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## NEW CALIFORNIA WORKPLACE LAWS FOR 2018 AND HOW TO GET READY

Governor Brown has signed into law a number of significant employment-related bills that will impact California workplaces. Here's a summary of key laws taking effect on January 1, 2018, along with best practices to get ready -- and ensure compliance.

### Salary history

California joins a growing number of jurisdictions in barring employers from using or seeking job applicants' salary history. A.B. 168 will prohibit all employers, public and private, from relying on "salary history Information" as a factor in determining whether to offer employment and what salary to offer to an applicant. Also, an employer cannot, orally or in writing, personally or through an agent (such as a manager or even a third party), seek salary history information about an applicant. Salary history information includes information about compensation and benefits, but the bill does not apply to salary history information that is disclosable to the public pursuant to federal or state law, such as under the California Public Records Act. The law also requires employers to provide the pay scale for a position upon an applicant's "reasonable" request.

If an applicant voluntarily and without prompting does disclose salary history information to a prospective employer, the law would not prevent the employer from considering or relying on that information to set the salary for that applicant -- although the information still could not be used in determining whether or not to hire the individual. Employers should exercise caution in relying on this provision to consider salary history, as it could be difficult to demonstrate that a salary history disclosure was in fact voluntary. Employers should also bear in mind that under the California Fair Pay Act, salary history alone cannot justify a gender or race disparity in compensation.

On a related note, another new law, A.B. 46, will expand California's Fair Pay Act to public employers. However, public employers are not subject to the Act's misdemeanor provision for violations.

**Getting Ready.** Employers should revise job applications and hiring forms and notices, whether hard copy or online, to remove questions that could seek salary history information. Employers should also revise applicable hiring policies and procedures and interview/screening guidelines, to make clear that the organization does not request salary history and will not use salary history unless otherwise permitted by law. Procedures should be put in place to ensure delivery of pay scale information upon an

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applicant's request. And, training should be provided to all personnel involved at any stage of the hiring process to ensure they understand the restrictions and obligations imposed by the new law. Employers in San Francisco should also take note that a similar city ordinance takes effect in July 2018.

## Immigration Enforcement

In response to anticipated immigration-related actions by the Trump Administration, California has enacted strict new measures related to workplace immigration enforcement.

A.B. 450 will bar public and private employers, and anyone acting on their behalf, from voluntarily consenting to allow an immigration enforcement agent to enter nonpublic areas of a workplace, except if the agent provides a judicial warrant or as otherwise required by federal law. Employers can take an immigration agent to a nonpublic area in order to verify whether the agent has a judicial warrant, so long as no employees are present in the area and no consent to search nonpublic areas is given in the process.

The new law also prohibits employers and anyone acting on their behalf from providing voluntary consent to an immigration enforcement agent to access, review, or obtain employee records without a subpoena or judicial warrant. This provision does not prohibit an employer from challenging a subpoena or judicial warrant in a federal court, nor does it apply to inspection of I-9 records or other documents for which the employer has received a Notice of Inspection.

A.B. 450 also imposes several new notification requirements on employers, as follows:

- Within 72 hours of receiving a Notice of Inspection from an immigration agency to inspect I-9 forms or other employment records, the employer must post a workplace notice to employees and provide written notice to a collective bargaining representative. The Labor Commissioner will develop a template that employers can use for this purpose. Also, upon reasonable request, an employer must provide an affected employee a copy of an I-9 Notice of Inspection.
- Within 72 hours of receiving an immigration agency notice that provides results of the I-9 or records inspection, an employer must provide each current affected employee and the collective bargaining representative a copy of the notice. Also the employer must provide to each "affected employee" and their representative written notice of the employer and employee's obligations arising from the inspection results. An "affected employee" is one identified by the inspection results as lacking work authorization or whose work authorization documents have been identified by the agency inspection to have deficiencies. The notice must relate to the affected employee only and must be delivered by hand at the workplace if possible, or by mail and email if hand delivery is not possible.

Violations of any of the above provisions carry hefty civil penalties of \$2,000 to \$5,000 for a first violation and \$5,000 to \$10,000 for each subsequent violation.

Finally, A.B. 450 prohibits employers from reverifying employment eligibility of a current employee at a time or in a manner not required by federal law. Violations carry a civil penalty of up to \$10,000. This law does not restrict an employer's compliance with a memorandum of understanding regarding the use of E-Verify.

**Getting Ready.** Employers should ensure that management is familiar with the new prohibitions on granting voluntary access and understands proper procedures when faced with a visit or inspection request from immigration authorities. Employers should be prepared to promptly comply with the new posting and notice requirements when a Notice of Inspection or inspection results are received. Also, employers should review their I-9 processes to ensure that they are in full compliance with the law and are not engaging in reverification practices that are not strictly required by federal law.

## Ban the Box

The new California Ban-the-Box law, A.B. 1008, amends the Fair Employment and Housing Act ("FEHA") to make it an unlawful employment practice for employers with five or more employees to:

- include on any application for employment any question that seeks the disclosure of an applicant's conviction history;
- inquire into or consider an applicant's conviction history before the applicant receives a conditional offer of employment; and
- consider, distribute, or disseminate information related to arrests that did not result in convictions, diversion program participation, and/or convictions that were sealed, dismissed, expunged or eradicated.

The new law exempts from its coverage only a handful of positions: positions for which government agencies are required by law to check conviction history; positions with criminal justice agencies; farm labor contractors; and positions for which the employer is required by federal, state or local law to check criminal history or to restrict employment based on criminal history.

The law provides that covered employers may only consider an applicant's conviction history after the applicant has received a conditional offer of employment. If an employer intends to deny hire *solely or in part* because of conviction history, the employer must conduct an individualized assessment to determine whether that history has a *direct and adverse relationship* with the specific duties of the

job. Moreover, when making that assessment the employer must consider the nature and gravity of the offense and conduct, the passage of time since the date of the offense/conduct and completion of any sentence, and the nature of the position held or sought. Employers may, but are not required to, record the results of their individualized assessments in writing.

If the individualized assessment leads to a preliminary decision that the conviction history is disqualifying, the employer must then follow a specific procedure, sometimes referred to as a “fair chance” process, as follows:

- First, the employer must provide *written notice* to the applicant. The written notice must identify the conviction on which the preliminary decision is based, include a copy of the conviction history report, if any, and explain the applicant’s right to respond to the notice within at least five business days. The notice must also explain the applicant’s right to submit evidence challenging the accuracy of the conviction record, or evidence of rehabilitation, mitigating circumstances, or both. *Employers are prohibited from making any final determinations based on conviction history during the minimum five day business period.*
- Second, if the applicant timely notifies the employer *in writing* that the applicant is disputing the conviction history and is taking steps to obtain evidence to do so, the employer must provide the applicant an additional five business days to respond. Any additional evidence the applicant provides in response must be taken into consideration by the employer before a final decision is made.
- Finally, if after receiving the response from the applicant the employer makes a final decision to deny employment based on conviction history, the employer must again notify the applicant *in writing*. This final notification must include: the final denial; information relating to any existing procedure to challenge the decision or request reconsideration; and the right to file a complaint with the Department of Fair Employment and Housing. The employer has the option to include an explanation for making the final denial.

***Getting Ready.*** Covered employers should revise their paper and online employment applications to remove “boxes” or questions which seek criminal conviction information from applicants. They also should review interview guidelines and hiring processes to ensure compliance with the law, and train managers, hiring, and recruiting personnel that they may not seek or rely on conviction history before a conditional offer of employment is made. Employers should adopt procedures to comply with the individualized assessment and “fair chance” process requirements. Finally, employers should review and revise, as necessary, “adverse action” notifications to comply with federal and California fair credit reporting law requirements, as well as local ban-the-box or fair chance ordinance requirements such as in San Francisco and Los Angeles.



## New Parental Leave Act

The New Parent Leave Act, S.B. 63, amends the California Family Rights Act (“CFRA”) to allow employees who work for an employer with at least 20 employees to take 12 weeks of unpaid leave for new child bonding purposes so long as the employee works at a worksite that employs at least 20 employees within a 75-mile radius. The new law is a significant expansion of the CFRA, which currently only applies to employers with 50 or more employees. It will provide parental leave rights to an estimated 2.7 million California workers who previously were not eligible for leave because of the size of their worksite. The law applies to private and public employers.

Similar to CFRA’s current requirements, it will be unlawful for a covered employer to refuse to allow an eligible employee to take up to 12 weeks of job-protected parental leave to bond with a new child within one year of the child’s birth, adoption or foster care placement. Eligible employees must have 12 months of service plus at least 1,250 hours of service with the employer during the 12-month period preceding the leave. Note that the law only expands CFRA’s bonding leave provision -- it does not require employers with fewer than 50 employees to offer CFRA leave for other reasons such as for the employee’s or a family member’s serious health condition.

Before the start of a parental leave, the employer must provide the employee with a guarantee of reinstatement to the same or comparable position following the leave; failure to provide this guarantee will violate the law. Also, if both parents work for the same employer and are otherwise eligible for leave, the employer can require them to share the 12-week allotment between them.

Leave is unpaid, although employees may use accrued vacation, paid sick time, other accrued paid time off, or other paid or unpaid time off negotiated with the employer, and can apply for California Paid Family Leave benefits. Employers must maintain and pay for group health coverage during a parental leave at the level and under the conditions that coverage would have been provided had the employee continued working. The employer can recover coverage costs if the employee fails to return from leave after the leave entitlement period has expired *and* the failure to return is for a reason other than the continuation, recurrence, or onset of a serious health condition or other circumstances beyond the employee’s control.

The new law does not affect an employee’s right under California law to take up to four months of leave for pregnancy-related disability, in addition to the 12 weeks of parental leave. Also, the new law does not apply to employees who are already subject to the FMLA and CFRA.

***Getting Ready.*** For employers with at least 20 employees within a 75-mile radius of the worksite, promptly update employee handbooks and personnel policies, and

create/update leave request forms and notices with respect to the new leave rights, reinstatement guarantee, and other requirements. Also, provide training to human resource employees and managers about the new leave rights and obligations.

## Retaliation

S.B. 306 greatly expands certain employee retaliation and whistleblower claims. The law allows the Labor Commissioner to initiate an investigation of employers, with or without a complaint being filed, when it suspects the employer discharged or otherwise discriminated against an individual in violation of any law under the Labor Commissioner's jurisdiction. In contrast, existing law authorizes such investigations only when an employee files a complaint.

Under the new law, complaints can be initiated by the Labor Commissioner when suspected retaliation occurs during the course of adjudicating a wage claim, during a field inspection, or in instances of suspected unlawful immigration-related threats. Moreover, the Labor Commissioner will now have authority to petition a court for relief, including injunctive relief, during the course of an investigation and prior to completing its investigation or concluding that retaliation has in fact occurred. This change means that employers could be forced to reinstate employees pending the months or years it takes to litigate a claim of unlawful retaliation.

Even more significantly, the law greatly diminishes the burden of proof for injunctive relief in retaliation or whistleblower cases under the Labor Commissioner's jurisdiction, allowing an employee or the Labor Commissioner to obtain a preliminary injunction against an employer (most likely, restoring the employee to his or her position following termination or other disciplinary action) upon a mere showing of "reasonable cause" that a violation of the law occurred, and instructing courts to consider the "chilling effect on other employees asserting their rights under those laws" in determining if temporary injunctive relief or a permanent injunction is proper. The existing standard of proof for injunctive relief requires a showing of irreparable harm if the relief is not granted, likelihood of success on the merits of the claim, and that the foregoing interests outweigh the harm the defendant will suffer from granting injunctive relief.

S.B. 306 does provide that any temporary relief does not restrain an employer from disciplining or terminating an employee for conduct unrelated to the retaliation claim. However, as many employers know from experience, employees with performance issues who know that they are about to be terminated or disciplined will often attempt to file retaliation claims internally or with state and federal agencies in order to protect themselves from adverse action. Thus, it isn't often that a discipline or termination claim will be deemed "unrelated" to a claim of retaliation.

The law also establishes a new citation process pursuant to Section 98.74 of the Labor Code for enforcement of whistleblower or retaliation claims. While current law requires

the Labor Commissioner to bring a civil action for enforcement, S.B. 306 authorizes the Labor Commissioner to issue a citation directing the employer to cease the alleged violation and take actions necessary to remedy the violation, such as ordering reinstatement or back pay, thus placing the burden on the employer to challenge the citation through an administrative and court appeal. The law also requires any employer challenging the citation to post a bond with the Labor Commissioner's office equal to the amount of back pay allegedly owed.

***Getting Ready.*** The new law necessitates that employers carefully analyze and make well-reasoned disciplinary decisions and that they document thoroughly the reason(s) for those decisions. Employers should familiarize themselves with the provisions of the new law and be aware that litigating retaliation and whistleblower claims under the Labor Commissioner's jurisdiction, and opposing petitions for injunctive relief related to these claims, will be more difficult once the new law takes effect. Employers will also face a heavy burden when challenging citations under the new law.

### Anti-Harassment Training

Employers in California with 50 or more employees currently are required to provide two hours of sexual harassment training to supervisors every two years. Now, S.B. 396 will require that anti-harassment training also include a component on harassment based on gender identity, gender expression, and sexual orientation. This training must include "practical examples inclusive of harassment based on gender identity, gender expression, and sexual orientation," and must be "presented by trainers or educators with knowledge and expertise" in these areas.

The new law also requires employers with five or more employees to post a new workplace notice, to be developed by the Department of Fair Employment and Housing, regarding transgender rights.

Another new law, S.B. 295, requires that farm labor contractors comply with existing requirements to conduct sexual harassment training for certain employees by providing the training in the language understood by the employee.

***Getting Ready.*** Employers should be certain to update their A.B. 1825 training to include information regarding gender identity, gender expression, and sexual orientation. Also, look for the new poster and ensure it's up in your workplace by the first of the year.

### Human Trafficking

Existing California law requires certain types of businesses to post a notice regarding human trafficking and assistance hotlines. A.B. 260 will extend the posting requirement to hotels, motels, and bed and breakfast inns, and S.B. 225 will require new language in the notice to state that person can text a specified number for services and support.

*Getting Ready.* Employers covered by this posting requirement should ensure the notice is in place and that it is updated to incorporate the new language.

### Construction Contractor Liability

Under A.B. 1701, general contractors will be responsible for any payments owed to a wage claimant (or third party on a wage claimant's behalf) by their subcontractors if the claimant's work is a subject of the contractors' relationship. Liability extends to unpaid wages, fringe or other benefit payments and contributions, and interest owed, but it does not include penalties or liquidated damages. The new law also requires subcontractors to provide payroll records to general contractors upon request. Finally, general contractors may establish remedies by contract for liabilities incurred on behalf of subcontractors. This law applies to contracts entered into on or after January 1, 2018.

*Getting Ready.* General contractors should review all agreements with subcontractors to ensure appropriate indemnification provisions are included. They should discuss with subcontractors their practices regarding wages and benefits. Also, general contractors should take full advantage of the new payroll review provision and request to review subcontractors' records where wage compliance may be an issue.

### Compliance Wrap-Up

With this new slate of workplace laws going into effect in January, employers have a lot to do to get ready, including reviewing and updating employee handbooks to ensure full compliance.

Contact us for a flat rate to update your handbook for 2018 – we'd be happy to help.

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