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Recent Deluge of California Legislation Imposes New Requirements on Employers

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October 15th marked the deadline for Governor Jerry Brown to sign the numerous employment-related bills proposed during the California State Legislature's 2017 legislative session. While many bills did not make the final cut, Governor Brown signed several that will significantly impact California employers. The newly-enacted laws address a range of topics, including family medical leave, criminal conviction history, salary history, sanctuary immigration policy, harassment training, and retaliation claims. Unless otherwise indicated, the new laws become effective January 1, 2018.

New Law Will Ban Inquiries Regarding Salary History

Following the recent trend among several states and cities, California will now prohibit all employers from inquiring about or relying upon salary history information of an applicant as a factor in determining whether to offer employment or an applicant's salary. The law also requires employers to provide applicants with the pay scale for a position, upon request. The law is intended to help offset gender-based pay inequities and follows on the heels of recent California legislation making it more difficult for employers to justify gender-based pay disparities, including California's Fair Pay Act, enacted in 2015 and amended in 2016 to cover race and ethnicity.

Assembly Bill (AB) 168 adds a new section to the Labor Code, section 432.3, which applies to all employers, including state and federal governments. The new law covers information regarding both prior compensation and benefits. It prohibits inquiries directed to both applicants and agents, such as employment agencies.

Applicants can voluntarily, and without prompting, provide their prior salary information to an employer. An employer is not prohibited from relying upon such information, but should be aware that they must continue to comply with California's Fair Pay Act. The Fair Pay Act provides that salary history information alone cannot justify disparity in compensation.

Several other states and cities have similar salary history laws including Delaware, Massachusetts, Oregon, San Francisco, New York City, and Philadelphia.

California's "Ban the Box" Law Will Prohibit Pre-Offer Inquiries Regarding Criminal History Statewide

Following another recent and widespread trend toward the adoption of so-called "Ban the Box" laws and fair chance hiring requirements, California will now prohibit all employers with five or more employees from inquiring into or relying upon an applicant's criminal conviction history until an applicant has received a conditional offer of employment. The new law prohibits employers from including, on any pre-offer application form, any question regarding criminal conviction history.

The "Ban the Box" law is intended to reduce barriers to employment for people with conviction histories and to decrease unemployment in communities with concentrated numbers of people with conviction histories.

The law also limits the information an employer can consider or distribute as part of a criminal history background check. Specifically, employers may not consider arrests not resulting in conviction, with limited exceptions, or referral to or participation in a pretrial or post-trial diversion program.

Employers who rely upon conviction history in denying an applicant employment will be required to conduct an individualized assessment of whether the conviction history has a direct and adverse relationship with the specific duties of the job. Employers must consider as part of this process: (1) the nature and gravity of the offense; (2) the time that has passed; and (3) the nature of the position sought.

Employers must provide the following information to any applicant denied an offer based on conviction history: (1) the conviction the employer relied upon; (2) notice of the applicant's right to challenge the accuracy of the information and/or provide evidence of rehabilitation or mitigating circumstances; and (3) a copy of the criminal history report.

An employer must then provide an applicant at least five days to respond before finalizing its decision. If an applicant disputes the preliminary decision, the employer must provide an additional five days to respond.

If the employer decides to deny the applicant employment, it must issue a final notice, which must include: (1) the employer's final decision; (2) any existing procedure the employer has for the applicant to challenge the decision or request reconsideration; and (3) a notice of the applicant's right to file a complaint with the California Department of Fair Employment and Housing (DFEH).

AB 1008 will be codified at new Government Code section 12952. The law contains certain exceptions, including for positions in criminal justice or when employers are legally required to conduct criminal background checks.

Twenty-nine other states and over 150 cities and counties have adopted some form of the "Ban the Box" law. Nine states and 15 major cities have also enacted fair chance hiring requirements. The Equal Employment Opportunity Commission has issued guidelines providing for fair chance hiring requirements as well. Employers in San Francisco and Los Angeles should continue to ensure that their hiring procedures and background checks comply with the "Ban the Box" and Fair Chance Ordinances in those cities, which will remain in effect.

California Becomes a Sanctuary State and Restricts Employers' Compliance

with Federal Immigration Actions

In response to federal immigration policy, Governor Brown signed a controversial new immigration law that will impose requirements on all employers for complying with federal immigration agency actions. The law will likely create uncertainty for employers trying to comply with both federal immigration actions and state law. Under AB 450, employers are prohibited from voluntarily permitting a federal immigration agent from searching nonpublic areas of a worksite without a judicial warrant. It also prohibits employers from permitting a federal immigration agent from accessing or reviewing personnel records without a subpoena, court order, or, in the case of I-9 Employment Eligibility Verification forms, a Notice of Inspection.

The law requires employers to provide current employees notice of any inspection of I-9 Employment Eligibility Verification forms or other employment records within 72 hours of receiving a Notice of Inspection from a federal immigration agency. Employers must provide this notice by posting a notice in the workplace, in the language the employer normally uses to communicate with its employees, and by notifying any authorized employee representative, such as a union. The bill also requires employers to provide a copy of any Federal Notice of Inspection to employees upon request. AB 450 will be codified at new Government Code sections 7285.1, 7285.2, and 7285.3.

New Labor Code section 90.2 will require employers to provide employees a copy of two types of notices from a federal immigration agency: inspection results and any employee or employer obligations resulting from such inspection. The notice must be provided to each current affected employee and any collective bargaining representative within 72 hours of receipt. Section 90.2 contains specific requirements for the contents of such notice and the manner in which employers must provide notice.

The bill also adds a new Labor Code section 1019.2, which will prohibit employers from reverifying a current employee’s employment eligibility at a time or in a manner not required by federal law.

An employer violating these provisions may be subject to penalties ranging from $2,000 to $10,000 for each violation.

AB 450 follows the enactment of another immigration-related bill, Senate Bill (SB) 54, so-called “sanctuary state” legislation, which among other things, limits who state and local law enforcement agencies can hold and question regarding immigration-related violations.

Expanded California Family Leave and Job-Protection Benefits Will Impact Smaller Employers

Proponents of extending parental leave benefits in California scored a significant win with the signing of SB 63. Titled the “New Parent Leave Act,” the new legislation provides up to 12 weeks of job-protected parental leave to bond with a new child for employees of employers of 20 or more individuals within a 75-mile radius. The new law does not apply to larger employers (50+ employees). The Federal Family and Medical Leave Act (FMLA) and the California Family Rights Act (CFRA) already apply to employers with 50 or more employees, and the new law does not apply to an employee covered under both CFRA and the FMLA. Further, it only applies to employees with more than 12 months of service with the employer and at least 1,250 hours of service during the previous 12-month period.

The bill makes it an unlawful employment practice for an employer to: (1) refuse to allow an eligible employee to take up to 12 weeks of bonding leave; (2) refuse to provide a guarantee of employment in the same or a comparable position *before the start of the leave*; (3) refuse to maintain and pay for the employer's share of continued health insurance coverage for an eligible employee during the leave (if applicable); (4) refuse to hire, or to discharge, fine, suspend, expel, or discriminate against an individual because of: (a) an individual's exercise of the right to bonding leave, (b) an individual's giving information or testimony as to his or her own bonding leave, or (c) another person's bonding leave, in an inquiry or proceeding concerning the bonding leave; or (5) interfere with, restrain, or deny the exercise of, or the attempt to exercise any right provided with respect to the bonding leave.

Although any new parent leave taken by eligible employees will be unpaid, employees will be entitled to use vacation pay, sick pay, or accrued paid time off during their leave. An employer subject to SB 63 that employs both parents entitled to bonding leave is not required to grant leave that would allow the parents leave totaling more than 12 combined weeks. In such a situation, the employer may, but is not required to, grant leave to both parents simultaneously.

SB 63 also creates a parental leave mediation pilot program. Within 60 days of receiving a right-to-sue notice, an employer may request that all parties participate in mediation. An employee may not pursue a civil lawsuit concerning the leave until the mediation is complete. SB 63 deems mediation "complete" when either party notifies the DFEH that it is electing not to participate in, or is withdrawing from, the mediation. Thus, a plaintiff can avoid mediation simply by sending a letter declining to participate in, or withdrawing from, mediation.

The pilot program (in effect through January 1, 2020) was added to SB 63 with the intent to address Governor Brown's concerns about the burdens on small businesses and the threat of increased litigation, expressed in 2016 when the Governor vetoed an earlier version of the bill. However, with the ability of plaintiffs to so easily opt out of mediation, the pilot program will likely not provide much protection for employers. SB 63 will be codified at new Government Code section 12945.6.

New California Bill Favors Employees in Retaliation Actions

In a major triumph for labor organizations, SB 306 was signed into law. Currently, the California Labor Code prohibits a person from being discharged, discriminated against, or retaliated against for engaging in certain protected conduct. Both existing employees and applicants may file a complaint with the California Division of Labor Standards Enforcement (DLSE). An investigation by the Labor Commissioner ensues, and if the employer is found liable for a violation, an employee or applicant is entitled to reinstatement of employment and reimbursement for lost wages and benefits.

The new bill makes significant changes to existing law and tilts claim reviews in favor of employees. The DLSE is now authorized to begin an investigation of an employer—and obtain a preliminary injunction—even without a complaint having been filed (new Labor Code section 98.7(a)(2)). The Labor Commissioner can do so upon a mere showing that "reasonable cause exists to believe a violation [of the law] has occurred." An injunction would order an employee to be reinstated pending resolution of his or her retaliation claim, a process that could take two to three years. If such injunctive relief is granted, it can no longer be stayed pending appeal.

This new "reasonable cause" standard under SB 306 authorizes the Labor Commissioner to petition a superior court for temporary or permanent injunctive relief, with a significantly reduced burden of proof (contained in new Labor Code section 98.7(b)(2)). Under prior law, such a petition could not occur until: (1) the completion of an investigation, (2) a required showing of irreparable harm and

likelihood of success on the merits, and (3) a determination of the employer's liability.

As part of its analysis in considering injunctions under SB 306, courts will be expected to consider "the chilling effect on other employees asserting their rights under those laws in determining if temporary injunctive relief is just and proper." The inclusion of this factor in the court's analysis decidedly favors employees. Conversely, in one small benefit to employers, the bill provides that injunctive relief under the new provision does not prohibit an employer from disciplining or terminating an employee for conduct unrelated to the claim of retaliation.

The law authorizes the Labor Commissioner to issue citations to violators (new Labor Code section 98.7(c)(1)). Employers can be subjected to civil penalties of $100 per day for noncompliance, up to a maximum of $20,000, for willfully either refusing to comply with a court order to hire, promote, or restore an employee, or failing to obey an order to post a specified notice (contained in new Labor Code section 98.7(c)(3)). The penalties are disbursed to the affected employee. Under the existing labor code section on retaliation, the Labor Commissioner was required to seek enforcement via a civil action.

In another troubling addition for employers, SB 306 entitles the Labor Commissioner to reasonable attorney's fees if it is a prevailing party in an enforcement action, to be determined and enforced by the court.

There are review procedures, including the ability to request a hearing before an officer for petitions for writ of mandate (employers must post a bond). However, even this represents a significant change, as previously employers could challenge a labor commissioner action in civil court actions. SB 306 will amend Section 98.7 of the Labor Code, and additions to the Labor Code will be codified as sections 98.74, 1102.61, and 1102.62.

Mandated Sexual Harassment Training Must Now Include Gender Identity, Gender Expression, and Sexual Orientation

SB 396 will change the content of many California employers' sexual harassment training seminars. The bill requires that as a component of such training, employers must also deliver training on harassment based on gender identity, gender expression, and sexual orientation.

Employers with 50 or more employees are required to provide no less than two hours of training regarding sexual harassment to all supervisory and management employees every two years, under existing law.

SB 396 will now mandate that the two hours of required training include elements covering these new and additional topics. The new law necessitates that the training "include practical examples inclusive of harassment based on gender identity, gender expression, and sexual orientation, and shall be presented by trainers or educators with knowledge and expertise in those areas."

Further, SB 396 requires employers to prominently display a poster regarding transgender rights in an accessible location in the office or workplace. Employer posters will be developed by the DFEH. SB 396 will amend sections 12950 and 12950.1 of the Government Code and also amend sections 14005 and 14012 of the Unemployment Insurance Code.

Suggested Actions

In light of these changes, California employers should consider implementing the following actions:

- Train managers, recruiters, human resource professionals, and other relevant staff regarding these new requirements and restrictions.

- Prepare forms to comply with the new immigration enforcement-related notice requirements, as employers will have only 72 hours to provide required pre- and post-inspection notices. The California Labor Commissioner will make available on its website a template that employers can use for posting such notice. The notice will be available by July 1, 2018.
- Ensure that all immigration-related legal requirements, including I-9 forms, are strictly followed. Maintain I-9 forms in a file separate from personnel policies.
- Update application forms, candidate questionnaires, interview outlines and scripts, and other screening and hiring materials to omit inquiries regarding salary history and pre-offer inquiries regarding criminal history.
- Consider asking applicants about their experience level to gauge salary expectations, rather than salary history. If an employee voluntarily offers salary information, contemporaneously document that the employee introduced the information into the discussion.
- Review criminal history screening policies, procedures, and forms to ensure compliance with the “Ban the Box” law. Prepare policies for dealing with criminal history to avoid ad hoc decision-making by managers and consider involving human resource professionals.
- Contemporaneously document any individualized assessments regarding an applicant’s suitability for employment based on criminal history information.
- Employers with between 20 and 49 employees should carefully review and revise family leave policies to comply with the new requirements of SB 63.
- If covered by SB 63, be aware that the new bonding leave law is provided in addition to pregnancy disability leave, and therefore an eligible employee who is disabled by pregnancy, childbirth, or a related medical condition is eligible for up to four months of pregnancy disability leave *in addition to* up to 12 weeks of bonding leave.
- Become familiar with the new provisions of SB 306 and the procedures for litigating retaliation or whistleblower claims. Have an extra level of review for adverse employment decisions with potentially retaliatory impact.
- Educate all employees, especially supervisory employees, about laws prohibiting retaliation and about appropriate nonretaliatory conduct.
- Advise managers on the need to be prepared for unexpected events arising out of SB 306, such as field inspections or labor commissioner investigations.
- Ensure the mandated training required by SB 396 includes training on harassment based on gender identity, gender expression, and sexual orientation. This training should be crafted to meet the applicable and required standards discussed above.
- Display the mandated poster on transgender rights (to be developed by the DFEH) in a prominent and accessible location in the workplace.

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