RESOLUTION 06-01-2022

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Labor Code section 552, to read as follows:

§ 552

(a) No employer of labor shall cause his employees to work more than six days in seven.

(b) No violation of subdivision (a) of this section occurs when:

(1) The employee is exempt from the payment of minimum wage and overtime under any of the following:

(A) The exemption for persons employed in an executive, administrative, or professional capacity provided in any applicable order of the Industrial Welfare Commission.

(B) The exemption for outside salespersons provided in any applicable order of the Industrial Welfare Commission.

(C) The overtime exemption for computer software professionals paid on a salaried basis provided in Section 515.5; and

(2) The employee voluntarily elects to work on the seventh day in seven.

(3) An employer may establish a rebuttable presumption under this subdivision by notifying the employee who is exempt under subpart (b)(1) in writing of the employee's entitlement to one day's rest in seven.

(Proposed new language underlined; language to be deleted stricken)

PROPNENT: San Diego County Bar Association

STATEMENT OF REASONS

The Problem: Under current law, Labor Code sections 550, 551, and 552 operate to create a right of one day's rest in seven for all employees, and employers cannot compel or cause their employees to work more than six days in seven, except in specified circumstances. Any person who violates that right is subject to prosecution for a misdemeanor and employers may be subject to civil penalties. (Lab. Code, §§ 553, 558.)

The problem is that employers cannot always monitor when certain exempt employees, like executives, professionals, remote salespeople, and computer software professionals, choose to work, such as checking email, making phone calls, or accessing the workplace remotely. As a matter of law, exempt employees are not required to document their minutes of work for pay purposes (exempt employees receive a salary, rather than an hourly rate), and employers are not required to maintain records of time worked by exempt employees. Further, the key case examining the issue, *Mendoza v. Nordstrom* (2017) 2 Cal.5th 1074, requires a case-by-case analysis as to whether an employer "caused" an employee to work more than six days in seven, thus creating ongoing uncertainty for employers

The Solution: This resolution would provide employers with a greater degree of certainty against facing potential criminal and civil liability when specified exempt employees choose to work more than six days in seven, while preserving prohibitions against employers motivating or inducing employees to work every day. It seeks to codify the holding in *Mendoza v. Nordstrom* (2017) 2 Cal.5th 1074 as to specified exempt employees, and to provide employers with a means to create a rebuttable presumption that said exempt employees are voluntarily working more than six days in seven, thus providing employers with a greater degree of certainty against liability. However, by creating a rebuttable presumption, it also preserves the rights of the exempt employees to establish that, notwithstanding a written policy affirming the right of employees to one day of rest in seven, the employer caused the employee to work more than six days in seven

IMPACT STATEMENT
This resolution may require additional statutory changes.

CURRENT OR PRIOR RELATED LEGISLATION
No known prior or pending similar legislation.

AUTHOR AND/OR PERMANENT CONTACT
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RESPONSIBLE FLOOR DELEGATE
Lisa Hird Chung

RESOLUTION 06-02-2022

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Government Code section 12945.2, to read as follows:

§ 12945.2

(a) It shall be an unlawful employment practice for any employer, as defined in paragraph (3) of subdivision (b), to refuse to grant a request by any employee with more than six (6) ~~twelve~~ months of service with the employer, and who has at least 625 ~~1,250~~ hours of service with the employer during the previous six (6) ~~twelve~~-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) "Domestic partner" has the same meaning as defined in Section 297 of the Family Code.

(3) "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.

(4) "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, or domestic partner 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.

(5) "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.

(6) "FMLA" means the federal Family and Medical Leave Act of 1993 (P.L. 103-3).[1]

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

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

(9) "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.

(10) "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.

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

(12) "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.

(13) "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, or domestic partner 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,[2] 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, or domestic partner 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 six (6) ~~twelve~~ 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 six (6) ~~twelve~~-month period.

(C) The employee has worked or been paid for a minimum of 252 ~~504~~ hours during the preceding six (6) ~~twelve~~-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.

(Proposed new language underlined; language to be deleted stricken)

PROPNENT: Women Lawyers Association of Los Angeles

STATEMENT OF REASONS

The Problem: Existing law requires individuals to be employed for a minimum of twelve months before they are eligible for disability insurance benefits relating to pregnancy and bonding. By requiring a full twelve-month period of employment to be considered an “employee” for the

purposes of eligibility of SDI and FMLA benefits, §12945.2(c) causes harm to women for three central reasons: (1) This full-year employment requirement places an undue burden on women by sometimes forcing them to change their gestational health plans, potentially causing long term health damage, or stripping them of vital employment during unplanned pregnancies; (2) This limitation also, in effect, circumvents unlawful pregnancy discrimination by refusing to protect pregnant employees during their employment. Employers are enabled to violate federal law by finding legal reasons to refuse benefits for a pregnant worker, which has the effect of refusing viable employment. If the time frame were six months, it is possible employers would be able to see and know a worker is pregnant and could legally refuse to provide FMLA and SDI benefits in this short period of time, thus precluding the pregnant worker from work and financial viability. Shortening the length of time required for eligible "employee" status would eliminate this loophole. (3) Finally, this definition of "employee" also does not consider workers in the "gig economy," who have no formal employment contract, but are continuously employed on a contract basis. It ignores the reality of the ever-increasing "gig economy" that has become a staple in American society, by precluding this benefit from these workers entirely, as there is no "start" date for employment in a particular company when workers are contract based.

The Solution: This proposed change would shorten the timeframe that defines employment for coverage of FMLA and disability insurance benefits under the California Family Rights Act, so that benefits for pregnant women can take effect at six (6) months instead of twelve (12), allowing more women to be able to retain their jobs while also giving birth and bonding with their new children. It will ultimately serve to keep more women in the workforce in the long term.

IMPACT STATEMENT
This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION
Government Code § 12945.2 was amended by Senate Bill No. 1383, Chapter 86, also known as the California Family Rights Act, and signed into law, taking effect on January 1, 2021. See also Senate Bill 17 (2017-2018 Reg. Sess.).

AUTHOR AND/OR PERMANENT CONTACT
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RESPONSIBLE FLOOR DELEGATE
Elizabeth Silver

RESOLUTION 06-03-2022

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Unemployment Insurance Code section 3301, to read as follows:

§ 3301

(a)(1) The purpose of this chapter is to establish, within the state disability insurance program, a family temporary disability insurance program. Family temporary disability insurance shall provide: (i) up to ~~eight~~ twenty-four weeks of wage replacement benefits to workers who take time off work to care for a seriously ill child, spouse, parent, grandparent, grandchild, sibling, or domestic partner, to bond with a minor child within one year of the birth or placement of the child in connection with foster care or adoption, or to participate in a qualifying exigency related to the covered active duty or call to covered active duty of the individual's spouse, domestic partner, child, or parent in the Armed Forces of the United States; and (ii) up to four weeks of wage replacement benefits to workers who have had a miscarriage on or after twelve weeks of gestation.

(2) Nothing in this chapter shall be construed to abridge the rights and responsibilities conveyed under the CFRA or pregnancy disability leave.

(b) An individual's "weekly benefit amount" shall be the amount provided in Section 2655. An individual is eligible to receive family temporary disability insurance benefits equal to one-seventh of the individual's weekly benefit amount for each full day during which the individual is unable to work due to caring for a seriously ill or injured family member, bonding with a minor child within one year of the birth or placement of the child in connection with foster care or adoption, or participating in a qualifying exigency related to the covered active duty or call to covered active duty of the individual's spouse, domestic partner, child, or parent in the Armed Forces of the United States.

(c) The maximum amount payable to an individual during any disability benefit period for family temporary disability insurance shall be eight times the individual's "weekly benefit amount," but in no case shall the total amount of benefits payable be more than the total wages paid to the individual during the individual's disability base period. If the benefit is not a multiple of one dollar ($1), it shall be computed to the next higher multiple of one dollar ($1).

(d) No more than ~~eight~~ twenty-four weeks of family temporary disability insurance benefits shall be paid within any 12-month period if such benefits are provided pursuant to subsection (a)(1)(i) of this section. No more than twelve weeks of family temporary disability insurance benefits shall be paid within any 12-month period if such benefits are provided pursuant to subsection (a)(1)(ii) of this section. Receipt of benefits under subsection (a)(1)(i) shall in no way limit the benefits to which a worker is entitled under subsection (a)(1)(ii); likewise, receipt of benefits under subsection (a)(1)(ii) shall in no way limit the benefits to which a worker is entitled under subsection (a)(1)(i).

(e) An individual shall file a claim for family temporary disability insurance benefits not later than the 41st consecutive day following the first compensable day with respect to which the claim is made for benefits, which time shall be extended by the department upon a showing of good cause. If a first claim is not complete, the claim form shall be returned to the claimant for completion and it shall be completed and returned not later than the 10th consecutive day after

the date it was mailed by the department to the claimant, except that such time shall be extended by the department upon a showing of good cause.

(f) This section shall become operative on January 1, 2024~~1~~3.

(Proposed new language underlined; language to be deleted stricken)

PROPNENT: Women Lawyers Association of Los Angeles

STATEMENT OF REASONS

The Problem: The United States is one of the only industrialized countries in the world without a national paid family leave program. The data on the amount of leave other countries provide is highly individualized because of the differences in the way different countries set up their leave programs, but according to data collected by the Organization for Economic Cooperation and Development (https://www.oecd.org/els/soc/PF2_1_Parental_leave_systems.pdf), countries like Finland and Hungary offer 161 weeks and 160 weeks, respectively. Other countries like Germany, France and the United Kingdom offer 58 weeks, 42 weeks and 39 weeks, respectively. The United States offers nothing. In the absence of a national program, California implemented the nation's first paid family leave program. California's paid family leave program is entirely-worker funded and pays only a portion of some workers' wages (many California workers are not entitled to this benefit at all). Although California's paid family leave program is a significant step toward providing California workers with a respectable amount of paid family leave, one of the problems with the program is that existing law provides for only eight weeks of partial wage replacement benefits to workers who need to take time off to care for a new child or ill family member. (Unemp. Ins. Code, § 3301.) In many situations, especially that of adding a child to a family, eight weeks is woefully inadequate. Existing law also provides no paid time off for a worker who has had a miscarriage. If a worker needs time to heal physically or emotionally, that worker must use sick days and/or vacation time, if that worker has any such days available. California is considered the world's fifth largest economy. We should make sure that workers are provided with the support they need to care for a new child and/or ill family members.

The Solution: This proposal would increase the amount of time during which a worker could receive wage replacement benefits to care for a new child or ill family member and provide workers with paid time off to take care of themselves after a miscarriage.

IMPACT STATEMENT
This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION
SB 951 (2021-2022 Reg. Sess.); SB 1123 (2018 Reg. Sess.); SB 83 (2019 Reg. Sess.)

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RESOLUTION 06-04-2022

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Labor Code section 226, to read as follows:

§ 226

(a) Every employer shall, semimonthly or at the time of each payment of wages, furnish each of his or her employees, either as a detachable part of the check, draft, or voucher paying the employee s wages, or separately when wages are paid by personal check or cash, an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours worked by the employee, except for any employee whose compensation is solely based on a salary and who is exempt from payment of overtime under subdivision (a) of Section 515 or any applicable order of the Industrial Welfare Commission, (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, (4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item, (5) net wages earned, (6) the inclusive dates of the period for which the employee is paid, (7) the name of the employee and the last four digits of his or her social security number or an employee identification number other than a social security number, (8) the name and address of the legal entity that is the employer and, if the employer is a farm labor contractor, as defined in subdivision (b) of Section 1682, the name and address of the legal entity that secured the services of the employer, and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee. The deductions made from payment of wages shall be recorded in ink or other indelible form, properly dated, showing the month, day, and year, and a copy of the statement and the record of the deductions shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California.

(b) An employer that is required by this code or any regulation adopted pursuant to this code to keep the information required by subdivision (a) shall afford current and former employees the right to inspect or copy records pertaining to their employment, upon reasonable request to the employer. <u>The employer shall have no obligation to make available any records created more than 5 years prior to the employer's receipt of the request to inspect.</u> The employer may take reasonable steps to ensure the identity of a current or former employee. If the employer provides copies of the records, the actual cost of reproduction may be charged to the current or former employee.

(c) An employer who receives a written or oral request to inspect or copy records pursuant to subdivision (b) pertaining to a current or former employee shall comply with the request as soon as practicable, but no later than 21 calendar days from the date of the request. A violation of this subdivision is an infraction. Impossibility of performance, not caused by or a result of a violation of law, shall be an affirmative defense for an employer in any action alleging a violation of this subdivision. An employer may designate the person to whom a request under this subdivision will be made.

(d) This section does not apply to any employer of any person employed by the owner or occupant of a residential dwelling whose duties are incidental to the ownership, maintenance, or

use of the dwelling, including the care and supervision of children, or whose duties are personal and not in the course of the trade, business, profession, or occupation of the owner or occupant.

(e) An employee suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a) is entitled to recover the greater of all actual damages or fifty dollars ($50) for the initial pay period in which a violation occurs and one hundred dollars ($100) per employee for each violation in a subsequent pay period, not exceeding an aggregate penalty of four thousand dollars ($4,000), and is entitled to an award of costs and reasonable attorney s fees.

(f) A failure by an employer to permit a current or former employee to inspect or copy records within the time set forth in subdivision (c) entitles the current or former employee or the Labor Commissioner to recover a seven-hundred-fifty-dollar ($750) penalty from the employer.

(g) The listing by an employer of the name and address of the legal entity that secured the services of the employer in the itemized statement required by subdivision (a) shall not create any liability on the part of that legal entity.

(h) An employee may also bring an action for injunctive relief to ensure compliance with this section, and is entitled to an award of costs and reasonable attorney s fees.

(i) This section does not apply to the state, to any city, county, city and county, district, or to any other governmental entity, except that if the state or a city, county, city and county, district, or other governmental entity furnishes its employees with a check, draft, or voucher paying the employee s wages, the state or a city, county, city and county, district, or other governmental entity shall use no more than the last four digits of the employee s social security number or shall use an employee identification number other than the social security number on the itemized statement provided with the check, draft, or voucher.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Alameda County Bar Association

STATEMENT OF REASONS

The Problem: Under existing law, an employer is required to provide wage and hour records to current and former employees upon demand. The statute requires the employer to keep wage records for 3 years after an employee's final date of employment, but contains no limit on the duration of time for which records must be produced. Many employers maintain records for longer than 5 years. Sometimes older records are difficult to access, because the employer has changed its payroll software or its outsourced payroll provider. If the employer does not produce all records in its possession, without regard to their age, it is subject to a penalty of $750.00.

The Solution: This resolution would limit the scope of the employer's obligation to produce payroll records to those records created within 5 years before the request for records. Providing the last 5 years of records is sufficient for an employee or former employee to evaluate any potential claims or causes of action for unpaid wages, as all such claims are time-barred after 4 years.

IMPACT STATEMENT

This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION
None known

AUTHOR AND/OR PERMANENT CONTACT
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RESPONSIBLE FLOOR DELEGATE
Margaret J. Grover

RESOLUTION 06-05-2022

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Labor Code section 1198.5, to read as follows:

§ 1198.5

(a) Every current and former employee, or his or her representative, has the right to inspect and receive a copy of the personnel records that the employer maintains relating to the employee's performance or to any grievance concerning the employee.

(b)(1) The employer shall make the contents of those personnel records available for inspection to the current or former employee, or his or her representative, at reasonable intervals and at reasonable times, but not later than 30 calendar days from the date the employer receives a written request, unless the current or former employee, or his or her representative, and the employer agree in writing to a date beyond 30 calendar days to inspect the records, and the agreed-upon date does not exceed 35 calendar days from the employer's receipt of the written request. Upon a written request from a current or former employee, or his or her representative, the employer shall also provide a copy of the personnel records, at a charge not to exceed the actual cost of reproduction, not later than 30 calendar days from the date the employer receives the request, unless the current or former employee, or his or her representative, and the employer agree in writing to a date beyond 30 calendar days to produce a copy of the records, as long as the agreed-upon date does not exceed 35 calendar days from the employer's receipt of the written request. Except as provided in paragraph (2) of subdivision (c), the employer is not required to make those personnel records or a copy thereof available at a time when the employee is actually required to render service to the employer, if the requester is the employee.

(2)(A) For purposes of this section, a request to inspect or receive a copy of personnel records shall be made in either of the following ways:

(i) Written and submitted by the current or former employee or his or her representative.

(ii) Written and submitted by the current or former employee or his or her representative by completing an employer-provided form.

(B) An employer-provided form shall be made available to the employee or his or her representative upon verbal request to the employee's supervisor or, if known to the employee or his or her representative at the time of the request, to the individual the employer designates under this section to receive a verbal request for the form.

(c) The employer shall do all of the following:

(1) With regard to all employees, maintain a copy of each employee's personnel records for a period of not less than three years after termination of employment.

(2) With regard to current employees, make a current employee's personnel records available for inspection, and, if requested by the employee or his or her representative, provide a copy thereof, at the place where the employee reports to work, or at another location agreeable to the employer and the requester. If the employee is required to inspect or receive a copy at a location other than the place where he or she reports to work, no loss of compensation to the employee is permitted.

(3) (A) With regard to former employees, make a former employee's personnel records available for inspection, and, if requested by the employee or his or her representative, provide a

copy thereof, at the location where the employer stores the records, unless the parties mutually agree in writing to a different location. A former employee may receive a copy by mail if he or she reimburses the employer for actual postal expenses.

(B)(i) Notwithstanding subparagraph (A), if a former employee seeking to inspect his or her personnel records was terminated for a violation of law, or an employment-related policy, involving harassment or workplace violence, the employer may comply with the request by doing one of the following:

(I) Making the personnel records available to the former employee for inspection at a location other than the workplace that is within a reasonable driving distance of the former employee's residence.

(II) Providing a copy of the personnel records by mail.

(ii) Nothing in this subparagraph shall limit a former employee's right to receive a copy of his or her personnel records.

(d) An employer is required to comply with only one request per year by a former employee to inspect or receive a copy of his or her personnel records.

(e) The employer may take reasonable steps to verify the identity of a current or former employee or his or her authorized representative. For purposes of this section, "representative" means a person authorized in writing by the employee to inspect, or receive a copy of, his or her personnel records.

(f) The employer may designate the person to whom a request is made.

(g) Prior to making records specified in subdivision (a) available for inspection or providing a copy of those records, the employer may redact the name of any nonsupervisory employee contained therein.

(h) The requirements of this section do not apply to:

(1) Records relating to the investigation of a possible criminal offense.

(2) Letters of reference.

(3) Ratings, reports, or records that were:

(A) Obtained prior to the employee's employment.

(B) Prepared by identifiable examination committee members.

(C) Obtained in connection with a promotional examination.

(4) Employees who are subject to the Public Safety Officers Procedural Bill of Rights (Chapter 9.7 (commencing with Section 3300) of Division 4 of Title 1 of the Government Code).

(5) Employees of agencies subject to the Information Practices Act of 1977 (Title 1.8 (commencing with Section 1798) of Part 4 of Division 3 of the Civil Code).

(6) Records created more than 5 years prior to the employer's receipt of the request to inspect or receive.

(i) If a public agency has established an independent employee relations board or commission, an employee shall first seek relief regarding any matter or dispute relating to this section from that board or commission before pursuing any available judicial remedy.

(j) In enacting this section, it is the intent of the Legislature to establish minimum standards for the inspection and the receipt of a copy of personnel records by employees. Nothing in this section shall be construed to prevent the establishment of additional rules for the inspection and the receipt of a copy of personnel records that are established as the result of agreements between an employer and a recognized employee organization.

(k) If an employer fails to permit a current or former employee, or his or her representative, to inspect or copy personnel records within the times specified in this section, or times agreed to by mutual agreement as provided in this section, the current or former employee or the Labor Commissioner may recover a penalty of seven hundred fifty dollars ($750) from the employer.

(l) A current or former employee may also bring an action for injunctive relief to obtain compliance with this section, and may recover costs and reasonable attorney's fees in such an action.

(m) Notwithstanding Section 1199 , a violation of this section is an infraction. Impossibility of performance, not caused by or resulting from a violation of law, may be asserted as an affirmative defense by an employer in any action alleging a violation of this section.

(n) If an employee or former employee files a lawsuit that relates to a personnel matter against his or her employer or former employer, the right of the employee, former employee, or his or her representative to inspect or copy personnel records under this section ceases during the pendency of the lawsuit in the court with original jurisdiction.

(o) For purposes of this section, a lawsuit “relates to a personnel matter” if a current or former employee's personnel records are relevant to the lawsuit.

(p) An employer is not required to comply with more than 50 requests under this section to inspect and receive a copy of personnel records filed by a representative or representatives of employees in one calendar month.

(q) This section does not apply to an employee covered by a valid collective bargaining agreement if the agreement expressly provides for all of the following:

(1) The wages, hours of work, and working conditions of employees.

(2) A procedure for the inspection and copying of personnel records.

(3) Premium wage rates for all overtime hours worked.

(4) A regular rate of pay of not less than 30 percent more than the state minimum wage rate.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Alameda County Bar Association

STATEMENT OF REASONS

The Problem: Under existing law, an employer is required to provide personnel records to current and former employees upon demand. The statute requires the employer to keep personnel records for 3 years after an employee’s final date of employment, but contains no limit on the duration of time for which records must be produced. Many employers maintain records for longer than 5 years. Sometimes older records are difficult to access, because the employer has changed its database or changed an outsourced human resources provider. If the employer does not produce all records in its possession, it is subject to a penalty of $750.00.

The Solution: This resolution would limit the scope of the employer’s obligation to produce personnel records to those records created within 5 years before the request for records. Providing the last 5 years of records is sufficient for an employee or former employee to evaluate

any potential claims or causes of action, as almost every employment-related claim has a statute of limitations of 4 years or less.

IMPACT STATEMENT
This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION
There is no prior related legislation. Resolution 08-02-2002 proposed a change to Labor Code section 1198.5 that would have granted former employees the right to inspect personnel files for a period of up to 4 years post-termination. Resolution 02-07-2005 proposed a change to Labor Code section 1198.5 that would have granted former employees the right to inspect personnel files for a period of up to 2 years post-termination. The statute was amended to grant rights to former employees, but the proposed limitation was not included in the amendment.

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