar sterilization procedures.

(C) Clinical services related to the provision or use of contraception, including consultations, examinations, procedures, device insertion, ultrasound, anesthesia, patient education, referrals, and counseling.

(D) Followup services related to the drugs, devices, products, and procedures covered under this subdivision, including, but not limited to, management of side effects, counseling for continued adherence, and device removal.

(2) (A) Except for a grandfathered health plan, a disability insurer subject to this subdivision shall not impose a deductible, coinsurance, copayment, or any other cost-sharing requirement on the coverage provided pursuant to this subdivision.

(B) If the FDA has approved one or more therapeutic equivalents, as that term is defined by the FDA, of a contraceptive drug, device, or product, a disability insurer is not required to cover all of those therapeutically equivalent versions in accordance with this subdivision, as long as at least one is covered without cost sharing in accordance with this subdivision. If there is no therapeutically equivalent generic substitute available in the market, an insurer shall provide coverage without cost sharing for the original, brand name contraceptive.

(C) If a covered therapeutic equivalent of a drug, device, or product is deemed medically inadvisable by the insured's provider, a disability insurer shall defer to the determination and judgment of the provider and provide coverage for the alternative prescribed contraceptive drug, device, product, or service without imposing any cost-sharing requirements. Medical inadvisability may include considerations such as severity of side effects, differences in permanence or reversibility of contraceptives, and ability to adhere to the appropriate use of the drug or item, as determined by the provider. The department may promulgate regulations establishing an easily accessible, transparent, and sufficiently expedient process that is not unduly burdensome, including timeframes, for an insured, an insured's designee, or an insured's provider to request coverage of an alternative prescribed contraceptive. A request for coverage under this subparagraph that is submitted by an insured, an insured's designee, or a provider shall be approved by the disability insurer in compliance with the time limits in Section 10123.191.

(3) Except as otherwise authorized under this section, an insurer shall not infringe upon an insured's choice of contraceptive drug, device, or product and shall not impose any restrictions or delays on the coverage required under this subdivision, including prior authorization, step therapy, or other utilization control techniques.

(4) Coverage with respect to an insured under this subdivision shall be identical for an insured's covered spouse and covered nonspouse dependents.

(c) This section shall not be construed to deny or restrict in any way any existing right or benefit provided under law or by contract.

(d) This section shall not be construed to require an individual or group disability insurance policy to cover experimental or investigational treatments.

(e) (1) Notwithstanding any other provision of this section, a religious employer may request a disability insurance policy without coverage for contraceptive methods that are contrary to the religious employer's religious tenets. If so requested, a disability insurance policy shall be provided without coverage for contraceptive methods. The exclusion from coverage under this provision shall not apply to a contraceptive drug, device, procedure, or other product that is used for purposes other than contraception.

(2) For purposes of this section, a "religious employer" is an entity for which each of the following is true:

(A) The inculcation of religious values is the purpose of the entity.

(B) The entity primarily employs persons who share the religious tenets of the entity.

(C) The entity serves primarily persons who share the religious tenets of the entity.

(D) The entity is a nonprofit organization pursuant to Section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

(f) (1) A group or individual policy of disability insurance, except for a specialized health insurance policy, that is issued, amended, renewed, or delivered on or after January 1, 2017, shall cover up to a 12-month supply of FDA-approved, self-administered hormonal contraceptives when dispensed or furnished at one time for an insured by a provider, pharmacist, or at a location licensed or otherwise authorized to dispense drugs or supplies.

(2) This subdivision shall not be construed to require a policy to cover contraceptives provided by an out-of-network provider, pharmacy, or location licensed or otherwise authorized to dispense drugs or supplies, except as may be otherwise authorized by state or federal law or by the insurer's policies governing out-of-network coverage.

(3) This subdivision shall not be construed to require a provider to prescribe, furnish, or dispense 12 months of self-administered hormonal contraceptives at one time.

(4) An insurer subject to this subdivision shall not impose utilization controls or other forms of medical management limiting the supply of FDA-approved, self-administered hormonal contraceptives that may be dispensed or furnished by a provider or pharmacist, or at a location licensed

or otherwise authorized to dispense drugs or supplies to an amount that is less than a 12-month supply, and shall not require an insured to make any formal request for such coverage other than a pharmacy claim.

(g) This section shall not be construed to exclude coverage for contraceptive supplies as prescribed by a provider, acting within the provider's scope of practice, for reasons other than contraceptive purposes, such as decreasing the risk of ovarian cancer or eliminating symptoms of menopause, or for contraception that is necessary to preserve the life or health of an insured.

(h) This section only applies to disability insurance policies or contracts that are defined as health benefit plans pursuant to subdivision (a) of Section 10198.6, except that for accident only, specified disease, or hospital indemnity coverage, coverage for benefits under this section applies to the extent that the benefits are covered under the general terms and conditions that apply to all other benefits under the policy or contract. This section shall not be construed as imposing a new benefit mandate on accident only, specified disease, or hospital indemnity insurance.

(i) For purposes of this section, the following definitions apply:

(1) "Grandfathered health plan" has the meaning set forth in Section 1251 of PPACA.

(2) "PPACA" means the federal Patient Protection and Affordable Care Act (Public Law 111-148), as amended by the federal Health Care and Education Reconciliation Act of 2010 (Public Law 111-152), and any rules, regulations, or guidance issued thereunder.

(3) With respect to policies of disability insurance issued, amended, or renewed on or after January 1, 2016, "health care provider" means an individual who is certified or licensed to furnish family planning services within their scope of practice pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, including a pharmacist authorized pursuant to Section 4052 or 4052.3 of the Business and Professions Code, or an initiative act referred to in that division, or Division 2.5 (commencing with Section 1797) of the Health and Safety Code.

(4) For purposes of this section, "over-the-counter FDA-approved contraceptive drugs, devices, and products" and "over-the-counter birth control methods" are limited to those included as essential health benefits pursuant to Section 10112.27.

SEC. 18. Section 10127.09 is added to the Insurance Code, to read:

10127.09. Notwithstanding any other law, a disability insurance policy that provides hospital, medical, surgical, prescription drug, or nursing benefits, except a policy providing only dental or vision benefits, that is issued, amended, renewed, or delivered, on or after January 1, 2024, and that is issued to a bona fide public or private institution of higher learning and provides coverage to its students and their dependents, or to its faculty, staff, administration, and their respective dependents, shall comply with the coverage requirements of Sections 10123.1945 and 10123.196.

SEC. 19. Section 10509.5 is added to the Public Contract Code, to read:

10509.5. Notwithstanding any other law, commencing January 1, 2024, the University of California shall not approve a health benefit plan contract for employees that does not comply with the contraceptive coverage requirements of Sections 1367.25 and 1367.255 of the Health and Safety Code Sections 10123.1945 and 10123.196 of the Insurance Code.

SEC. 20. Section 10828 is added to the Public Contract Code, to read:

10828. Notwithstanding any other law, commencing January 1, 2024, the California State University shall not approve a health benefit plan contract for employees that does not comply with the contraceptive coverage requirements of Sections 1367.25 and 1367.255 of the Health and Safety Code, and Sections 10123.1945 and 10123.196 of the Insurance Code.

SEC. 21. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

SEC. 22. Section 5.5 of this bill incorporates amendments to Section 12926 of the Government Code proposed by both this bill and Assembly Bill 1766. That section of this bill shall only become operative if (1) both bills are enacted and become effective on or before January 1, 2023, (2) each bill amends Section 12926 of the Government Code, and (3) this bill is enacted after Assembly Bill 1766, in which case Section 5 of this bill shall not become operative.

SEC. 23. Section 6.5 of this bill incorporates amendments to Section 12931 of the Government Code proposed by both this bill and Assembly Bill 2960. That section shall only become operative if (1) both bills are enacted and become effective on or before January 1, 2023, (2) each bill amends Section 12931 of the Government Code, and (3) this bill is enacted after Assembly Bill 2960, in which case Section 6 of this bill shall not become operative.

O

Assembly Bill No. 2091

CHAPTER 628

An act to add Section 56.108 to the Civil Code, to amend Sections 2029.200, 2029.300, and 2029.350 of the Code of Civil Procedure, to amend Section 123466 of the Health and Safety Code, to amend Section 791.29 of the Insurance Code, and to amend Section 3408 of the Penal Code, relating to information disclosure, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor September 27, 2022. Filed with Secretary of State September 27, 2022.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2091, Mia Bonta. Disclosure of information: reproductive health and foreign penal civil actions.

(1) Existing law provides that every individual possesses a fundamental right of privacy with respect to their personal reproductive decisions. Existing law prohibits the state from denying or interfering with a person's right to choose or obtain an abortion prior to viability of the fetus, or when the abortion is necessary to protect the life or health of the person. Existing law requires a health insurer to take specified steps to protect the confidentiality of an insured's medical information, and prohibits an insurer from disclosing medical information related to sensitive health care services to the policyholder or any insureds other than the protected individual receiving care. Existing law generally prohibits a provider of health care, a health care service plan, or a contractor from disclosing medical information regarding a patient, enrollee, or subscriber without first obtaining an authorization, unless a specified exception applies, including that the disclosure is in response to a subpoena. Existing law prohibits an employer from using or disclosing medical information that it possesses pertaining to its employees without the patient having first signed an authorization, unless a specified exception applies, including that the disclosure is compelled by judicial or administrative process or by any other specific provision of law. Existing law authorizes a California court or attorney to issue a subpoena if a foreign subpoena has been sought in this state.

This bill would prohibit compelling a person to identify or provide information that would identify or that is related to an individual who has sought or obtained an abortion in a state, county, city, or other local criminal, administrative, legislative, or other proceeding if the information is being requested based on another state's laws that interfere with a person's right to choose or obtain an abortion or a foreign penal civil action, as defined. The bill would authorize the Insurance Commissioner to assess a civil penalty, as specified, against an insurer that has disclosed an insured's

confidential medical information. The bill would prohibit a provider of health care, a health care service plan, a contractor, or an employer from releasing medical information that would identify an individual or related to an individual seeking or obtaining an abortion in response to a subpoena or a request or to law enforcement if that subpoena, request, or the purpose of law enforcement for the medical information is based on, or for the purpose of enforcement of, either another state's laws that interfere with a person's rights to choose or obtain an abortion or a foreign penal civil action. The bill would prohibit issuance of a subpoena if the submitted foreign subpoena relates to a foreign penal civil action and the submitted foreign subpoena would require disclosure of information related to sensitive services, as defined.

(2) Existing law sets forth the health care access rights of an incarcerated pregnant person and an incarcerated person who is identified as possibly pregnant or capable of becoming pregnant. Existing law prohibits the imposition of conditions or restrictions on an incarcerated person's ability to obtain an abortion.

This bill would prohibit prison staff from disclosing identifying medical information related to an incarcerated person's right to seek and obtain an abortion if the information is being requested based on another state's law that interferes with a person's rights to choose or obtain an abortion or a foreign penal civil action.

(3) This bill would incorporate additional changes to Sections 2029.300 and 2029.350 of the Code of Civil Procedure proposed by SB 107 to be operative only if this bill and SB 107 are enacted and this bill is enacted last.

(4) This bill would declare that it is to take effect immediately as an urgency statute.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares all of the following:

(a) Abortion care is a constitutional right and an integral part of comprehensive sexual and reproductive health care and overall health and well-being.

(b) In May 2019, the Governor signed the California Proclamation on Reproductive Freedom, reaffirming California's commitment to ensuring access to reproductive health care services, including abortion.

(c) If the United States Supreme Court overturns the protections under Roe v. Wade, people in more than one-half of the states in the country – more than 36 million women and other people who may become pregnant – will lose access to abortion care.

(d) In December 2021, more than 40 organizations joined together to form the California Future of Abortion Council to identify barriers to abortion services and recommend proposals to support equitable and

affordable access to abortion care for Californians and all who seek care in California.

(e) California is committed to building upon existing protections that preserve the right to abortion and implement innovative and bold programs and policies to truly be a reproductive freedom state.

(f) Other states and certain California localities have increased their efforts to limit abortion access and impose criminal, civil, and administrative liability on patients, providers, and those coordinating care.

(g) Actions against California abortion providers, patients, and supporters based on hostile antiabortion statutes in other states would interfere with protected rights under the Reproductive Privacy Act (Article 2.5 (commencing with Section 123460) of Chapter 2 of Part 2 of Division 106 of the Health and Safety Code) and the confidentiality of patient medical records.

(h) California must protect the confidentiality of medical records related to abortion to protect abortion providers and others who assist in providing abortion care from frivolous civil lawsuits and accompanying costs aimed at harassing providers, diverting resources, and shutting down clinics.

SEC. 2. Section 56.108 is added to the Civil Code, to read:

56.108. (a) Notwithstanding subdivisions (b) and (c) of Section 56.10 or subdivision (c) of Section 56.20, a provider of health care, health care service plan, contractor, or employer shall not release medical information related to an individual seeking or obtaining an abortion in response to a subpoena or request if that subpoena or request is based on either another state's laws that interfere with a person's rights under the Reproductive Privacy Act (Article 2.5 (commencing with Section 123460) of Chapter 2 of Part 2 of Division 106 of the Health and Safety Code) or a foreign penal civil action, as defined in Section 2029.200 of the Code of Civil Procedure.

(b) A provider of health care, health care service plan, contractor, or employer shall not release medical information that would identify an individual or that is related to an individual seeking or obtaining an abortion to law enforcement for either of the following purposes, unless that release is pursuant to a subpoena not otherwise prohibited by subdivision (a):

(1) Enforcement of another state's law that would interfere with a person's rights under the Reproductive Privacy Act (Article 2.5 (commencing with Section 123460) of Chapter 2 of Part 2 of Division 106 of the Health and Safety Code).

(2) Enforcement of a foreign penal civil action, as defined in Section 2029.200 of the Code of Civil Procedure.

SEC. 3. Section 2029.200 of the Code of Civil Procedure is amended to read:

2029.200. In this article:

(a) "Foreign jurisdiction" means either of the following:

(1) A state other than this state.

(2) A foreign nation.

(b) "Foreign penal civil action" means a civil action authorized by the law of a state other than this state in which the sole purpose is to punish an offense against the public justice of that state.

(c) "Foreign subpoena" means a subpoena issued under authority of a court of record of a foreign jurisdiction.

(d) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(e) "State" means a state of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.

(f) "Subpoena" means a document, however denominated, issued under authority of a court of record requiring a person to do any of the following:

(1) Attend and give testimony at a deposition.

(2) Produce and permit inspection, copying, testing, or sampling of designated books, documents, records, electronically stored information, or tangible things in the possession, custody, or control of the person.

(3) Permit inspection of premises under the control of the person.

SEC. 4. Section 2029.300 of the Code of Civil Procedure is amended to read:

2029.300. (a) To request issuance of a subpoena under this section, a party shall submit the original or a true and correct copy of a foreign subpoena to the clerk of the superior court in the county in which discovery is sought to be conducted in this state. A request for the issuance of a subpoena under this section does not constitute making an appearance in the courts of this state.

(b) In addition to submitting a foreign subpoena under subdivision (a), a party seeking discovery shall do both of the following:

(1) Submit an application requesting that the superior court issue a subpoena with the same terms as the foreign subpoena. The application shall be on a form prescribed by the Judicial Council pursuant to Section 2029.390. No civil case cover sheet is required.

(2) Pay the fee specified in Section 70626 of the Government Code.

(c) When a party submits a foreign subpoena to the clerk of the superior court in accordance with subdivision (a), and satisfies the requirements of subdivision (b), the clerk shall promptly issue a subpoena for service upon the person to which the foreign subpoena is directed.

(d) A subpoena issued under this section shall satisfy all of the following conditions:

(1) It shall incorporate the terms used in the foreign subpoena.

(2) It shall contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

(3) It shall bear the caption and case number of the out-of-state case to which it relates.

(4) It shall state the name of the court that issues it.

(5) It shall be on a form prescribed by the Judicial Council pursuant to Section 2029.390.

(e) A subpoena shall not be issued if the submitted foreign subpoena relates to a foreign penal civil action and would require disclosure of information related to sensitive services. For purposes of this subdivision, "sensitive services" has the same meaning as defined in Section 791.02 of the Insurance Code.

SEC. 4.5. Section 2029.300 of the Code of Civil Procedure is amended to read:

2029.300. (a) To request issuance of a subpoena under this section, a party shall submit the original or a true and correct copy of a foreign subpoena to the clerk of the superior court in the county in which discovery is sought to be conducted in this state. A request for the issuance of a subpoena under this section does not constitute making an appearance in the courts of this state.

(b) In addition to submitting a foreign subpoena under subdivision (a), a party seeking discovery shall do both of the following:

(1) Submit an application requesting that the superior court issue a subpoena with the same terms as the foreign subpoena. The application shall be on a form prescribed by the Judicial Council pursuant to Section 2029.390. No civil case cover sheet is required.

(2) Pay the fee specified in Section 70626 of the Government Code.

(c) When a party submits a foreign subpoena to the clerk of the superior court in accordance with subdivision (a), and satisfies the requirements of subdivision (b), the clerk shall promptly issue a subpoena for service upon the person to which the foreign subpoena is directed.

(d) A subpoena issued under this section shall satisfy all of the following conditions:

(1) It shall incorporate the terms used in the foreign subpoena.

(2) It shall contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

(3) It shall bear the caption and case number of the out-of-state case to which it relates.

(4) It shall state the name of the court that issues it.

(5) It shall be on a form prescribed by the Judicial Council pursuant to Section 2029.390.

(e) Notwithstanding subdivision (a), a subpoena shall not be issued pursuant to this section in any of the following circumstances:

(1) If the foreign subpoena is based on a violation of another state's laws that interfere with a person's right to allow a child to receive gender-affirming health care or gender-affirming mental health care. For the purpose of this paragraph, "gender-affirming health care" and "gender-affirming mental health care" shall have the same meaning as provided in Section 16010.2 of the Welfare and Institutions Code.

(2) If the submitted foreign subpoena relates to a foreign penal civil action and would require disclosure of information related to sensitive

services. For purposes of this paragraph, "sensitive services" has the same meaning as defined in Section 791.02 of the Insurance Code.

SEC. 5. Section 2029.350 of the Code of Civil Procedure is amended to read:

2029.350. (a) Notwithstanding Sections 1986 and 2029.300, if a party to a proceeding pending in a foreign jurisdiction retains an attorney licensed to practice in this state, who is an active member of the State Bar, and that attorney receives the original or a true and correct copy of a foreign subpoena, the attorney may issue a subpoena under this article.

(b) Notwithstanding subdivision (a), an attorney shall not issue a subpoena under this article based on a foreign subpoena that relates to a foreign penal civil action and that would require disclosure of information related to sensitive services. For purposes of this subdivision, "sensitive services" has the same meaning as defined in Section 791.02 of the Insurance Code.

(c) A subpoena issued under this section shall satisfy all of the following conditions:

(1) It shall incorporate the terms used in the foreign subpoena.

(2) It shall contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

(3) It shall bear the caption and case number of the out-of-state case to which it relates.

(4) It shall state the name of the superior court of the county in which the discovery is to be conducted.

(5) It shall be on a form prescribed by the Judicial Council pursuant to Section 2029.390.

SEC. 5.5. Section 2029.350 of the Code of Civil Procedure is amended to read:

2029.350. (a) Notwithstanding Sections 1986 and 2029.300, if a party to a proceeding pending in a foreign jurisdiction retains an attorney licensed to practice in this state, who is an active member of the State Bar, and that attorney receives the original or a true and correct copy of a foreign subpoena, the attorney may issue a subpoena under this article.

(b) (1) Notwithstanding subdivision (a), an authorized attorney shall not issue a subpoena pursuant to subdivision (a) if the foreign subpoena is based on a violation of another state's laws that interfere with a person's right to allow a child to receive gender-affirming health care or gender-affirming mental health care.

(2) For the purpose of this subdivision, "gender-affirming health care" and "gender-affirming mental health care" shall have the same meaning as provided in Section 16010.2 of the Welfare and Institutions Code.

(c) Notwithstanding subdivision (a), an attorney shall not issue a subpoena under this article based on a foreign subpoena that relates to a foreign penal civil action and that would require disclosure of information related to sensitive services. For purposes of this subdivision, "sensitive services" has the same meaning as defined in Section 791.02 of the Insurance Code.

(d) A subpoena issued under this section shall satisfy all of the following conditions:

(1) It shall incorporate the terms used in the foreign subpoena.

(2) It shall contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

(3) It shall bear the caption and case number of the out-of-state case to which it relates.

(4) It shall state the name of the superior court of the county in which the discovery is to be conducted.

(5) It shall be on a form prescribed by the Judicial Council pursuant to Section 2029.390.

SEC. 6. Section 123466 of the Health and Safety Code is amended to read:

123466. (a) The state shall not deny or interfere with a woman's or pregnant person's right to choose or obtain an abortion before the viability of the fetus, or when the abortion is necessary to protect the life or health of the woman or pregnant person.

(b) A person shall not be compelled in a state, county, city, or other local criminal, administrative, legislative, or other proceeding to identify or provide information that would identify or that is related to an individual who has sought or obtained an abortion if the information is being requested based on either another state's laws that interfere with a person's rights under subdivision (a) or a foreign penal civil action, as defined in Section 2029.200 of the Code of Civil Procedure.

SEC. 7. Section 791.29 of the Insurance Code, as added by Section 7 of Chapter 190 of the Statutes of 2021, is amended to read:

791.29. Notwithstanding any other law, and to the extent permitted by federal law, a health insurer shall take the following steps to protect the confidentiality of an insured's medical information:

(a) (1) A health insurer shall not require a protected individual to obtain the policyholder's authorization to receive sensitive services or to submit a claim for sensitive services if the protected individual has the right to consent to care.

(2) A health insurer shall recognize the right of a protected individual to exclusively exercise rights granted under this section regarding medical information related to sensitive services that the protected individual has received.

(3) A health insurer shall direct all communications regarding a protected individual's receipt of sensitive health care services directly to the protected individual receiving care as follows:

(A) If the protected individual has designated an alternative mailing address, email address, or telephone number pursuant to subdivision (b), the health insurer shall send or make all communications related to the protected individual's receipt of sensitive services to the alternative mailing address, email address, or telephone number designated.

(B) If the protected individual has not designated an alternative mailing address, email address, or telephone number pursuant to subdivision (b), the health insurer shall send or make all communications related to the protected individual's receipt of sensitive services in the name of the protected individual at the address or telephone number on file.

(C) Communications subject to this paragraph shall include the following written, verbal, or electronic communications:

(i) Bills and attempts to collect payment.

(ii) A notice of adverse benefits determinations.

(iii) An explanation of benefits notice.

(iv) A health insurer's request for additional information regarding a claim.

(v) A notice of a contested claim.

(vi) The name and address of a provider, description of services provided, and other information related to a visit.

(vii) Any written, oral, or electronic communication from a health insurer that contains protected health information.

(4) A health insurer shall not disclose medical information related to sensitive health care services provided to a protected individual to the policyholder or any insureds other than the protected individual receiving care, absent an express written authorization of the protected individual receiving care.

(b) (1) A health insurer shall permit an insured to request, and shall accommodate requests for, confidential communication in the form and format requested by the insured, if it is readily producible in the requested form and format, or at alternative locations.

(2) A health insurer may require the insured to make a request for a confidential communication described in paragraph (1) in writing or by electronic transmission.

(3) The confidential communication request shall apply to all communications that disclose medical information or provider name and address related to receipt of medical services by the individual requesting the confidential communication.

(4) The confidential communication request shall be valid until the insured submits a revocation of the request, or a new confidential communication request is submitted.

(5) For the purposes of this section, a confidential communications request shall be implemented by the health insurer within 7 calendar days of the receipt of an electronic transmission, telephonic request, or request submitted through the health insurer's internet website, or within 14 calendar days of receipt by first-class mail. The health insurer shall acknowledge receipt of the confidential communications request and advise the insured of the status of implementation of the request if an insured contacts the insurer.

(c) (1) A health insurer shall notify insureds that they may request a confidential communication pursuant to subdivision (b) and how to make the request.

(2) The information required to be provided pursuant to this subdivision shall be provided to insureds with individual or group coverage upon initial enrollment and annually thereafter upon renewal. The information shall also be provided in the following manner:

(A) In a conspicuously visible location in the evidence of coverage.

(B) On the health insurer's internet website, accessible through a hyperlink on the internet website's home page and in a manner that allows insureds, prospective insureds, and members of the public to easily locate the information.

(d) Notwithstanding subdivision (b), a provider of health care may make arrangements with the insured for the payment of benefit cost sharing and communicate that arrangement with the insurer.

(e) A health insurer shall not condition coverage on the waiver of rights provided in this section.

(f) If the commissioner determines that an insurer has violated this section, the commissioner may, after appropriate notice and opportunity for hearing in accordance with the Administrative Procedure Act (Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code), by order, assess a civil penalty not to exceed five thousand dollars ($5,000) for each violation, or, if a violation was willful, a civil penalty not to exceed ten thousand dollars ($10,000) for each violation. The commissioner shall have the discretion to determine the acts or omissions that constitute a violation of this section.

(g) This section shall become operative on July 1, 2022.

SEC. 8. Section 3408 of the Penal Code is amended to read:

3408. (a) A person incarcerated in the state prison who is identified as possibly pregnant or capable of becoming pregnant during an intake health examination or at any time during incarceration shall be offered a test upon intake or by request. Pregnancy tests shall be voluntary and not mandatory, and may only be administered by medical or nursing personnel. An incarcerated person who declines a pregnancy test shall be asked to sign an "Informed Refusal of Pregnancy Test" form that shall become part of their medical file.

(b) An incarcerated person with a positive pregnancy test result shall be offered comprehensive and unbiased options counseling that includes information about prenatal health care, adoption, and abortion. This counseling shall be furnished by a licensed health care provider or counselor who has been provided with training in reproductive health care and shall be nondirective, unbiased, and noncoercive. Prison staff shall not urge, force, or otherwise influence a pregnant person's decision.

(c) A prison shall not confer authority or discretion to nonmedical prison staff to decide if a pregnant person is eligible for an abortion. If a pregnant person decides to have an abortion, that person shall be offered, but not forced to accept, all due medical care and accommodations until they are no longer pregnant. A pregnant person who decides to have an abortion shall be referred to a licensed professional specified in subdivision (b) of Section 2253 of the Business and Professions Code.

(d) A person incarcerated in prison who is confirmed to be pregnant shall, within seven days of arriving at the prison, be scheduled for a pregnancy examination with a physician, nurse practitioner, certified nurse-midwife, or physician assistant. The examination shall include all of the following:

(1) A determination of the gestational age of the pregnancy and the estimated due date.

(2) A plan of care, including referrals for specialty and other services to evaluate for the presence of chronic medical conditions or infectious diseases, and to use health and social status of the incarcerated person to improve quality of care, isolation practices, level of activities, and bed assignments, and to inform appropriate specialists in relationship to gestational age and social and clinical needs, and to guide use of personal protective equipment and additional counseling for prevention and control of infectious diseases, if needed.

(3) The ordering of prenatal labs and diagnostic studies, as needed based on gestational age or existing or newly diagnosed health conditions.

(e) Incarcerated pregnant persons shall be scheduled for prenatal care visits as follows, unless otherwise indicated by the physician, nurse practitioner, certified nurse-midwife, or physician assistant:

(1) Every four weeks in the first trimester up to 24 to 28 weeks.

(2) Every two weeks thereafter up to 36 weeks gestation.

(3) Every one week thereafter until birth.

(f) Incarcerated pregnant persons shall be provided access to both of the following:

(1) Prenatal vitamins, to be taken on a daily basis, in accordance with medical standards of care.

(2) Newborn care that includes access to appropriate assessment, diagnosis, care, and treatment for infectious diseases that may be transmitted from a birthing person to the birthing person's infant, such as HIV or syphilis.

(g) Incarcerated pregnant persons housed in a multitier housing unit shall be assigned lower bunk and lower tier housing.

(h) Incarcerated pregnant persons shall not be tased, pepper sprayed, or exposed to other chemical weapons.

(i) Incarcerated pregnant persons who have used opioids prior to incarceration, either by admission or written documentation by a probation officer, or who are currently receiving methadone treatment, shall be offered medication-assisted treatment with methadone or buprenorphine, pursuant to Section 11222 of the Health and Safety Code, and shall be provided information on the risks of withdrawal.

(j) (1) An eligible incarcerated pregnant person or person who gives birth after incarceration in the prison shall be provided notice of, access to, and written application for, community-based programs serving pregnant, birthing, or lactating incarcerated persons. At a minimum, the notice shall contain guidelines for qualification, the timeframe for application, and the process for appealing a denial of admittance to those programs.

(2) If a community-based program is denied access to the prison, the reason for the denial shall be provided in writing to the incarcerated person within 15 working days of receipt of the request. The written denial shall address the safety or security concerns for the incarcerated person, infant, public, or staff.

(k) Each incarcerated pregnant person shall be referred to a social worker who shall do all of the following:

(1) Discuss with the incarcerated person the options available for feeding, placement, and care of the child after birth, including the benefits of lactation.

(2) Assist the incarcerated pregnant person with access to a phone in order to contact relatives regarding newborn placement.

(3) Oversee the placement of the newborn child.

(*l*) An incarcerated pregnant person shall be temporarily taken to a hospital outside the prison for the purpose of giving childbirth and shall be transported in the least restrictive way possible and in accordance with Section 3407. An incarcerated pregnant person shall not be shackled to anyone else during transport. An incarcerated pregnant person in labor or presumed to be in labor shall be treated as an emergency and shall be transported to the outside facility, accompanied by prison staff.

(m) An incarcerated pregnant person may elect to have a support person present during labor, childbirth, and during postpartum recovery while hospitalized. The support person may be an approved visitor or the prison's staff designated to assist with prenatal care, labor, childbirth, lactation, and postpartum care. The approval for the support person shall be made by the administrator of the prison or that person's designee. If an incarcerated pregnant person's request for an elected support person is denied, reason for the denial shall be provided in writing to the incarcerated person within 15 working days of receipt of the request. The written denial shall address the safety or security concerns for the incarcerated person, infant, public, or staff. Upon receipt of a written denial, the incarcerated pregnant person may choose the approved institution staff to act as the support person.

(n) All pregnant and postpartum incarcerated persons shall receive appropriate, timely, culturally responsive, and medically accurate and comprehensive care, evaluation, and treatment of existing or newly diagnosed chronic conditions, including mental health disorders and infectious diseases.

(o) An incarcerated pregnant person in labor and delivery shall be given the maximum level of privacy possible during the labor and delivery process. If a guard is present, they shall be stationed outside the room rather than in the room, absent extraordinary circumstances. If a guard must be present in the room, the guard shall stand in a place that grants as much privacy as possible during labor and delivery. A guard shall be removed from the room if a professional who is currently responsible for the medical care of a pregnant incarcerated person during a medical emergency, labor, delivery, or recovery after delivery determines that the removal of the guard is medically necessary.

(p) Upon return to prison, the physician, nurse practitioner, certified nurse-midwife, or physician assistant shall provide a postpartum examination

within one week from childbirth and as needed for up to 12 weeks postpartum, and shall determine whether the incarcerated person may be cleared for full duty or if medical restrictions are warranted. Postpartum individuals shall be given at least 12 weeks of recovery after any childbirth before they are required to resume normal activity.

(q) The rights provided for incarcerated persons by this section shall be posted in at least one conspicuous place to which all incarcerated persons have access.

(r) Prison staff shall not disclose identifying medical information related to an incarcerated person's right to seek and obtain an abortion if the information is being requested based on either another state's laws that interfere with a person's rights under the Reproductive Privacy Act (Article 2.5 (commencing with Section 123460) of Chapter 2 of Part 2 of Division 106 of the Health and Safety Code) or a foreign penal civil action, as defined in Section 2029.200 of the Code of Civil Procedure.

SEC. 9. The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

SEC. 10. (a) Section 4.5 of this bill incorporates amendments to Section 2029.300 of the Code of Civil Procedure proposed by both this bill and Senate Bill 107. That section of this bill shall only become operative if (1) both bills are enacted and become effective on or before January 1, 2023, but this bill becomes operative first, (2) each bill amends Section 2029.300 of the Code of Civil Procedure, and (3) this bill is enacted after Senate Bill 107, in which case Section 2029.300 of the Code of Civil Procedure, as amended by Section 4 of this bill, shall remain operative only until the operative date of Senate Bill 107, at which time Section 4.5 of this bill shall become operative.

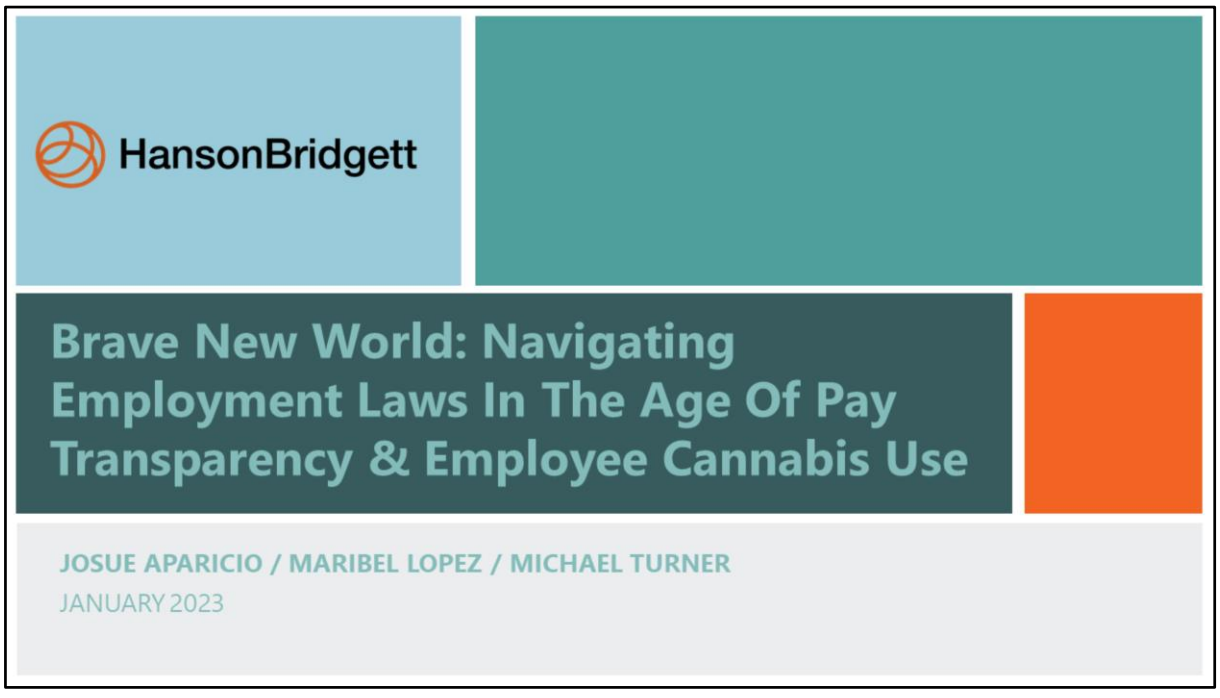
(b) Section 5.5 of this bill incorporates amendments to Section 2029.350 of the Code of Civil Procedure proposed by both this bill and Senate Bill 107. That section of this bill shall only become operative if (1) both bills are enacted and become effective on or before January 1, 2023, but this bill becomes operative first, (2) each bill amends Section 2029.350 of the Code of Civil Procedure, and (3) this bill is enacted after Senate Bill 107, in which case Section 2029.350 of the Code of Civil Procedure, as amended by Section 5 of this bill, shall remain operative only until the operative date of Senate Bill 107, at which time Section 5.5 of this bill shall become operative.

SEC. 11. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the California Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to protect the public from actions authorized under the law of another state that are contrary to the public policy of this state, including actions which interfere with a person's right to choose or obtain an abortion

and foreign penal civil actions, it is necessary that this act take effect immediately.

O


HansonBridgett
Brave New World: Navigating Employment Laws In The Age Of Pay Transparency & Employee Cannabis Use
JOSUE APARICIO / MARIBEL LOPEZ / MICHAEL TURNER
JANUARY 2023

California's New Pay Transparency Law

- Senate Bill 1162 passed in September 2022
- Amends Section 12999 of the Government Code and Section 432.3 of the Labor Code
- Effective as of January 1, 2023
- Changes:
  1. Annual Pay Data Report
  2. Pay Scales Transparency

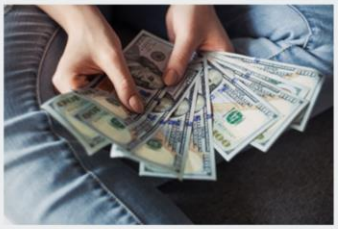
Annual Pay Data Report - Section 12999

- Threshold: 100 or more employees
  - 100 or more employees hired through labor contractors:
    - Separate report for employees hired through labor contractors in the prior calendar year
- When: On or before the second Wednesday of May 2023 (May 10) and for each year thereafter on or before the second Wednesday of May
- Must include median and mean hourly rate for each combination of:
  - Race;
  - Ethnicity; and
  - Sex

  within each job category.

Penalties

- Civil Penalty not to exceed $100 per employee for failure to file the required report
  - Not in excess of $200 per employee for subsequent failure to file the required report
- Penalties deposited in the Civil Rights Enforcement and Litigation Fund



Pay Scale Requirements - Section 432.3

- Threshold: 15 or more employees
- Must include the pay scale for a position in any job posting
- Third parties announcing, posting, and publishing job posting must include pay scale in job posting
- Must maintain records of job title and wage rate history for each employee to be open to inspection by the Labor Commissioner
  - Rebuttable presumption in favor of an employee's claim if employer fails to keep records

Recent Guidance

- Pay Scale:
  - Salary or hourly wage range employer expects to pay for position
    - Includes piece rate or commission range if the position's hourly or salary are based on either
    - Excludes bonuses, commissions, tips, or other benefits
  - Pay scale must be included in nationwide job postings if the position may ever be filled in California, either in-person or remotely
  - No links, no QR codes allowed! Must include pay scale in actual job posting.

- 15-Employee Threshold:
  - Employer reaches 15 employees at any point in a pay period
  - At least one employee is currently located in California
  - If employer has more than one facility, all employees are counted, as well as out-of-state employees for this calculation.

Remedies

- Complaints filed with the Labor Commissioner's Office within one year after the date the person learned of the violation
- Civil action for injunctive relief and any other relief court deems appropriate
- Civil Penalties can range from $100- $10,000 per violation
- Employees Protected Against Retaliation:
  - Must file claim with Labor Commissioner or civil action in court within one year of retaliation (No need to file claim with Labor Commissioner first)
  - Awards: reinstatement, back pay, interest on back pay, and other remedies

Questions:

- Must a pay scale be updated each time an employee leaves their position? i.e. employee that leaves is paid the lowest/max amount on the scale
- Cost of Living Adjustments (COLA) and pay transparency
- Reporting Annual Pay Data Report for Labor Contractors– workers to perform labor within the client employer's usual course of business

AB 2188: Weed & The Workplace

AB 2188: Overview

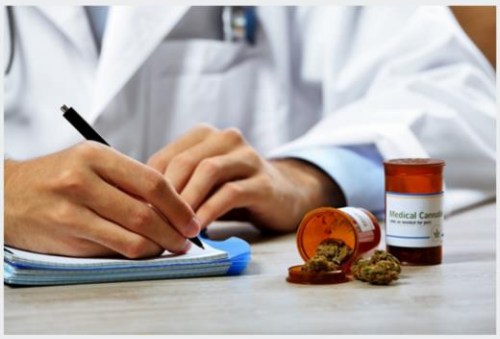
- Creates anti-discrimination protections for individuals that use cannabis while off duty and away from the workplace.
- Adds Section 12954 to the California Government Code and serves as an amendment to the California Fair Employment and Housing Act ("FEHA").
- Effective January 1, 2024.

The Slow Burn – How Did We Get Here?

Bill Clinton, 42nd U.S. President
Presidential Candidates' Forum on WCBS-TV
March 29, 1992

The Slow Burn – 1996

- California voters pass Prop 215 (Compassionate Use Act)
- CA becomes first state to legalize cannabis for medicinal use
- Passed with 55.6% voter approval
- No employment protections



The Slow Burn – 2008

Ross v. RagingWire Telecommunications, Inc.

- **Facts**
  - Gary Ross suffered from back spasms and used medical cannabis for pain.
  - RagingWire offered Ross a job on the condition that he passed a pre-employment drug test, and he tested positive for THC.
  - Ross sues under the FEHA, claiming disability discrimination for discharge and failing to reasonably accommodate his medical use at home to treat his disability.
- **Cal Supreme Court held:**
  - "… we have no reason to conclude the voters intended to speak so broadly, and in a context so far removed from the criminal law, as to require employers to accommodate marijuana use."
  - "Nothing in the act's text or history indicates the voters intended to articulate any policy concerning marijuana in the employment context, let alone a fundamental public policy requiring employers to accommodate marijuana use by employees.

The Slow Burn – 2016

- California voters pass Prop 64 (Adult Use of Marijuana Act).
- Legalized *recreational* cannabis use starting in 2018.
- Passed with 57.13% voter approval.
- No employment protections:
  - Section 11362.45(f) of Health & Safety Code states:
  - The new law does NOT impact the rights and obligations of employers to maintain a drug-free workplace.
  - The new law does NOT require an employer to permit or accommodate the use, consumption, or possession of cannabis in the workplace.
  - The new law does NOT affect the ability of the employer to have policies prohibiting the use of cannabis by employees and prospective employees, or prevent employers from complying with state and federal law.

The Slow Burn – 2023

- Cannabis use remains illegal under federal law.
  - **38** states and D.C. have legalized medical use
  - **19** states and D.C. have legalized recreational use

- Only **7** states have employment protections addressing off-duty cannabis use
  - Nevada, New York, New Jersey, Connecticut, Montana, Rhode Island, and
  - Now California (effective 2024)

What Does AB 2188 Require?

- It is unlawful for an employer to discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalizing a person, if the discrimination is based upon any of the following:
  - (1) The person's use of cannabis ***off the job and away from the workplace***.
  - (2) An employer-required drug screening test that has found the person to have ***nonpsychoactive cannabis metabolites*** in their hair, blood, urine, or other bodily fluids.
- Does NOT prohibit an employer from discriminating based on scientifically valid pre-employment drug screening conducted through methods that do not screen for ***nonpsychoactive cannabis metabolites***.

"off the job and away from the workplace..."

- "Nothing in this section permits an employee to possess, to be impaired by, or to use, cannabis on the job, or affects the rights or obligations of an employer to maintain a drug- and alcohol-free workplace, as specified in ***Section 11362.45 of the Health and Safety Code***, or any other rights or obligations of an employer specified by federal law or regulation."
- Translation = Coming to work "high" is NOT protected.

Other Notable Aspects of AB 2188

- No distinction between recreational and medical use
- Applies to applicants and employees
- **Reminder -** Adverse action includes:
  - Deny hiring or termination
  - "or any term or condition of employment or otherwise penalizing a person"
    - e.g., reduce hours or salary, demotion, refusing to promote, job reassignment

Are All Employees Protected By AB 2188?

- No. Does **NOT** apply to:
  - Building and construction trades
  - Positions that require a federal government background investigation or security clearance
    - Law enforcement, Teachers, etc.
  - Employers receiving federal funding or federal licensing-related benefits, or entering into a federal contract
  - Employers required to test applicants/employees for controlled substances under state or federal law
    - Safety-sensitive industries, such as transportation industry (aviation, trucking, railroads, mass transit, pipelines, etc.)

Other Industries?

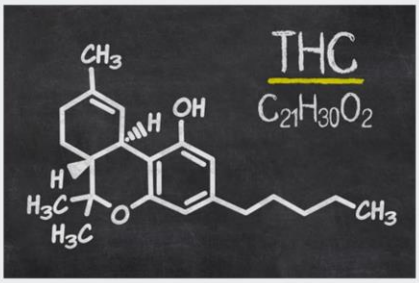
- Healthcare workers?
- Drivers not subject to Department of Transportation regulations?
- Security guards?
- Heavy equipment operators?

What are Nonpsychoactive Cannabis Metabolites?

- It is unlawful for an employer to discriminate based upon:
  - "An employer-required drug screening test that has found the person to have ***nonpsychoactive cannabis metabolites*** in their hair, blood, urine, or other bodily fluids."
- Does NOT prohibit an employer from discriminating based on scientifically valid pre-employment drug screening conducted through methods that do not screen for ***nonpsychoactive cannabis metabolites***

Nonpsychoactive Cannabis Metabolites

- THC is the chemical compound found in cannabis that causes psychoactive effects—it's what makes people feel "high."
- After THC is metabolized, it is stored in the body as a ***nonpsychoactive*** cannabis metabolite—a metabolite that does not indicate impairment, only that an individual has recently consumed cannabis.
- The presence of nonpsychoactive cannabis metabolites can vary depending on the route of consumption (eating vs. inhaling), and among occasional or chronic users.



Is Pre-Employment Drug Testing Still Legal?

- Yes - Employers may still require pre-employment drug testing as a condition of employment
- Except the testing method used cannot screen for ***nonpsychoactive cannabis metabolites***
- Translation = Say goodbye to urine drug tests

New Ways To Test Impairment

According to the California Legislature:

- *"As science has improved, employers now have access to multiple types of tests that do not rely on the presence of nonpsychoactive cannabis metabolites."*

Cannabis Breathalyzers

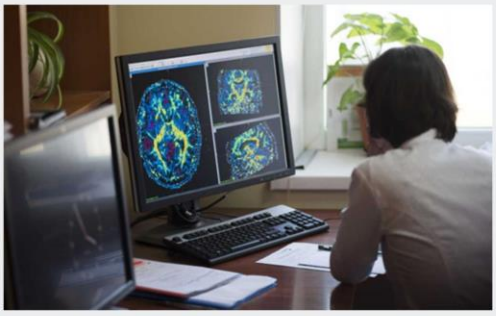
- Hound Labs
- Cannabix Technologies
- Lifeloc Technologies

Impairment App

- Druid developed a mobile application that measures response times and motor skills
- Will also pick up forms of impairment that arise from issues other than cannabis use

Brain Imaging Procedure

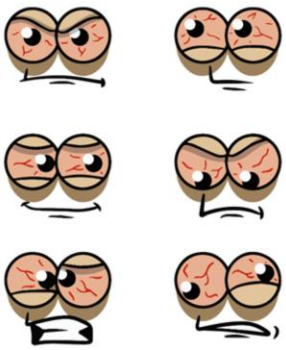
- Researchers at Massachusetts General Hospital (MGH) claim to have found a noninvasive brain imaging procedure that identifies individuals whose performance has been impaired by THC.
- The technique uses imaging technology known as functional near-infrared spectroscopy (fNIRS) to measure brain activation patterns that correlate to impairment from THC intoxication.



In The Meantime, How Do We Prove Current Impairment?

Documentation and Witness Statements

- It is more important than ever to clearly document evidence of impairment, such as:
  - Slurred speech,
  - Odor/smell,
  - Changes in motor function,
  - Bloodshot eyes,
  - Delayed reaction time,
  - Poor coordination.
- As well as evidence of possession of cannabis in the workplace



How to Prepare for January 1, 2024?

- Revise practices/procedures regarding drug testing
  - Test cannot screen for nonpsychoactive cannabis metabolites
  - Pre-employment testing, reasonable suspicion testing
- Update and implement new training
  - Interviewers, supervisors, internal recruiters (3rd party recruiters)
  - New investigation practices (incident reports and witness statements)

How to Prepare for January 1, 2024?

- Revise employment applications
  - Including employment questionnaires and background check forms
- Revise employee handbooks and drug and alcohol policies
  - Define "off the job and away from the workplace"
  - Clearly explain that impairment on the job could lead to immediate termination
    - Even if use was off duty but remain impaired on duty

Types of Policies

- **Zero-Tolerance Policy**
  - Outright prohibition on cannabis use
  - Not available to all employers
- **"Don't Ask, Don't Tell"**
  - No pre-employment drug testing
  - May involve drug testing based on reasonable suspicion
- **The Alcohol Model**
  - Treats it like alcohol
  - Beware of company-sponsored social events

Questions?

Josue Aparicio
Associate | San Francisco, CA
415.995.5094
japaricio@hansonbridgett.com

Maribel Lopez
Associate | San Francisco, CA
415.995.6332
mlopez@hansonbridgett.com

Michael Turner
Counsel | San Francisco, CA
415.995.5808
mturner@hansonbridgett.com

Assembly Bill No. 2188

CHAPTER 392

An act to add Section 12954 to the Government Code, relating to employment.

[Approved by Governor September 18, 2022. Filed with Secretary of State September 18, 2022.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2188, Quirk. Discrimination in employment: use of cannabis.

Existing law, the California Fair Employment and Housing Act, protects and safeguards the right and opportunity of all persons to seek, obtain, and hold employment without discrimination, abridgment, or harassment on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status. The act prohibits various forms of employment discrimination and empowers the Civil Rights Department to investigate and prosecute complaints alleging unlawful practices.

This bill, on and after January 1, 2024, would also make it unlawful for an employer to discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalize a person, if the discrimination is based upon the person's use of cannabis off the job and away from the workplace, except for preemployment drug screening, as specified, or upon an employer-required drug screening test that has found the person to have nonpsychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids. The bill would exempt certain applicants and employees from the bill's provisions, including employees in the building and construction trades and applicants and employees in positions requiring a federal background investigation or clearance, as specified. The bill would specify that the bill does not preempt state or federal laws requiring applicants or employees to be tested for controlled substances as a condition of employment, receiving federal funding or federal licensing-related benefits, or entering into a federal contract.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares both of the following:

(a) Tetrahydrocannabinol (THC) is the chemical compound in cannabis that can indicate impairment and cause psychoactive effects. After tetrahydrocannabinol is metabolized, it is stored in the body as a nonpsychoactive cannabis metabolite. These metabolites do not indicate

impairment, only that an individual has consumed cannabis in the last few weeks.

(b) The intent of drug tests is to identify employees who may be impaired. While there is consensus that an employee should not arrive at a worksite high or impaired, when most tests are conducted for cannabis, the results only show the presence of the nonpsychoactive cannabis metabolite and have no correlation to impairment on the job.

(c) As science has improved, employers now have access to multiple types of tests that do not rely on the presence of nonpsychoactive cannabis metabolites. These alternative tests include impairment tests, which measure an individual employee against their own baseline performance and tests that identify the presence of THC in an individual's bodily fluids.

SEC. 2. Section 12954 is added to the Government Code, to read:

12954. (a) It is unlawful for an employer to discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalizing a person, if the discrimination is based upon any of the following:

(1) The person's use of cannabis off the job and away from the workplace. This paragraph does not prohibit an employer from discriminating in hiring, or any term or condition of employment, or otherwise penalize a person based on scientifically valid preemployment drug screening conducted through methods that do not screen for nonpsychoactive cannabis metabolites.

(2) An employer-required drug screening test that has found the person to have nonpsychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids.

(b) Nothing in this section permits an employee to possess, to be impaired by, or to use, cannabis on the job, or affects the rights or obligations of an employer to maintain a drug- and alcohol-free workplace, as specified in Section 11362.45 of the Health and Safety Code, or any other rights or obligations of an employer specified by federal law or regulation.

(c) This section does not apply to an employee in the building and construction trades.

(d) This section does not apply to applicants or employees hired for positions that require a federal government background investigation or security clearance in accordance with regulations issued by the United States Department of Defense pursuant to Part 117 of Title 32 of the Code of Federal Regulations, or equivalent regulations applicable to other agencies.

(e) This section does not preempt state or federal laws requiring applicants or employees to be tested for controlled substances, including laws and regulations requiring applicants or employees to be tested, or the manner in which they are tested, as a condition of employment, receiving federal funding or federal licensing-related benefits, or entering into a federal contract.

(f) This section shall become operative on January 1, 2024.

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Weed And The Workplace: California's New Law Protecting Employee Cannabis Use

by Josue Aparicio & Gymmel M. Trembly

Governor Newsom has signed AB 2188[1] into law that will create anti-discrimination protections for individuals that use cannabis while off duty and away from the workplace, with exceptions for certain industries, such as building, construction and those subject to federal drug testing regulations.

Importantly, AB 2188 will not permit employees to possess, to be impaired by, or to use, cannabis on the job, nor will it affect the rights or obligations of an employer to maintain a drug-and alcohol-free workplace. Rather, the new law will prevent employers from punishing employees or refusing to hire applicants based on *off-duty* cannabis use, or for failing a drug test that found the person to have nonpsychoactive cannabis metabolites in their system.

While AB 2188 does not go into effect until January 1, 2024, California employers will want to use the next 15 months to ensure their drug testing processes and drug-and-alcohol policies comply with the new provisions of AB 2188. Here are some things California employers should know and consider as they prepare for this new law.

Will AB 2188 Apply To All California Employees?

No. AB 2188 will not apply to employees in the building and construction trades, and will not apply to applicants or employees hired for positions that require a federal government background investigation or security clearance.

In addition, the new law will not preempt state or federal laws requiring applicants or employees to be tested for controlled substances, including laws governing federal contractors or employers receiving federal funding or federal licensing-related benefits. Nor will AB 2188 affect the rights or obligations of an employer to maintain a drug-and-alcohol-free workplace, as specified in Section 11362.45 of the Health and Safety Code, or any other federal law or regulation.

Although not expressly stated, the statute's reference to federal regulations appears to be aimed at those industries subject to certain federal drug testing requirements, such as aviation, railroads, trucking, or maritime, all of which are subject to federal

regulations administered by the U.S. Department of Transportation.

What Are Nonpsychoactive Cannabis Metabolites?

The provisions of AB 2188 focus on *how* an employer determines an employee is impaired by tetrahydrocannabinol ("THC") while on the job.

THC is the chemical compound found in cannabis that can indicate impairment and cause psychoactive effects—it is what makes people feel "high." After THC is metabolized, it is stored in the body as a *nonpsychoactive cannabis metabolite*—a metabolite that does not indicate impairment, only that an individual has recently consumed cannabis.

The presence of nonpsychoactive cannabis metabolites can vary depending on the route of consumption, oral consumption or inhalation, and among occasional or chronic users. So, as noted by the California Legislature, "the presence of the nonpsychoactive cannabis metabolite [has] no correlation to impairment on the job."

Covered employers must understand the substances for which they are testing. Starting in 2024, any adverse employment actions taken against employees or applicants based on drug tests screening for nonpsychoactive cannabis metabolites could lead to claims of discrimination and/or wrongful termination.

How Does AB 2188 Change California Law?

AB 2188 will add Section 12954 to the California Government Code and serves as an amendment to the state's anti-discrimination laws, known as the California Fair Employment and Housing Act ("FEHA"). The FEHA prohibits various forms of employment discrimination based upon a number of protected categories, including, a person's race, religious creed, color, national origin, ancestry, physical or mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or veteran or military status.[2]

Beginning on January 1, 2024, AB 2188 will add to that list by making it unlawful for an employer to discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalize a person, if the discrimination is based upon either:

1. The person's use of cannabis off the job and away from the workplace; or
2. An employer-required drug screening test that has found the person to have nonpsychoactive cannabis metabolites in their urine, hair, blood, or other bodily fluids.

Notably, AB 2188 does not make a distinction between medical cannabis use and recreational cannabis use, both of which are legal in California.

California voters passed Proposition 215 in 1996 and became the first state to legalize the medicinal use of cannabis. Two decades later, voters passed Proposition 64—a voter initiative that legalized recreational use of cannabis in the state. However, the state did not establish workplace protections for off-duty cannabis use, even for medicinal purposes. In fact, in 2008, the California Supreme Court held that California employers were not required to accommodate an employee's off-duty use of medical cannabis and could take cannabis use into consideration when making employment decisions; finding that Prop 215 was not intended "to address the respective rights and duties of employers and employees."[3]

Although AB 2188 does not take effect until 2024, California employers should be aware that it has the potential to change various aspects of employment law, including with respect to an employer's obligations to accommodate off-duty cannabis use for medicinal purposes or to otherwise treat a mental or physical disability.

How Does AB 2188 Change Pre-Employment Drug Testing?

Employers may still require pre-employment drug testing as a condition of employment, except the testing method used cannot screen for nonpsychoactive cannabis metabolites.

According to the California Legislature, due to advancements in science, "employers now have access to multiple types of tests that do not rely on the presence of nonpsychoactive cannabis metabolites," including "impairment tests, which measure an individual employee against their own baseline performance and tests that identify the presence of THC in an individual's bodily fluids."

Urine tests are currently the most commonly used drug test by employers, which screen for nonpsychoactive cannabis metabolites and can detect cannabis in the body days or weeks after its consumed. This, however, is far from detecting whether an individual is impaired on the job or at the time of the drug test.

Employers that utilize pre-employment drug testing have until January 1, 2024, to transition to a drug test that complies with the provisions of AB 2188.

How Should California Employers Prepare For AB 2188?

AB 2188 is scheduled to take effect on January 1, 2024. In the meantime, employers should review and consider revising their drug and alcohol policies to ensure compliance with the provisions of AB 2188. This includes specifically forbidding on-duty cannabis use and impairment, as well as defining what it means to be "off the job and away from the workplace," which may have changed in the minds of many employees due to the rise of remote and hybrid work arrangements.

Furthermore, employers that utilize drug testing need to review their current testing practices to determine if their method of drug testing screens for nonpsychoactive cannabis metabolites, and if so, transition to a drug test that does not.

[1] Assembly Bill ("AB") 2188 was authored by California Assembly Member Bill Quirk (D-Fremont), and signed by Governor Newsom on September 18, 2022.

[2] Gov. Code, § 12940

[3] *Ross v. RagingWire Telecommunications, Inc*. (2008) 42 Cal.4th 920.

For more information, please contact:

Josue Aparicio, Associate
415-995-5094
JAparicio@hansonbridgett.com

Gymmel M. Trembly, Associate
(415) 995-5809
GTrembly@hansonbridgett.com

HansonBridgett

Trends in Wage / Hour Litigation (and More)

ALEXA GALLOWAY / DIANE MARIE O'MALLEY / GYMMEL TREMBLY

JANUARY 2023

Agenda

- Status of Arbitrating Class and PAGA Claims
- Meal and Rest Period Litigation
- Rounding – Is it Still Legal?
- Compensable Time – "Off-The-Clock" Work
- Remote Work Litigation
- National Labor Relations Board GC Guidance Memorandum
- Questions

Status of Arbitrating Class and PAGA Claims

The Status of Class Action and PAGA Waivers In Arbitration Agreements

- On June 15, 2022 , the U.S. Supreme Court ruled that individual claims under the California Private Attorneys General Act (PAGA) can be compelled to arbitration if the employee signed a valid arbitration agreement providing that the claims be litigated in an arbitral forum - *Viking River Cruises v. Moriana*, 596 U.S. __ (June 15, 2022).
- The issue in *Viking River* was whether the Federal Arbitration Act (FAA) "preempts a rule of California law that invalidates contractual waivers of the right to assert representative claims under PAGA." 142 S.Ct. at 1913.

The Status of Class Action and PAGA Waivers In Arbitration Agreements

- The employee in *Viking River* executed an agreement to arbitrate any dispute arising out of her employment. The agreement contained a 'Class Action Waiver' providing that, in any arbitral proceeding, the parties could not bring any dispute as a class, collective, or representative PAGA action.
- MOST IMPORTANT FOR THIS CASE - The agreement also contained a severability clause specifying that if the waiver was found invalid, any class, collective, representative, or PAGA action would presumptively be litigated in court.
- Viking River moved to compel arbitration.

The Status of Class Action and PAGA Waivers In Arbitration Agreements

- The trial court denied the employer's motion based on the rule from the California Supreme Court case *Iskanian v. CLS Trans. L.A., LLC*, 59 Cal.4th 348 (2014) holding that "categorical waivers of PAGA standing are contrary to state policy and that PAGA claims cannot be split into arbitrable individual claims and nonarbitrable 'representative' claims."

The Status of Class Action and PAGA Waivers In Arbitration Agreements

- The Supreme Court reversed, holding "*the FAA preempts the rule of Iskanian insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate*." The Court stated that under the agreement at issue, Viking River and the employee "purported to waive 'representative' PAGA claims." The Court noted that "[u]nder Iskanian, this provision was invalid if construed as a wholesale waiver of PAGA claims" as "that aspect of Iskanian is not preempted by the FAA". However, the Court found "the severability clause in the agreement provides that if the waiver provision is invalid in some respect, any 'portion' of the waiver that remains valid must still be 'enforced in arbitration.'"
- The Court concluded that, based on the severability clause, "Viking [River] was entitled to enforce the agreement insofar as it mandated arbitration of [the employee's] individual PAGA claim."

The Status of Class Action and PAGA Waivers In Arbitration Agreements

- The Court then dismissed the employee's nonindividual PAGA claims for lack of statutory standing, stating, "When an employee's own dispute is pared away from a PAGA action, the employee is no different from a member of the general public, and PAGA does not allow such persons to maintain suit."

- "Moriana lacks statutory standing to continue to maintain her non-individual claims in court, and the correct course is to dismiss her remaining claims."

The Status of Class Action and PAGA Waivers In Arbitration Agreements

So what does this mean? Let's see what a California court with this question after *Viking River*?

- In *Johnson v. Lowe's Home Centers* (Case No. 2:21-cv-00087) (September 21, 2022), a federal district court granted an employer's motion to compel arbitration of claims as to the plaintiff's individual PAGA claims and to dismiss the representative PAGA claims as to the other allegedly aggrieved employees.

- The court concluded that an arbitration clause only restricted an employee's right to pursue PAGA lawsuits in her individual capacity and thus agreed to enforce the arbitration agreement. Also agreeing with the U.S. Supreme Court in the face of a lack of CA Supreme Court guidance, the court found: "non-individual PAGA claims should be dismissed once the individual PAGA claim is compelled to arbitration."

The Status of Class Action and PAGA Waivers In Arbitration Agreements

So, your arbitration agreement is enforceable – don't lose the right to use it –

- *Gallo v. Wood Ranch USA, Inc.,* (2022) 81 Cal.App 5th 621 upheld SB 762 – which became effective on January 1, 2022, and provided that "if the fees or costs to initiate an arbitration proceeding are not paid within 30 days after the due date the drafting party is in material breach of the arbitration agreement, is in default of the arbitration, and waives its right to compel arbitration."
- Wood Ranch's late payment of its share of the initiation fees constituted a material breach of the arbitration agreement. The court declared plaintiff's election to withdraw from arbitration and pursue her case in court.

The Status of Class Action and PAGA Waivers In Arbitration Agreements

Don't forget your agreements still need to be otherwise compliant – in other words - must not be procedurally or substantially unconscionable.

- *Mendoza v. Trans Valley Transport* (2022) 75 Cal. App.5th 748. Under the specific facts of the case, including the fact that the arbitration agreement was in an Employee Handbook with no separate acknowledgement, the court found that the parties had not entered into an express agreement to arbitrate.
- It is important to demonstrate the employee knowingly entered into an agreement with the employer to arbitrate his/her claims.

Still Up In The "Arbitration Air" - AB 51

- AB 51 precludes employers from enforcing arbitration agreements for FEHA and Labor Code claims as a condition of employment.
- *Chamber of Commerce of the United States of America et al. v. Becerra et al.*(Case Number 2:19-at-01142)(U.S. District Court for the Eastern District of California) The California Chamber of Commerce and other business associations filed a lawsuit on December 6, 2019 attacking AB 51. The Chamber argued the FAA preempted AB 51. The District Court agreed, issued a temporary restraining order followed by a ruling halting enforcement of AB 51 and invalidating the law.
- On September 15, 2021, the Ninth Circuit reinstated AB 51 vacated the injunction. On August 22, 2022, a majority of the entire Ninth Circuit panel voted to rehear the case. While the litigation is pending, AB 51 is stayed again.

On The Horizon For PAGA

- *Estrada v. Royalty Carpet Mills, Inc.*, 76 Cal.App.5th 685 (Cal. Ct. App. 2022) – pending at the California Supreme Court - issue - whether trial courts have inherent authority to ensure that PAGA cases can be tried in a manageable way and strike or dismiss PAGA claims if they are not manageable. The court found it did not have that authority.

On The Horizon For PAGA

- *Estrada v. Royalty Carpet Mills, Inc.*: "Currently, only one published California opinion, Wesson v. Staples the Of ice Superstore, LLC (2021) 68 Cal.App.5th 746, 283 Cal.Rptr.3d 846 (Wesson), addresses this issue. It concluded courts have inherent authority to strike unmanageable PAGA claims. . . While we understand the concerns expressed in Wesson, we reach the opposite conclusion. Based on our reading of pertinent Supreme Court authority . . . we find a court cannot strike a PAGA claim based on manageability."

On The Horizon For PAGA

Background: *Peck v. Swift Transportation (Ninth Circuit – February 2022)*: held a PAGA action plaintiff does not have the right to intervene, object to, or move to vacate a judgment in a related PAGA action that has been settled. "The fact that Peck may ultimately receive a portion of the PAGA settlement did not make him a party to the lawsuit. Moreover, a PAGA action has "no individual component." Finally, although Peck has a separately filed PAGA action, that does not make him a party to this PAGA case."

- *Turrieta v. Lyft, Inc.*, 69 Cal.App.5th 955 (Cal. Ct. App. 2021) - pending at the California Supreme Court - issue - will the California Supreme Court agree with the Ninth Circuit *Swift Transportation* decision?
- How does the *Viking River* case impact this issue?

Reforming PAGA – The California Fair Pay and Employer Accountability Act

- In July 2022, the Secretary of State announced that the California Fair Pay and Employer Accountability Act ("Act") qualified for the 2024 ballot with 962,217 signatures submitted in support of PAGA reform.
- The Act seeks to repeal PAGA and eliminate the current private right of action. The Act proposes that the state provide more funding to the Labor Commissioner to enforce Labor Code violations. (The original purpose of the PAGA was to turn over enforcement to private individuals allegedly because the Labor Commissioner did not have sufficient staff or funding.)

Reforming PAGA - California Fair Pay and Employer Accountability Act

- According to the California Chamber of Commerce, the Act:
  - Replaces PAGA with alternative enforcement mechanisms through the state;
  - Ensures 100% of penalties go to workers;
  - Speeds up recovery of wages and penalties for workers; and
  - Doubles penalties where employers willfully violate the law.

The ballot measure is a year away – plenty of time for employers to campaign for this reform.

- https://advocacy.calchamber.com/2022/07/25/california-fair-pay-and-employer-accountability-act-qualifies-for-2024-ballot/

Meal and Rest Period Litigation

Meal and Rest Period Litigation
No Sign of Slowing in 2023

- Recent developments further incentivize meal/rest period claims
- No Rounding Meal Periods
- Labor Code 226.7 "Premium" Pay for Missed Meal/Rest Periods constitute "wages"
  - Wage statement penalties
  - Waiting time penalties
  - Attorneys' fees

Naranjo v. Spectrum Security Services

- May 2022, California Supreme Court decision
- Facts:
  - Spectrum employed security guards for federal prisoners / detainees
  - Security guards were required to remain on duty during meal breaks
  - (No on-duty meal period agreements)
  - Plaintiff was terminated for leaving his post to take a meal break
  - Class Action for violation of state meal break requirements

Naranjo – Meal Period Statutory Requirements

- Under Labor Code Section 512, employees must be provided with thirty-minute meal period before the end of the fifth hour
- Labor Code Section 226.7 provides that the employer shall pay one additional hour of pay at the employee's regular rate of compensation for each workday that the meal period is not provided.

Naranjo – Primary Questions

- Whether this extra "premium" pay for missed breaks constitutes "wages" that must be reported on statutorily required wage statements during employment (Labor Code § 226) and paid within statutory deadlines when an employee leaves the job (Labor Code § 203)?
  - AKA: Wage Statement Penalties - $50/$100 per pay period up to $4,000
  - AKA: Waiting Time Penalties – Daily Wage Rate up to 30 days

Are these "penalties" a remedy or wages?

- Supreme Court Answer: Premium Pay is both a remedy and also wages
- "[A]n employee becomes entitled to premium pay for missed or noncompliant meal and rest breaks precisely because she was
  - required to work when she should have been relieved of duty
  - required to work too long into a shift without a meal break
  - required in whole or part to work through a break; or
  - required to remain on duty without an appropriate agreement in place authorizing on-duty meal breaks"

Naranjo: Now What?

- Since premium pay constitutes wages:
  - they must be reported on wage statements, or be subject to Labor Code 226 penalties
  - Unpaid premium wages are subject to waiting time penalties, up to 30 days of daily wage rate

What about attorneys' fees?

- Labor Code § 218.5 mandates an award of reasonable attorney fees to the prevailing party in any action brought for the nonpayment of wages.
- Previously, courts held that an action brought for failure to provide rest breaks or meal periods was not "an 'action brought for the nonpayment of wages' within the meaning of section 218.5." *See Kirby v. Immoos Fire Protection, Inc.*, 53 Cal.4th 1244 (2012).
- *After Naranjo*, courts are now able to award attorneys' fees for failure to make "premium payments."

Betancourt v. OS Restaurant Services, LLC
Court of Appeals, Second District

- Published September 12, 2022
- For $15,375, Plaintiff settled her claim for meal and rest break violations, and waiting time and wage statement penalties, subject to a motion for attorney fees incurred on her wage and hour claims.
- After *Naranjo* held that premium pay for missed meal and rest breaks were wages, Second District affirmed an $280,000 attorneys' fee award.

Employer Takeaway

- Even a single missed / late / short meal or rest period has potential to trigger:
  - Inaccurate Wage Statement Penalties up to $4000
  - Waiting Time Penalties up to 30 days
  - Attorneys' fees

Rounding – Is it Still Legal?

Rounding – What is the latest?

- *Camp v. Home Depot U.S.A., Inc.,* Case No. H049033, 2022 WL 13874360 (Cal. Ct. App. October 24, 2022). The Court reversed summary judgment for an employer that had a facially neutral quarter hour rounding policy because the employer "could and did track the exact time in minutes that an employee worked each shift and [where] those records showed that [the employee] … was not paid for all the time he worked." The Court noted that the application of current CA law that holds rounding is legal should be reexamined in circumstances where employee's work can be captured and has been captured to the minute and, as a result of a rounding system, the employee is not compensated for all time actually worked.

Rounding – What is the latest?

- In the news -
- "Our policy has been to round total shift time up or down to the nearest 15 minutes, which has been a common industry practice for many years," Beth Marlowe, a Home Depot spokesperson, told HR Dive via email.
- "As laws, technology and workplace practices continue to evolve, **we're changing our practice nationwide effective Jan. 16, 2023, to pay hourly associates to the nearest minute based on exact time punches**."
  - https://www.hrdive.com/news/home-depot-will-pay-employees-to-minute/640411/#:~:text=%E2%80%9CAs%20laws%2C%20technology%20and%20workplace,hour%20lawsuits%20over%20the%20years

Compensable Time – "Off-The-Clock" Work

Compensable Time – "Off-The-Clock Work"

- In *Cadena v. Customer Connexx LLC,* Case No. 2:18-cv-00233-APG-DJA, (October 24, 2022), the Ninth Circuit held that booting up computers, "waiting" to clock in, was compensable work time under the Fair Labor Standards Act.

Compensable Time – "Off-The-Clock Work"

- *Johnson v. WinCo Foods, LLC*, 2022 WL 2112792 (9th Cir. 2022) - Plaintiff brought a class action seeking compensation as an "employee" for the time and expense of taking a drug test while an applicant for employment. Plaintiffs argued that because the drug tests were administered under the control of the employer, they qualified as "employees" under California law. The Ninth Circuit agreed that plaintiffs were not yet employees when they took the drug test and the "control test" in California applies to control over the manner of performance of the work itself, not the manner of establishing qualifications to do the work.

Compensable Time – "Off-The-Clock Work"

- The Court also rejected plaintiff's contract theory on the ground that they were well aware that they not hired until they established they were qualified for the job by passing the drug test.

- "In this case we have no written contract, but we have a verbal offer of employment. *WinCo went to great lengths when the verbal offer was made to communicate that its job offer was conditional.*"

Remote Work Litigation

Ongoing Remote Work

- U.S. Census Bureau's "2022 Household Pulse Survey" found that nearly 20% of California adults telecommute full-time.
- 33% of California adults lived in households in which someone had worked from home at least one day the previous week.
- In 2019, about 6.3% of employed Californians and 5.7% of employed Americans said they "usually worked from home."

COVID / Remote Work Lawsuits

- Remote employees suing employers in venues *where they live*, not where the employer is located. *See Malloy v. Superior Court,* 2022 WL 4298371 (Cal. Ct. App. 2022) (L.A. Plaintiff suing Orange County-based employer in Los Angeles).
- Employers with "in-person" requirements facing lawsuits from employees and applicants alleging disabilities; "undue hardship" defense challenged by prior remote work arrangements.
- Non-exempt remote employees seeking compensation for "extra" time worked at home.

"COVID" Remote Work Expenses

- Background
- California Labor Code section 2802 requires reimbursement for "all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties."
- Common claims:
  - Vehicle use, mileage, gas
  - Personal cell phone usage
  - Personal equipment usage
  - Clothing, uniforms

2022 "Remote Work" Class Actions

- *Torres v. Fox Broadcasting Company, LLC*, Los Angeles Superior Court, Case No. 22STCV06823), filed February 24, 2022
  - Senior Financial Analyst alleges failure to reimburse home expenses from March 15, 2020 to the present
  - Seeking reimbursement for: home internet service, cell phones, also electricity
  - 1,000 employee class
  - Remote work expenses from $50 to $100 per month per worker: $2.9 million sought

2022 "Remote Work" Class Actions cont.

- *Williams v. Amazon.com Services LLC, et al.,* Northern District of California, Case 22-cv-01892-VC.
- Motion to Dismiss denied (in part) on June 1, 2022
- Senior Software Development Engineer
- Judge Chhabria stated:
  - "Discharging those duties plausibly requires the use of physical space, internet, and electricity."
  - "Amazon had reason to know that Williams incurred these business expenses, even though he did not explicitly request reimbursement."

National Labor Relations Board GC Guidance Memorandum

NLRB Issues Memo re Electronic Surveillance
October 31, 2022

- NLRB seeking to maintain relevance in remote work environments.
- The recently-confirmed NLRB General Counsel issued a guidance memo indicating an intent to "protect employees" from "intrusive or abusive electronic monitoring and automated management practices."
- General Counsel expresses concern that new employer technologies create "the potential for omnipresent surveillance and other algorithmic-management tools to interfere with the exercise of Section 7 rights by significantly impairing or negating employees' ability to engage in protected activity."

NLRB Memo, cont.

- "Electronic monitoring"
  - Recording conversations
  - Tracking movements through wearable devices, security cameras, ID badges, employer-issued phones, apps installed on workers' devices
  - Keyloggers and software that takes screenshots, webcam photos, or audio recordings
- "Automated Management"
  - Use of artificial intelligence to manage employee productivity
  - Conducting personality tests to screen applicants
  - Scrutinizing applicants' social media accounts

NLRB GC's Proposal

- It is unlawful to
  - Engage in surveillance (or appearance thereof) of protected union activity, or new monitoring in response to Section 7 activity
  - Discipline employees who protest workplace surveillance or productivity quotas
- Proposal: "I will urge the Board to find that an employer has presumptively violated Section 8(a)(1) where the employer's surveillance and management practices, viewed as a whole, would tend to interfere with or prevent a reasonable employee from engaging in activity protected by the Act."

NLRB GC Memo Takeaway

- Private employers under Board jurisdiction should carefully consider legitimate business reasons for new and current electronic management tools
- As with employer handbooks and other "facially neutral" policies, employers may have the burden to justify use of technology in workplace
- Balance needs of the remote workplace with risk of NLRB
- Unions and the NLRB may be seeking to bring complaints pursuant to this Memo.

A Helpful Checklist – What To Audit

- In wage and hour cases, we always check meal and rest break policies – but remember there are many rules that could come up once you turn over to plaintiff's counsel those time and payroll records – here are a few:
  - Do you have split shifts and, if so, are you paying correctly?
  - Do any employees work seven days in a row in a workweek and, if so, is there evidence of voluntariness for working that seventh day?
  - Are you paying the regular rate of pay for overtime, meal and rest premiums and sick pay? Are you including all non-discretionary income?

A Helpful Checklist – What To Audit

- Do your wage statements *accurately* portray all applicable Labor Code Section 226(a)(7) items?
- If NOC shift employees are taking on-duty meal periods, what are they told and doing for rest breaks? Are any other employees taking on-duty meal periods and, if so, are they doing so correctly?
- Do you round employee time? Is it neutral and do you audit it?
- Do your employees engage in any activities *that plaintiffs claim is* off-the-clock work? Such as, waiting in line for temperature checks; using their cell phones to respond to work related messages after hours, checking their schedules or other activities. Do any employees spend time waiting to boot up computers before clocking in?

QUESTIONS?

Alexa Galloway
Associate | Los Angeles, CA
213.839.7714
agalloway@hansonbridgett.com

Diane Marie O'Malley
Partner | San Francisco, CA
415.995.5045
domalley@hansonbridgett.com

Gymmel Trembly
Associate | San Francisco, CA
415.995.5809
gtrembly@hansonbridgett.com