KRONICK

REFERENCE GUIDE

2023 LEGISLATIVE UPDATE

An Employer's Guide to New Laws Impacting the Workplace in 2023 and Beyond

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The 2022 legislative session marked a turn for the California Legislature in terms of its focus on legislation impacting the workplace. While the last two years were focused primarily on COVID-related legislation that topic faded somewhat, although it certainly was not entirely forgotten. The California Legislature passed a number of bills in a variety of areas that will have significant impacts on workplace for both employers and employees. The key bills are summarized below.

I. Employee Leave Laws

A. AB 1041 (WICKS) LEAVE TO CARE FOR A "DESIGNATED PERSON."

The California Family Rights Act (CFRA) makes it unlawful for an employer to refuse to grant an eligible employee's request to take leave for, among other reasons, providing care to family members or because of the employee's own serious health condition. This bill expands the class of persons for whom an employee is entitled to leave under the CFRA to provide care.

Prior to the passage of AB 1041, an eligible employee was entitled to leave of up to 12 workweeks to provide care for a child, spouse, domestic partner, parent, grandparent, sibling, or grandchild. In addition to these categories of individuals, AB 1041 entitles an employee to take leave to care for a "designated person" as defined in the bill. The term "designated person" is defined as "any individual related by blood or whose association with the employee is the

equivalent of a family relationship". Employees may identify a designated person at the time the employee requests the leave. An employer is allowed to limit an employee to one designated person per 12-month period for family care and medical leave.

AB 1041 takes effect January 1, 2023.

B. AB 1949 (LOW) BEREAVEMENT LEAVE.

AB 1949 adds new section 12945.7 to the Government. Code. The bill makes it an unlawful employment practice for an employer, defined as any person who employs five or more employees state or local public entity, to refuse to provide an eligible employee with up to five days of unpaid bereavement leave upon the death of a family member. "Family member" is defined as a spouse, child, parent, sibling, grandparent, grandchild, domestic partner, or parent-in-law. In order for an employee to be eligible for bereavement leave, they must have been employed by their employer for at least 30 days prior to the commencement of the leave.

The days of bereavement leave need not be consecutive but the leave must be completed within three months of the death of the family member.

If an employer has an existing bereavement leave policy that 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, with the remainder of the days of leave being 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.

If an employer does not have an existing bereavement leave policy, then the entire five days of bereavement leave may be unpaid.

If requested by the employer, the employee must provide documentation of the death of the family member within 30 days of the first day of the leave. Acceptable documentation includes, but is not limited to, a death certificate, a published obituary, or a written verification of death, burial, or memorial service from a mortuary, funeral home, burial society, religious institution, or governmental agency.

The bill not only makes it an unlawful employment practice to refuse to grant the leave, but also makes it an unlawful employment practice to refuse to hire, or to discharge, demote, fine, suspend, expel, or discriminate against an individual because they either exercise their right to bereavement leave or provide information or testimony as to their own bereavement leave or another person's bereavement leave in an inquiry or proceeding related to rights provided by the bill.

Finally, employers are required to maintain the confidentiality of an employee's request for bereavement leave along with any documentation provided establishing the death of a family member.

The provisions of AB 1949 will go into effect January 1, 2023.

C. AB 152 (TING) EXTENDING COVID-19 SUPPLEMENTAL PAID SICK LEAVE.

This bill amends Labor Code section 248.7 to extend California's COVID-19 supplemental paid sick leave (SPSL) to December 31, 2022. Without this bill the 80 hours of supplemental paid sick leave was set to expire on September 30, 2022.

Under existing law, employees are entitled to up to 40 hours of paid leave if they are forced to miss work after testing positive with COVID-19 or they need to care for a family member with COVID-19. An additional 40 hours of supplemental paid sick leave is available if an employee tests positive for COVID-19 and cannot work remotely. AB

152 changes the law to allow employers to require a third COVID-19 test within 24 hours of the second positive test. If employee refuses to test or to provide the test results, the employer is allowed to deny the additional 40 hours of SPSL.

AB 152 also establishes the California Small Business and Nonprofit COVID-19 SPSL Relief Grant Program. Small businesses and non-profits may be able to receive grants to reimburse them up to $50,000 for supplemental paid leave costs incurred. Small businesses and nonprofits interested in determining their eligibility for such relief may wish to consult with legal counsel.

II. Pay Reporting

SB 1162 (Limón) Pay Transparency Law.

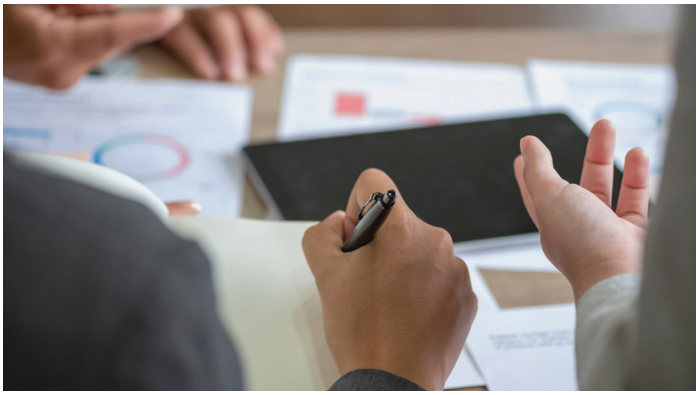
Pay Scale Disclosure:

Current law in California requires an employer, upon reasonable request, to provide the pay scale for a position to an applicant applying for employment. SB 1162 expands the transparency requirements by requiring an employer, with 15 or more employees, to include the pay scale for a position in any job posting. If an employer engages a third party to announce, post, publish, or otherwise make known a job posting, the employer must provide the pay scale to the third party, and it must include the pay scale in the job posting.

SB 1162 also requires an employer, regardless of size, to provide to an employee the pay scale for the position in which the employee is currently employed upon the employee's request. A "pay scale" is defined as the salary or hourly wage range that the employer reasonably expects to pay for the position.

In addition, SB 1162 requires an employer to maintain records of a job title and wage rate history for each employee for the duration of the employment plus three years after the end of the employment. The DLSE may inspect these records to see if there is a pattern of wage discrepancy. SB 1162 will create a rebuttable presumption in favor of an employee's claim if an employer fails to keep records in violation of these provisions.

SB 1162 allows penalties ranging from $100 to $10,000 per violation for failure to comply with the pay scale disclosure or record retention requirements. However, the DLSE will not assess a penalty for the first violation if the employer can demonstrate that all job postings for open positions have been updated to include the required pay scale information.



Pay Data Reporting:

Existing law requires employers with 100 or more employees to submit annual pay data reports with number of employees in each establishment by race, ethnicity, and sex. Starting January 1, 2023, a private employer with 100 or more employees will have to report the median and mean hourly rate for each job category broken down by race, ethnicity, and sex for both traditional employees and those hired through labor contractors. Additionally, employers will have to submit a separate pay data report for each employee hired through labor contractors and disclose the ownership names of all labor contractors used to supply employees.

SB 1162 permits a civil penalty of up to $100 per employee for the initial failure to file a pay data report and $200 per employee for any subsequent failure.

The new law takes effect January 1, 2023.

III. Worker's Compensation

A.SB 1127 (ATKINS) WORKER'S COMPENSATION FOR PEACE OFFICERS/FIREFIGHTERS.

This bill amends Labor Code sections 3761, 4656, and 5402 and adds new section 5414.3. Under existing law, an injured employee is required to submit a worker's compensation claim to their employer when injured on the job. If liability is not rejected within 90 days after the filing of the claim, the law creates a rebuttable presumption that the injury is compensable. This bill changes that 90-day timeframe to 75 days for certain injuries and illnesses sustained by peace officers and firefighters in the course of their employment. Claims for injuries such as hernias, pneumonia, heart trouble, PTSD, tuberculosis, blood-borne infectious diseases, meningitis, and others as defined by statute are covered by this new time period.

When the Appeals Board makes a finding that payment of compensation has been unreasonably delayed or refused, existing law requires that the amount of delayed or refused payment be increased up to 25% or up to $10,000, whichever is less. SB 1127 increases the penalty to five times the amount of benefits unreasonably delayed or denied with a cap of $50,000. The Appeals Board is expected to use its discretion to accomplish a just balance between the parties.

SB 1127 also increases the number of weeks temporary disability is available for firefighters and peace officers suffering from cancer from 104 to 240 weeks.

The provisions of SB 1127 take effect January 1, 2023.

.B. AB 1751 (DALY) EXTENDING COVID-19 WORKER'S COMPENSATION BENEFITS FOR CRITICAL WORKERS.

This bill amends Labor Code sections 3212.86.88. Existing law defines "injury" for worker's compensation purposes to include illness or death resulting from COVID-19 if the employee tested positive or was diagnosed with COVID-19 within 14 days after of providing labor or services at the employee's place of employment. If the positive test or diagnosis occurred after July 6, 2020, the employee's positive test or diagnosis must also have occurred during an outbreak at the worksite as that term is defined. An "outbreak" exists if within 14 calendar days a worksite with fewer than 100 employees experiences four positive tests or a worksite with more than 100 employees experiences positive tests equal to four percent of the total number of employees at that worksite.

A claim for benefits related to a COVID-19 related injury or illness is presumptively compensable if it is not rejected within 30 days (for fire, law enforcement, and healthcare workers) or 45 days (for all other employees) following submission of the worker's compensation claim form.

This definition of "injury" was meant to expire January 1, 2023. AB 1751 extends its expiration to January 1, 2024.

IV. Employment Discrimination

A. AB 2188 (QUIRK) DISCRIMINATION BASED ON CANNABIS USE.

This bill amends the California Fair Employment and Housing Act by adding Government Code section 12954. The new statute prohibits covered employers from discriminating

against a person in hiring, termination, or terms and conditions of employment based on either a person's use of cannabis off the job and away from the workplace or a drug screening test that finds nonpsychoactive cannabis metabolites in a person's hair, blood, urine, or other bodily fluid.

AB 2188 distinguishes between drug testing that identifies the presence of THC in an individual's bodily fluids and testing that identifies nonpsychoactive cannabis metabolite. The author of the bill explains, "[w]hen most employers conduct a drug test, they typically screen for the presence of nonpsychoactive cannabis metabolites, which can remain present in an individual's bodily fluids for weeks after cannabis use and do not indicate impairment. While there is consensus that no one should ever show up to work high or impaired, testing positive for this metabolite has no correlation to workplace safety or productivity. AB 2188 will ban employers from using this test, and clarify that they can continue to test for [THC]. Testing for THC may indicate an individual is impaired at work and is a better way to maintain workplace safety." (See 8/25/22 Assembly Floor Analysis.)

The new law does not prohibit an employer from refusing to hire an applicant based on valid preemployment drug screening conducted through methods that screen for THC. In addition, the new law does not permit an employee to possess, be impaired by, or use cannabis on the job, or affect the rights and obligations of an employer to maintain a drug- and alcohol-free workplace.

AB 2188 exempts certain applicants and employees from its provisions, including employees in the building and construction trades and positions that require a federal background investigation or clearance. The bill specifies that it does not preempt 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.

AB 2188 takes effect January 1, 2024.

B. SB 1044 (DURAZO) WORKERS' RIGHT IN EMERGENCIES.

SB 1044 adds new section 1139 to the Labor Code. The bill prohibits an employer from taking or threatening adverse action against an employee for refusing to report to, or leaving, a workplace because the employee reasonably believes the workplace or worksite is unsafe due to "emergency conditions".

"Emergency condition" means the existence of either of the following: (i) conditions 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 (ii) an order to evacuate a workplace, worksite, a worker's home, or the school of a worker's child due to natural disaster or criminal act.

The phrase "a reasonable belief that the workplace or worksite is unsafe" means that 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 is 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.

SB 1044 is expressly inapplicable to a health pandemic related emergency.

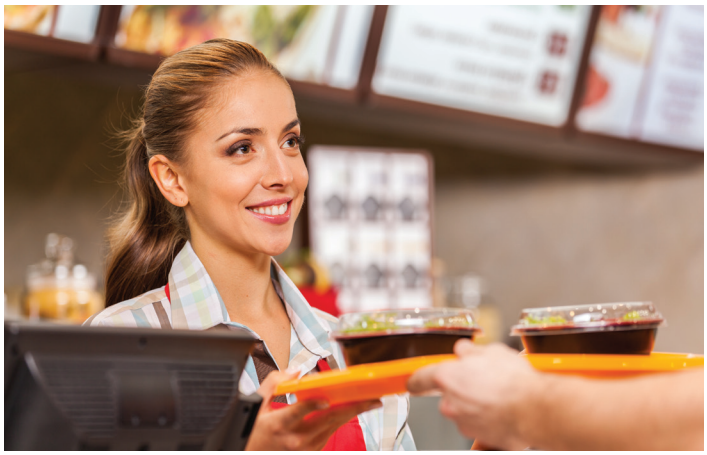
In addition, employers are prohibited from preventing an employee from using their phone to seek emergency assistance, assess the safety of the situation, or communicate with a person to verify their safety during an emergency condition.

Certain employees, like emergency response workers, transportation employees, and health care and residential care facility employees are exempted from the provisions of SB 1044.

SB 1044 takes effect January 1, 2023.

C. AB 2960 (STONE) STATUTE OF LIMITATIONS ON FEHA CLAIMS.

The California Fair Employment and Housing Act (FEHA) makes certain discriminatory employment practices illegal and authorizes a person claiming to have suffered from an unlawful employment practice to file a complaint with the California Civil Rights Department (formerly known as the California Department of Fair Employment and Housing).



The FEHA requires the California Civil Rights Department, if a civil action is not brought by the department within 150 days after the filing of a complaint, to notify the aggrieved employee that the department will issue, on request, a right-to-sue notice, or if not requested, the right-to-sue notice will be issued on the completion of its investigation, and not later than one year after the complaint was filed. For group or class complaints, the FEHA requires the department to issue a right-to-sue notice once its investigation is completed, and not later than 2 years after the filing of the complaint.

AB 2690 clarifies that the California Civil Rights Department may toll the statute of limitations on a FEHA claim during a mandatory or voluntary dispute resolution proceeding. The tolling begins on the day the department refers the case to its dispute resolution division and ends on the day the dispute resolution division closes its mediation record and returns the case the division that referred it.

D. SB 931 (LEYVA) DETERRING UNION MEMBERSHIP.

This bill adds section 3551.5 to the Government Code. It authorizes public employee organizations to bring claims against public employers for deterring or discouraging public employees from exercising their collective bargaining rights. If a public employer deters employees from becoming or remaining members of an employee organization, authorizing representation by an employee organization, or authorizing dues to an employee organization, the employee organization can bring an action against the employer before the Public Employment Relation Board (PERB).

If PERB finds the employer did deter any protected collective activities, the employer may be subjected to a civil penalty of up to $1,000 per each affected employee with a cap of $100,000. The money from the penalty is placed in the General Fund. If the an employee organization prevails in such a legal action, it may recover its reasonable attorney's fees and costs from the employer.

The author of SB 931 claims these penalties are necessary. "When an employee organization succeeds in petitioning PERB to grant an unfair labor practice charge, PERB can only issue a cease-and-desist order requiring the employer to post

notice of the violation. By the time of notice, the damage is done. It is obvious that some public employers are undeterred from breaking the law and will continue to violate their employees' rights to organize unless the Legislature acts to provide meaningful consequences." (8/15/22 Senate Floor Analysis.)

SB 931 takes effect January 1, 2023.

V. "Fast" Recovery Act

AB 257 (Holden) Fast Food Accountability And Standards Recovery Act ("FAST" Recovery Act)

This bill amends various provisions of the Labor Code. It establishes the Fast Food Council (Council) within the Department of Industrial Relations (DIR) for the purpose of establishing sector-wide minimum standards on wages, working hours, and other working conditions in the fast food industry.

The Council will consist of 10 members appointed by the Governor, Speaker of the Assembly, and the Senate Rules Committee. The Council will be made up of fast food employees, worker advocates, franchisors, franchisees, and government officials. AB 257 requires the Council establish terms of employment for all fast food restaurants whose brands have a 100 or more locations throughout the country.

The Council is prohibited from issuing, amending, or repealing any standards until the Director of Industrial Relations receives a petition approving the creation of the Council signed by at least 10,000 California fast food workers.

The bill sets a ceiling for any minimum wage established by the Council. From January 1, 2023 to December 31, 2023, the minimum wage will not exceed $22 dollars per hour. After January 1, 2024, the highest minimum wage that may be established by the Council each year shall increase by no more than the lesser of either 3.5% or adjusted to the U.S. Consumer Price Index.

AB 257 also authorizes a county or city with a population greater than 200,000 to establish a local Fast Food Council which would provide recommendations to the Council.

The bill also contains discrimination and anti-retaliation protections which prohibit a fast food restaurant from firing or retaliating against any employee for any of the following reasons:

> The employee made, or is believed to have made, a complaint or disclosed information to a franchisor, a person with authority to investigate noncompliance, the media, the Legislature, or a watchdog or community based organization, or a governmental agency.
>
> The employee participated in a proceeding relating to employee or public health or safety, or any state or local Fast Food Council proceeding.
>
> The employee refuses to perform work the employee reasonably believes violates employment, public health and safety laws, or would pose a substantial risk to the health or safety of the employee, other employees, or the public.

The law creates a rebuttable presumption of unlawful discrimination if an employer takes adverse action against an employee within 90 days following the date the employer had knowledge of any of the employee's above actions.

Exempted from the new law are specified bakeries and restaurants located and operated within a grocery establishment. The provisions of AB 257 go into effect January 1, 2023 and the Fast Food Council has a current expiration date of January 1, 2029.

VI. Changes To Covid-19 Exposure Notice Requirements

AB 2693 (Reyes) COVID-19 Notice Requirements.

This bill amends Labor Code section 6325 and 6409.6. Under existing law, employers are required to provide written notice to all worksite employees of a potential exposure to COVID-19. This bill would allow employers to satisfy the notice requirement by displaying a notice where notices to employees are customarily posted.

The notice must contain the dates on which an employee with a confirmed case of COVID-19 was on the worksite within their infectious period, the location of the exposures (but not so specific as to allow infected individuals be identified), and contact information for employees to receive information regarding COVID-19 benefits. The notice would need to remain posted for 15 days.

AB 2693 also requires employers keep a log of the dates notice was posted and, if requested, provide the Labor Commissioner access to such records.

The provisions of this bill take effect January 1, 2023 and expire January 1, 2024.

VII. Other Workplace-Related Bills

A. AB 2183 (STONE) FARMWORKER ORGANIZING RIGHTS. This bill amends various provisions within the Agricultural Labor Relations Act found at Labor Code section 1140, et seq. The new law permits as an alternative procedure to a polling place election process for certifying a labor organization, the certification of the labor organization as the exclusive bargaining representative of a bargaining unit through either a labor peace election or a non-labor peace election, dependent on whether an employer enrolls and agrees to a labor peace election for labor organization representation campaigns. A labor peace election or a non-labor peace election permits a bargaining unit to summarily select a labor organization as its representative for collective bargaining purposes without holding a polling place election.

A "labor peace compact" is defined in the bill as an agreement by the employer that includes (1) An agreement to make no statements for or against union representation to its employees or publicly, in any written or oral form, at any time during employee hire, rehire, or orientation, or after the filing of an intent to organize or petition for any type of election is filed; (2) to voluntarily allow labor organization access; (3) to not engage in any "captive audience meetings," defined as any meeting or communication between an employer or employer's management, supervisors, representatives, or agents and one or more agricultural employees, whether voluntary or mandatory, or paid or unpaid, where there is any discussion of unions, union representation, unionization efforts, or other protected concerted activity, in any way; (4) to not disparage the union in any written or verbal communications to employees or to the public; and (5) to not express any preference for one union over another union. Such a compact does not prohibit an employer from communicating truthful statement to employees regarding workplace policies or benefits, provided that such communications make no reference to any union, unionization efforts, or other protected concerted activity.

A labor peace election may be conducted by mail ballot subject to specified conditions regarding the contents of the mailing and the ballot as specified in the bill.

A non-labor peace election is one in which the labor organization becomes the exclusive representative for agricultural employees of an appropriate bargaining unit by filing a Non-Labor Peace Election Petition with the board alleging that a majority of the employees in the bargaining unit wish to be represented by that organization.

The bill takes effect January 1, 2023.

B. AB 984 (WILSON) GPS TRACKING OF COMMERCIAL OR FLEET VEHICLES.

This bill amends various sections of the Vehicle Code. California established a digital license plate pilot program back in 2018, and AB 984 now allows all California drivers to opt for digital license plates. The digital license plate is created by Reviver, a company dedicated to modernizing license plates. The plate connects to an app which allows vehicle owners to use vehicle location services, security features, and registration renewals without the need for stickers or trips to the DMV. The battery-powered version of the plate is available to all vehicles.

There is a hardwired version of the digital license plate which is offered only to commercial businesses. AB 984 prohibits an employer from using the GPS tracking and other monitoring services provided by the digital license plate to surveil employees, unless monitoring an employee during work hours is necessary for the performance of the employee's duties. The employer must notify the employee of the monitoring beforehand and the employee must be allowed to disable the monitoring capabilities outside of work hours.

If an employer fails to notify an employee before monitoring or retaliates against the employee for disabling the license plate's monitoring capabilities outside of work hours, the employee may file a complaint with the Labor Commissioner and the employer could be subject to civil penalties.

The bill takes effect January 1, 2023.

C. SB 1477 (WIECKOWSKI) WAGE GARNISHMENT.

This bill amends Code of Civil Procedure section 706.050. It changes the formula for determining the amount of disposable income which can be garnished from a judgement debtor's paycheck. After this bill takes effect on September 1, 2023, creditors will have to settle for garnishing less of a debtor's earnings than before.

Advocates of the bill - groups like California Low-Income Consumer Coalition and the Public Law Center — point to debt buyers' record profits during the pandemic as a reason for why this change is necessary. They claim SB 1477 "will level the playing field by allowing a level of garnishment that working families can afford." (8/30/22 Senate Floor Analysis.)

Before this bill, the formula for wage garnishment was the lesser of 25% of the debtor's disposable earnings for the week or 50% of the amount by which the debtor's disposable earnings for the week exceed 40 times the minimum hourly wage. Starting September 1, 2023, the formula for wage garnishment will be the lesser of 20% of the debtor's disposable earnings for the week or 40% of the amount by which the debtor's disposable earnings for the week exceed 48 times the minimum hourly wage.

D. AB 666 (QUIRK-SILVA) SUBSTANCE ABUSE DISORDER WORKFORCE DEVELOPMENT.

This bill adds Chapter 3.6 (commencing with Section 11794.5) to Part 2 of Division 10.5 of the Health and Safety Code. It requires the Department of Health Care Services (DHCS) to submit to the Legislature a report analyzing the state's substance use disorder (SUD) workforce needs and to

implement a workforce development program based on that report.

Despite access to public and private health insurance coverage for behavioral health services, many Californians with mental illnesses or substance abuse issues do not receive treatment. The author of this bill explains that to increase the likelihood of treatment, "California needs an adequate supply of behavioral health workers who are distributed equitably across the state..." (2/17/22 Assembly Floor Analysis.)

This bill permits the DHCS to implement a workforce development program that includes incentives such as stipends to cover costs related to testing, registration, and certification for individuals and tuition reimbursements for students who complete coursework in programs related to SUDs. The workforce development programming would become operative only if the Legislature appropriates funds for that purpose.

Kronick is a full-service law firm serving clients throughout California that provides the full spectrum of employment law services. The firm works closely with its labor relations and employment law clients to implement comprehensive policies and practices that help them avert potential employee relations problems along with the distractions and discontent that these problems often cause. We have developed highly effective tools for our clients such as employee handbooks, employee training sessions, and troubleshooting efforts that raise awareness, deter improprieties, and evidence employer preparedness. Should a specific issue arise, we defend our clients vigorously before public oversight agencies and, when necessary, in the courts. While we are highly proficient and costeffective litigators, we know that it is in helping our clients avoid litigation in the first place that we render them the greatest service.

Author

David W. Tyra is a shareholder at Kronick with 30 years of experience in labor and employment law. He represents public and private employers in employment-related litigation in both state and federal courts at the trial and appellate levels and before numerous federal and state agencies. He also provides advice, counsel and training on the full spectrum of labor and employment law issues facing employers and serves as an independent investigator for workplace investigations. David can be reached at 916-321-4594 or dtyra@kmtg.com.

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