WINSTON & STRAWN LLP

CLIENT ALERT

California Employment Legislative Update

OCTOBER 19, 2017

California Gov. Jerry Brown has recently signed into law various pieces of legislation related to the employment relationship, addressing issues such as sexual harassment prevention training, inquiries regarding applicants' criminal and salary histories, parental leave, service member discrimination, and immigration enforcement. The new legislation continues California's trend of increasing employee-friendly laws. A summary of the significant, recently enacted California laws that impact private sector employers follows below. Unless otherwise noted, the following bills are effective January 1, 2018.

Prohibition on Salary History Inquiries

AB 168 adds section 432.3 to the California Labor Code and bars employers from directly or indirectly seeking, or inquiring into, a job applicant's salary history information (including compensation and benefits). The legislation also prohibits employers from using an applicant's salary history information to determine whether to offer employment to an applicant or to decide what salary to offer an applicant. However, if an applicant discloses salary history "voluntarily and without prompting," AB 168 permits a prospective employer to consider or rely upon the voluntarily-disclosed information when determining an applicant's compensation. Nevertheless, employers must still comply with California's Equal Pay Act, Labor Code § 1197.5, which prohibits against using salary history by itself to justify a disparity in pay between employees of different sexes, races, or ethnicities. The law also requires an employer to provide a job applicant with the position's "pay scale" upon "reasonable request".

Interestingly, AB 168 revives language that was twice thwarted—first in October 2015 when Gov. Brown vetoed AB 1017, and then was removed from 2016's AB 1676 (fair pay legislation) before signature by Gov. Brown. Although the provision of pay scale information was not in the 2015 legislation, it was initially included in 2016 prior to revision. With passage of AB 168, California joins seven other U.S. jurisdictions to prohibit inquiries into an applicant's salary history, including Delaware, Puerto Rico, Oregon, Massachusetts, New York City, Philadelphia (currently pending legal challenge), and San Francisco. For more information, see our client briefing, Legislative Trends: Pay Equity & Inquiries.

Tips: California employers should promptly audit and review their recruitment and hiring processes, including job postings, applications, policies, and procedures, to ensure that they do not include salary disclosure requirements

or inquiries concerning salary history. Additionally, California employers should educate and train recruiters and managers on how to comply throughout the recruiting and offer process, including by emphasizing that they should not do anything to prompt an applicant to discuss pay history, and how and when to recognize a reasonable request for pay scale information. California employers should take care to utilize thoughtful pay scales and find alternative sources of information (other than their applicants) when trying to gauge current market pay for positions. Recruitment and hiring personnel should be instructed to consider the role, job responsibilities, skills, and experience, along with current market rates and a candidate's job expectations, when setting salary. Human resources will also need to confirm that third-party companies in charge of background checks and screenings are complying with new laws. Given the patchwork of different laws across multiple jurisdictions, nationwide employers should consider whether to develop uniform procedures that simultaneously comply with all applicable requirements.

Ban the Box

AB 1008 repeals and replaces existing Labor Code § 432.9, which prohibits state and local agencies from asking an applicant for employment to disclose conviction history information. California has already "banned the box" for all public employers and some cities in California have followed the trend. This new legislation will make "Ban the Box" policies mandatory across the board for all public and private employers in California that have five or more employees.

The new law adds Section 12952 to the Fair Employment and Housing Act (FEHA), which prohibits an employer, with five or more employees, from:

1. Including on any employment application a question seeking disclosure of a job applicant's conviction history (before the employer makes a conditional offer of employment to the applicant);

2. Inquiring into or considering the conviction history of an applicant until after extending a conditional offer of employment to the applicant; and

3. Considering, distributing, or disseminating information while conducting a conviction history background check in connection with any application for employment about (a) certain arrests not followed by a conviction, (b) referral to or participation in a pretrial or post trial diversion program, and (c) convictions that have been sealed, dismissed, expunged, or statutorily eradicated.

Employers may still conduct a conviction history background check that is not in conflict with the provisions above.

If an employer intends to reject an applicant because of the applicant's conviction history (e.g., after a post-offer background check), the employer must:

1. Make an individualized assessment of whether the conviction history has a direct and adverse relationship with the specific duties of the job that justifies denying the applicant the position, taking into account certain listed considerations;

2. Notify the applicant in writing of a preliminary decision to reject the applicant, identify which conviction it based its decision on, provide the applicant with a copy of the conviction history report (if any), and provide the applicant with an explanation of his or her right to respond to the preliminary decision before it is final; and

3. Allow the applicant at least five business days to respond to the notice and consider all information the applicant provides before the employer makes a final decision.

The new law does not apply to certain positions, including positions with criminal justice agencies, state or local agencies required to conduct background checks, farm labor contractors, and employers required by state, federal,

or local law to conduct background checks or restrict employment based on criminal history.

Tips: Given that this law mirrors existing guidance by the Equal Employment Opportunity Commission regarding when and how to consider applicant conviction history, many employers may have already been conducting similar individualized assessments when considering applicants with conviction histories. Nevertheless, California employers should audit and review recruitment and hiring processes, including job postings, applications, policies, and procedures to ensure compliance.

Small Business Parental Leave

SB 63, known as the "New Parent Leave Act," extends the protections of the California Family Rights Act (CFRA) to smaller employers—those with at least 20 employees within a 75 mile radius of the worksite of an employee seeking leave under the law. Specifically, the legislation prohibits such employers from refusing to allow employees with at least 1,250 hours of service during the previous 12-month period to take up to 12 weeks of parental leave to bond with a new child within one year of the child's birth, adoption, or foster care placement. If both parents are entitled to such leave are employed by the same employer, the employer is only required to grant a total of 12 weeks of leave for the same child, which may, but is not required to, be simultaneous. The legislation further provides that refusing to hire, discharge, or otherwise discriminate against an employee for exercising the rights provided under this law, or for providing information or testimony in connection with the employee's or another person's parental leave, constitutes an unlawful employment practice.

Tips: Impacted employers will need to revise their leave policies and train employees on CFRA requirements. Newly covered employers should consult with counsel to develop accurate and up-to-date policies and training programs.

Immigration Enforcement

Except as otherwise required by federal law, AB 450 prohibits employers from providing voluntary consent for an immigration enforcement agent to enter nonpublic areas of a place of labor, or to access review or obtain employee records, without a subpoena or court order. The bill, except as required by federal law, also requires employers to:

1. Provide employees notice that their I-9 Employment Eligibility Verification forms or other employment records had been inspected by an immigration agency within 72 hours of receiving the federal notice of inspection;

2. Provide, upon reasonable request by an affected employee, a copy of the notice of inspection of I-9 Employment Eligibility Verification forms; and

3. Provide to each current affected employee (and to the employee's authorized representative, if any) a copy of the immigration agency notice that provides the inspection results as well as written notice of the employer and affected employee's obligations arising from the results of the inspection.

The legislation also instructs the Labor Commissioner, by July 1, 2018, to create and make available a template for each of these notices. Under the legislation, employers are also prohibited from re-verifying the employment eligibility of a current employee at a time or in a manner not required by specified federal law. Violations of this law are subject to a civil penalty of between $2,000 and $5,000 for a first violation and $5,000 to $10,000 for a second violation.

Tips: Employers should review and modify existing policies, procedures, and training to ensure compliance with the legislation. In particular, front-line managers should be trained that ICE agents should not be allowed into nonpublic areas or given employee records without providing a warrant or subpoena. Employers must also comply with new posting, and be familiar with notice requirements triggered when it receives notice of a pending ICE inspection as well as after an inspection has been completed.

Sexual Harassment Prevention Training

SB 306 amends Labor Code § 98.7 by authorizing both the California Labor Commissioner and employees to seek injunctive relief against retaliation before the close of an investigation. For an employee to secure injunctive relief, the bill requires only a "showing that reasonable cause exists to believe a violation has occurred." By its terms, this standard is lower than the "irreparable harm" and "likelihood of success on the merits" requirements that an individual subject to harassment would otherwise be required to establish for temporary injunctive relief under California Code of Civil Procedure § 527. To determine whether injunctive relief is "just and proper," the new law instructs courts to consider the harm that directly results from the alleged conduct, as well as the "chilling effect" any alleged retaliation could have on other employees asserting workplace rights. The new law also expands the Labor Commissioner's authority by, for example, authorizing the Labor Commissioner to: directly issue administrative citations and penalties ($100 per day up to a maximum of $20,000) against employers who fail to comply with its anti-retaliation orders at the end of an investigation; unilaterally conduct investigations of an employer's workforce—even in the absence of a complaint—if it determines that retaliation may have occurred while a workplace complaint is being adjudicated; and, obtain an award for attorneys' fees and costs when it successfully prosecutes a retaliation claim in court.

Tips: During the Labor Commissioner's investigatory period of a retaliation claim, employers will likely face heightened scrutiny over management decisions because those decisions could become the basis for temporary injunctive relief. As a result, employers should seek legal counsel and appropriately weigh these new risks throughout the investigation process.

New Content Requirements for Mandated Harassment Training in California

SB 396 requires employers with 50 or more employees to expand existing sexual harassment training to include training on workplace harassment related to sexual orientation, gender identity, and gender expression. Current law requires private employers with 50 or more employees to provide at least two hours of sexual harassment training to supervisory employees every two years, and within six months of the date those employees take on a supervisory role. S.B. 396 expands existing law by requiring a component of this training to include training on harassment based on sexual orientation, gender identity, and gender expression. Like the existing requirements for sexual harassment training, the new training topics must include practical examples and be presented by trainers or educators with knowledge and expertise in these areas. The new law does not change the total amount of time that employers are required to provide training—rather, it only requires employers to update training content by incorporating these three new topics into existing curriculum. The law also obligates employers to prominently display a poster, to be developed by the DFEH, which includes information about rights of transgender individuals.

Tips: Employers should update workplace posters and existing training curriculum to be compliant with the new law.

Construction Contractor Wage Liability for Subcontractors

AB 1701 updates the Labor Code by providing that private construction contractors and subcontractors will be jointly liable for unpaid wages owed to employees. Contractors will now be liable for any unpaid wage, fringe, or other benefit payments or contributions (including interest), incurred by a subcontractor at any tier under the contractor. However, contractors will not be held liable for any penalties or liquidated damages assessed against such a subcontractor. The bill will also require subcontractors to provide, upon request, required payroll records to a direct contractor. Employees may bring a civil action to enforce liability under this provision, and the California Labor Commissioner may enforce a direct contractor's liability. Further, a joint labor-management cooperation committee is authorized to bring suit against direct contractors or subcontractors for unpaid wages, after providing the entities with at least 30 days' notice and an opportunity to cure violations.

Tips for Employers: General contractors should consider requiring subcontractors to disclose wage and fringe benefit data in order to monitor proper payment of wages and fringe benefits, and ensure subcontractors are complying with applicable laws and collective bargaining agreements.

Anti-Discrimination Law Modification Re Military Membership

AB 1710 and SB 266 amend Section 394 of the Military and Veterans Code, prohibiting discrimination against service members. Together, the bills expand the scope of military service discrimination prohibitions to include discrimination with respect to any employee's terms, conditions, or privileges of employment based on the employee's military membership or service. The expanded scope of anti-discrimination laws applies to individuals and both private and public employers. Like other charges of discrimination in California, employees must first bring a complaint of discrimination based on military service through the DFEH or EEOC. A person violating this section is guilty of a misdemeanor, as well as incurring liability for actual damages and reasonable attorney's fees incurred by the injured party.

Tips: The bill should have little practical impact on employers as it only slightly modifies existing anti-discrimination laws by expanding the definition of actionable discrimination based on military membership or service to include discrimination with respect to "the terms, conditions, or privileges of employment." Employers should continue to train and educate recruiters and managers regarding their obligations to comply with anti-discrimination laws with respect to employee and candidate service members.

Vetoed Employment Legislation

Gov. Brown also vetoed several employment related bills, including: AB 1209 (which would have required employers with at least 500 California employees to collect information on differences in pay between male and female exempt employees and board members); AB 569, (which would have prohibited employers and their agents from taking any "adverse action" against an employee, their dependents, and "family members" on the basis of the employee's "reproductive health decision);" and, AB 978 (which would have amended the Labor Code to require all employers to provide a copy of the employer's written injury and illness prevention program, free of charge, to any employee, or authorized representative, who requests it).
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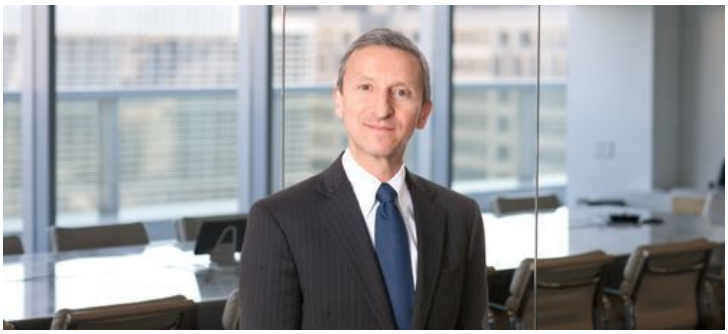

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