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California Enacts New Employer Requirements Effective January 1, 2018

The Bottom Line

- *California employers should be aware of several new and expanded laws going into effect beginning January 1, 2018, relating to a ban on inquiries to candidates about their salary history or prior criminal convictions; expanding already-mandated, supervisor-level sexual harassment prevention training to include specific anti-harassment training based on gender identity, gender expression and sexual orientation; and new parental leave rights for workers of employers with at least 20 employees.*
- *California employers should review recruitment processes and forms, provide additional training to supervisors and recruiters and revisit employment policies.*

California Governor Jerry Brown signed several pieces of new legislation this year that will impact the hiring, training and leave policies of many California employers as of January 1, 2018.

AB 168: Salary History Inquiry Restrictions

California joined New York City in prohibiting employers from inquiring about job applicants' salary history during the hiring process. The bill, AB 168, signed into law in October, and effective January 1, 2018, applies to all employers regardless of size, including state and local governments.

Similar to New York City's salary history law, AB 168 makes it unlawful for an employer to inquire about (whether orally or in writing, directly or indirectly), or rely upon, an applicant's salary history in determining whether to hire the applicant and what salary to offer. The bill provides two exceptions:

1. When an applicant "voluntarily and without prompting" offers such information, the employer may verify and rely upon it during the hiring process and in setting the applicant's salary.
2. Employers are not barred from considering salary history information that is publicly available pursuant to state or federal law.

Going further than New York City's law, AB 168 additionally requires employers, upon reasonable request from the applicants, to provide them with the pay scale assigned to the position sought. The new law, however, does not define "pay scale" or specify what information must be provided or whether employers must provide such information in writing.

The law seeks to help eradicate historical, gender-based pay disparities, based on the idea that if a candidate's new salary is based on past salary, it perpetuates the inequality. Even where consideration of salary history is permissible under the law, employers must be mindful that prior salary cannot, by itself, justify a disparity in compensation.

AB 1008: "Ban the Box"

In addition to salary history, California employers with at least five employees are now restricted from inquiring about applicants' criminal conviction history when making personnel decisions until a contingent offer of employment has been made. AB 1008, effective January 1, 2018, follows similar legislation already enacted in numerous other states and localities, including Los Angeles and San Francisco.

Under the new state law, employers with at least five employees cannot include on any employment application or in any interview any question that seeks the disclosure of an applicant's conviction history before the employer has made a conditional offer of employment. Once a conditional offer is made, employers may then inquire into an applicant's criminal history. If an employer seeks to deny an applicant a position based on criminal history, however, the employer must first:

- perform an individualized assessment linking the applicant's history to specific job duties of the position;
- notify the applicant in writing that his or her criminal history was a disqualifying factor; and
- allow the applicant an additional five days to respond with any relevant evidence challenging the denial, which the employer must consider (similar to the process under the Fair Credit Reporting Act).

The law allows certain exceptions, such as for positions where an employer is required by federal, state or local law to conduct criminal background checks for employment or restrict employment based on criminal history.

While employers may consider convictions in hiring decisions so long as they follow statutory procedural requirements, they may not consider:

- arrests that did not result in convictions (subject to certain exceptions);
- referral to a pre- or post-trial diversion program; or
- convictions that have been sealed, dismissed, expunged or statutorily eradicated pursuant to law.

SB 396: Expanded Workplace Harassment Prevention Training for Supervisors

California currently requires employers with 50 or more employees to provide at least two hours of sexual harassment training to supervisory employees within six months of becoming supervisors, and every two years thereafter. In October, Governor Brown signed SB 396, expanding the subject matter that such mandatory training must cover.

Beginning January 1, 2018, sexual harassment prevention training must include components on workplace harassment based on gender identity, gender expression and sexual orientation. The training further must "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."

The law also requires employers to display a poster developed by the California Department of Fair Employment and Housing regarding transgender rights in a prominent and accessible location in the workplace.

SB 63: The New Parent Leave Act

The state legislature extended existing protections for new parents working at larger companies to those working for smaller employers. The California Family Rights Act (CFRA) requires employers with 50 or more employees to allow workers up to 12 weeks unpaid leave for a qualifying purpose. Beginning January 1, 2018, those who work for employers with 20 or more employees will gain similar protections as those offered to new parents under the CFRA, with regard to leave for the birth, adoption or foster care placement of a child.

SB 63 requires covered employers to allow employees with more than 12 months of service, who have worked at least 1,250 hours during the previous 12 months, 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 placement. Employers are also required to maintain employees' health coverage during such leave, and to guarantee employment in the same or a comparable position upon an employee's return. Where both parents work for the same employer, the employer is only required to provide 12 weeks of total leave to the couple, and can (but is not required to) grant simultaneous leave to the parents.

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