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## Hastily Enacted Online Privacy Protection Bill The Target For Legislative Fixes This August

**AB 375** (Chau, Dem-Arcadia), the product of a deal between an online privacy initiative proponent, San Francisco real estate developer Alastair Mactaggart, and legislative leadership, which was enacted in June, is a target for legislative fixes before the end of this legislative session on August 31. The vehicle to largely technically amend AB 375 is **SB 1121** (Dodd, Dem-Napa).

AB 375 provides a consumer the following rights: 1) to request deletion of personal information which would require the business to delete information upon receipt of verified request, 2) to request a business that sells the consumer's personal information, or discloses it for a business purpose, disclose the categories of information that it collects and categories of information and the identity of any 3rd parties to which the information was sold or disclosed, and finally, 3) to opt-out of the sale of personal information by a business prohibiting the business from discriminating against the consumer for exercising this right, including a prohibition on charging the consumer who opts-out a different price or providing the consumer a different quality of goods or services, except if the difference is reasonably related to the value provided by the consumer's data.

Via SB 1121, the California Chamber of Commerce is proposing amendments to fix aspects of AB 375 that are unworkable and result in negative consequences unintended by the authors. It is important to fix as many of these problems as possible – as soon as possible. The stakes are too high to delay any further – for consumers, businesses, the Attorney General, and the California economy.

Industry's technical fixes include delaying implementation of AB 375 to 12-Months after completion of the Attorney General's rulemaking process; clarifying preemption language to avoid regulations at the local level; clarifying the definition of consumer to avoid unintended consequences, including deleting evidence of workplace sexual harassment; clarifying exemption for de-identified data; removing requirement that businesses identify specific pieces of information about consumers; clarifying that selling targeted advertising is not a sale of personal information when the platform is not disclosing personal information to the ad purchaser; ensuring AB 375 does not prevent protecting consumers from crimes of identity theft and other illegal activity by authorizing data use for identity verification and fraud detection purposes; and, exempting Gramm-Leach-Bliley Act from the California law.

## Official Legislative Information

Chamber-led industry meetings with Senate and Assembly leaders in the privacy arena, including the sponsors of AB 375, Assembly Member Ed Chau and Senator Robert Hertzberg (Dem-Van Nuys), as well as SB 1121 author Senator Bill Dodd, as well as Leadership will begin in earnest next week. Every industry is expected to lobby their closest allies.

While the priority is SB 1121 given the short timeframe for which to act this legislative session (Legislature adjourns August 31), there remains discussion of attempting to change AB 375 beyond technical changes. The reality is that this is likely to occur next year.

### Dynamex v. California Superior Court Decision Update

The April 2018 *Dynamex Operations West v. California Superior Court Decision* by the California Supreme Court, which requires employers to classify independent contractors (IC) as employees for wage and benefit purposes if the IC only services one employer, is priority for the California Chamber of Commerce. In-district legislator meetings by Chamber and industry lobbyists have gone well during the summer August recess. Members are understanding of its major, sector-wide implication.

The Chamber will have a bill before the Legislature adjourns on August 31 that delays compliance with the Dynamex Decision for one to 2 years, but no author has been decided upon. Under the banner of the Chamber, a broad-based coalition of businesses and associations have come together as the "I'm Independent Coalition" ([imIndependent.co](http://imIndependent.co)), which will hold a rally at the State Capitol on August 15. The I'm Independent Coalition is conveying to state lawmakers the need to suspend putting the Decision into effect so that there can be a robust legislative discussion about how best to balance worker protections with a flexible work model. The Court made its decision with limited information. The Legislature has the ability to identify criteria for independent contractors that better reflect California's economy and protect workers.

The livelihoods of nearly 2 million Californians who choose to work as independent contractors are at risk after the Decision. Independent contractors work in many industries, including insurance; construction, such as pool and spa building; communications and technology; pharmaceuticals; healthcare; education; transportation, and among many others.

The Decision overturned more than 3 decades of state employment law based on a set of rules called the Borello test for deciding whether a worker was an independent contractor. This approach weighed multiple factors to account for the variety of California industries and professions that would be regulated. The Dynamex ruling replaced the multiple factors with a one-size fits-all approach that is far more restrictive. The Decision is the first time in US history that a court has imposed such an approach without legislative approval.

Organized labor is vigorously opposing any legislative change to the Dynamex Decision.

### As Legislature Readies To Reconvene, Labor Bills Of Consequence To The Business Community To Be Considered

The following bills will be considered between now over the next two weeks by the Assembly and Senate Appropriations Committees. For those passed by these Committees, the Legislature will have until August 31 to take Floor votes and then both chambers adjourn for the year.

### **AB 1867 (Reyes, Dem-Fontana) Employee Sexual Harassment Recordkeeping**

This legislation requires an employer with 50 or more employees to maintain records of employee complaints of sexual harassment for 10 years from the date of filing. The bill authorizes the Department of Fair Employment and Housing to seek an order requiring an employer that violates the recordkeeping requirement to comply.

- The Chamber of Commerce does not foresee the author accepting favorable amendments, and anticipates this legislation being difficult to stop. The Chamber has changed its position to neutral as a “picking its battles” strategy and there is no private right of action language in the measure.

Support & Opposition: The bill is sponsored by the California Teamsters and the California Employment Lawyers Association. Opponents include the Associated Builders & Contractors Association, and 23 other trade groups.

Status: At this time, this bill has not been calendared for Senate Appropriations Committee consideration.

### **AB 1870 (Reyes, Dem-San Bernardino) Unlawful Employment Practices**

The Fair Employment and Housing Act makes specified employment practices unlawful, including discrimination against or harassment of employees. Current law authorizes a person claiming to be aggrieved by an alleged unlawful practice to file a complaint with the Department of Fair Employment and Housing within one year from the date upon which the unlawful practice occurred. This bill extends the period to 3 years for which complaints alleging unlawful employment or housing practices may be filed with the Department.

- The Governor’s Office indicates that a veto of the measure is not likely, so the author is not considering amendments. However, Senate Judiciary Committee Chair Hannah-Beth Jackson (Dem-Santa Barbara) opposes the bill’s ability to apply retroactively, and the Chair’s fellow Senate Judiciary Committee colleague, Senator Bill Monning (Dem-Carmel) has informed that if it continues to apply to retroactive claims, he would not vote for the bill on the Senate Floor.

Support & Opposition: This bill is supported by the American Civil Liberties Union, California Employment Lawyers Association, and California Teamsters, among 16 other unions and consumer groups. The opposition is led by the Chamber, 15 large industry trade organizations, as well as multiple local chambers of commerce.

Status: The bill has been referred to the Senate Appropriations Committee Suspense File.

### **AB 1976 (Limón, Dem-Santa Barbara) Employer Lactation Accommodation**

Current law requires every employer to provide a reasonable amount of break time to accommodate an employee desiring to express breast milk for the employee's infant child and requires an employer to make reasonable efforts to provide the employee with the use of a room or other location, other than a toilet stall, in close proximity to the employee's work area for the employee to express milk in private. This bill instead requires an employer to make reasonable efforts to provide an employee with use of a room or other location, other than a bathroom, for these purposes.

- Draft amendments provide for a mother's room temporary structure, and a hardship exemption for employers with less than 50 employees allows for use of a bathroom. Depending on how the amendments are drafted to reflect these changes the Chamber intends to change its position to neutral, and potentially support. The reason the Chamber could support the bill is that unless a company is exempt from the federal Fair Labor Standards Act (FLSA) (eg. 25 or fewer employees), businesses already need to comply with federal legal requirements in this area. FLSA Section 7 is the relevant federal statute. Mid-session, the author acquired staff, though a temporary Fellow, that has facilitated industry conversation in a positive manner.

Support & Opposition: The sponsor of the bill is the California Medical Association. Other supporters, of which there are 4, include the American Civil Liberties Union and California Employment Lawyers Association. The opposition list is longer, 16 in total, including the Chamber, and 11 large industry trade associations. The National Federation of Independent Business is also opposed.

Status: This bill is scheduled to be heard by the Senate Appropriations Committee on August 13.

### **AB 2770 (Irwin, Dem-Thousand Oaks) Former Employer Sexual Harassment Communications**

Current law makes employer communications protected from civil action, including certain communications concerning the job performance or qualifications of an applicant for employment that are made without malice by a current or former employer to a prospective employer. This bill includes among those privileged communications complaints of sexual harassment by an employee, without malice, to an employer based on credible evidence and communications between the employer and interested persons regarding a complaint of sexual harassment and authorizes an employer to answer, without malice, whether the employer would rehire an employee and whether or not a decision to not rehire is based on the employer's determination that the former employee engaged in sexual harassment.

Support & Opposition: This is a Chamber-sponsored bill. It is supported by 42 business entities, including the American Insurance Association, 14 large business trade groups, and many local chambers. There is no registered opposition.

Status: Signed by the Governor

### **AB 3081 (Gonzalez-Fletcher, Dem-San Diego) Workplace Sexual Harassment**

Current law prohibits an employer from discharging or in any manner discriminating or retaliating against an employee who is a victim of domestic violence, sexual assault, or stalking for taking time off work to obtain relief or because of the employee's status as a victim of domestic violence, sexual assault, or stalking, if the victim provides notice to the employer of the status or the employer has actual knowledge of the status. This bill also prohibits an employer from discharging or in any manner discriminating or retaliating against an employee who is a victim of sexual harassment for taking time off work to obtain specified relief or because of the employee's status as a victim of sexual harassment.

- This bill is of mention because it is one of 3 for which there are Chamber-led opposition coalition meetings with legislators. There are no forthcoming amendments the author will accept. It will be a floor fight. It contains duplicate employer compliance requirements in the Labor Code and Fair Employment and Housing Act, creating legal confusion, which typically leads to expensive litigation to resolve. Similar provisions were vetoed by the Governor because of unclear, conflicting provisions. Its poorly crafted, confusing state may lead to the bill's demise, according to a leading Sacramento labor lawyer.

Support & Opposition: The bill is supported by the California Teamsters and several women's organizations, among 12 other entities. It is opposed by the Chamber, 13 business trade groups, and 12 local chambers.

Status: This bill is scheduled to be heard by the Senate Appropriations Committee on August 6.

### **SB 937 (Wiener, Dem-San Francisco) Workplace Lactation Accommodation**

This bill requires a lactation room or location to include prescribed features and requires an employer to provide access to a sink and refrigerator in close proximity to the employee's work space. The bill requires an employer to develop and implement a policy regarding lactation accommodation and make it available to employees. This bill provides a private right of action for noncompliance.

- Earlier in the legislation session, the author was considered by the Chamber to be more accommodating than the other bill, AB 1976 (Limon, Dem-Santa Barbara), on the subject. An about face has occurred. The author does not intend to reflect a San Francisco ordinance on mother's room accommodation, which does not provide for private right of action.

Support & Opposition: The bill is supported by the California Employment Lawyers Association, California Labor Federation, and California Teachers Association. Opponents include the Chamber, American Insurance Association, and 8 large industry trade groups.

Status: This bill is scheduled to be heard by the Assembly Appropriations Committee on August 8.

### **SB 1284 (Jackson, Dem-Santa Barbara) Employer Paydata Reporting**

This bill requires private employers with more than 100 employees to submit an annual paydata report to the Department of Industrial Relations. This bill requires the Department to make the reports available to the Department of Fair Employment and Housing upon request. It imposes a civil penalty of \$500 on any employer who does not comply with the reporting requirement, and requires any penalties collected to be deposited into the Labor Enforcement and Compliance Fund, to be allocated upon appropriation by the Legislature to the Division of Labor Standards Enforcement to enforce wage differential laws.

- The Chamber is discussing amendments with the author to limit disclosure requirements and tone down intent language that was not detailed by the Chamber lead labor lobbyist. If the amendments are agreed to, the Chamber would remove the bill from the Job Killer list and remain opposed. If the Chamber moves to just an oppose position, this will come with an agreement to not lobby aggressively against the measure.

Support & Opposition: The bill is supported by the Consumer Attorneys of California and the Service Employees International Union – California. There are 20 local chambers in opposition, in addition to the Chamber, as well 11 large industry trade organizations.

Status: At this time, this bill has not been calendared for Assembly Appropriations Committee consideration.

### **SB 1300 (Jackson, Dem-San Diego) Sexual Harassment Legal Standard**

This measure provides that a plaintiff in an action alleging that a defendant failed to take all reasonable steps necessary to prevent discrimination and harassment from occurring is not required to prove that the plaintiff endured harassment or discrimination and provides that it suffices for the plaintiff to show that the employer knew that the conduct was unwelcome to the plaintiff, that the conduct would meet the legal standard for harassment or discrimination if it increased in severity or becomes pervasive, and that the defendant failed to take all reasonable steps to prevent the same or similar conduct from recurring.

- This is the most significant Chamber Floor fight of the session with regard to labor legislation. It is being sold as a sexual harassment prevention measure, but it is written to apply to all forms of discrimination allegation.

Support & Opposition: This bill is sponsored by the California Employment Lawyers Association and Equal Rights Advocates. It is Chamber-opposed, along with over 15 industry trade groups and 12 local chambers.

Status: This bill is scheduled to be heard by the Assembly Appropriations Committee on August 8.

## **SB 1343 (Mitchell, Dem-Los Angeles) Workplace Sexual Harassment Training**

### **Requirements**

Requires an employer who employs 5 or more employees to provide at least 2 hours of sexual harassment training to all employees by January 1, 2020, and once every 2 years after that. The bill requires the Department of Fair Employment and Housing to develop a 2-hour video training course on the prevention of sexual harassment in the workplace.

- Work on this legislation has been led by the California Manufacturing & Technology Association, and the organization has moved to a support position to send a message to the Governor that industry has come to the table on this subject. The California State Association of Counties is of like mind.

Support & Opposition: The bill is supported by 16 organizations, including 10 labor unions, such as California Teamsters, and the Consumer Attorneys of California. There is no longer opposition.

Status: This bill is scheduled to be heard by the Assembly Appropriations Committee on August 8.

## **Redding Area Wildfire Loss Surpasses \$1 Billion**

The insurance and reinsurance industry loss from the Carr wildfire in Shasta County, California, is anticipated to at least approach and possibly surpass \$1 billion, as the destruction continues with now more than 1,550 structures completely destroyed and another 258 damaged by the fire. Moody's has said that the total could reach \$1.5 billion.

The Red Flag fire weather warning remains in force in areas of California where early season wildfires have sprung up and are expanding. The Carr wildfire, near Redding, California, has been burning for some days now and has expanded to cover an area of almost 127,000 acres, with the burn still only 37% contained. The containment of the Carr wildfire has been increasing steadily, but still the number of structures destroyed or damaged continues to rise. As of the latest update, the Carr wildfire has now destroyed 1,060 residential properties, 19 commercial properties, and 474 farm buildings, outbuildings and the like (which can often also be insured).

These numbers are likely to rise further, given the Carr fire is still only 37% contained and the weather conditions will remain conducive to burns, making fighting the fire more difficult. As well as the 1,553 structures completely destroyed, another 189 residential properties, 6 commercial structures, and 81 outbuildings have been damaged.

The Carr wildfire has now become the 6<sup>th</sup> most destructive on record in California, surpassing both of last year's Thomas and Nuns fires. The Carr wildfire is currently set to be the largest loss of the 2018 California wildfire season. Insurers paid out more than \$14 billion in insurance claims due to fire damage around the world, almost entirely due to the October

and December events in California. In the industry's history, only 10 individual fires have prompted more than \$1 billion in payouts.

## Snapshot Of The Legislative Session, By The Numbers

As we head into the final month of the Legislative Session, the following is a snapshot of the number of measures [over 1,370 bills - 480 in Assembly and 890 in Senate] still pending that will be considered during the 4 weeks of August (Note: Additional bills could be pulled off the Inactive File to increase these numbers.)

### Assembly

The Assembly has about 480 measures to process in August. On the Assembly Floor, there are roughly 30 Assembly measures and 120 Senate measures. [150 measures]

The Assembly Appropriations Committee has 303 measures scheduled for its August 8 hearing (although some could be pushed over to its August 15 hearing). It has 27 bills currently on Suspense File. [330 measures]

### Senate

The Senate has about 890 measures to process in August. On the Senate Floor, there are roughly 15 Senate measures and 285 Assembly measures. [300 measures]

The Senate Appropriations Committee has 502 measures scheduled for its August 6 hearing (although some could be pushed over to its August 13 hearing). It has 88 bills currently on Suspense File. [590 measures]

The Assembly and Senate Appropriations Committees are likely to vote on their respective Suspense File measures on August 16, upon adjournment of the Floor Sessions.

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