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New 2018 CA Employment Laws

The California Legislature was very active in 2017, passing many new, mostly employee-favorable laws (some of which were a direct reaction to the changes happening from the new Presidential administration). As always, legal counsel should be contacted for reviewing how these new laws impact your business, and developing or modifying specific policies and procedures that minimize legal liability arising from these new laws.

SB 3 – Minimum Wage Increase

(Effective January 1, 2018)

Although SB 3 was passed in 2016, this legislation authorized annual increases in the minimum wage until it reaches $15.00. Starting January 1, 2018, the minimum wage for employers with 26 or more employees will increase to $11.00 per hour. For those employees classified as exempt, this means the minimum salary for the administrative, executive, and professional exemption will increase to $45,750. Employers with 25 employees or fewer will have to increase their minimum wage to $10.50 per hour, making the annual salary threshold exemption for these employers $43,680.

SB 63 – New Parent Leave Act

This legislation adds new Government Code section 12945.6 to require, beginning January 1, 2018, employers with 20-49 employees within 75 miles of the worksite to provide up to 12 workweeks of job-protected parental leave for an employee (male or female) to bond with a new child within one year of the child's birth, adoption, or foster care placement. It will be an unlawful employment practice to deny parental leave to an employee who has worked more than 12 months for the

employer, and who has worked at least 1,250 hours during the previous 12-month period. Notably, this new law does not require smaller employers to provide job-protected leave for other CFRA-related leaves such as serious health condition of the employee or employee's family member.

This legislation also makes it an unlawful employment practice for any employer to refuse to hire, discharge, fine, suspend, expel, or discriminate against individuals for exercising their right to parental leave, or giving information or testimony about their or another employee's parental leave in an inquiry or proceeding related to rights guaranteed under this section. It will also be an unlawful employment practice for an employer to interfere with, restrain, or deny the exercise of any right provided under this section.

Finally, this bill will also require the Department of Fair Employment and Housing (the "DFEH") to create a voluntary "parental leave mediation pilot program" that will enable employers to request mediation within 60 days of a right-to-sue notice being issued under this new provision. This would prevent the employee from pursuing any civil remedies until after the mediation is completed, however, and the statute of limitations for all related claims shall be tolled until then.

AB 168 – Prohibition on Salary History Inquiries

With AB 168, California joins states like Massachusetts, Oregon, and the District of Columbia, and large cities like San Francisco, Philadelphia, and New York, to prohibit inquiries into salary histories of job applicants. The underlying purpose of these laws is to combat pay inequities that are perpetuated when current pay is based on past employer decisions that could have been discriminatory. By prohibiting inquiries into past salaries, these statutes seek to emphasize the value of a particular position rather than the value of an individual as based on his or her prior earnings.

AB 168 adds new Labor Code section 432.3, which precludes employers from relying upon an applicant's salary history information as a factor for determining whether to offer employment to an

applicant, or what salary to offer the applicant. It also precludes employers from inquiring orally or in writing, personally or through an agent, about salary history information of an applicant, including about compensation and benefits. This section also incorporates California's Equal Pay Act to clarify that prior salary history alone is not sufficient to justify any disparity in compensation based on gender, race, or national origin. Finally, this new law requires employers, upon reasonable request, to provide an applicant the pay scale for the position.

There are two exceptions to the general restriction on inquiries into salary history. First, AB 168 does not preclude an applicant from volunteering, without prompting, from disclosing salary history information to a prospective employer. If the applicant voluntarily discloses such information, the employer may consider or rely on that information in determining salary for that applicant. Second, AB 168 does not apply to salary history information that is publicly available pursuant to California or federal law.

AB 450 – New Rules When Immigration Enforcement Agents Visit the Worksite

This legislation represents the California legislature's response to some of the immigration policies enacted on the national level. AB 450 is a wide-ranging piece of legislation which, among other things, limits California employers from voluntarily complying with federal immigration authorities, imposes new notice requirements, and enacts several new statutory penalties.

- New Government Code section 7285.1 prohibits employers or their agents from voluntarily consenting to immigration enforcement officials accessing non-public areas of a place of labor, except as otherwise required by federal law, unless the immigration enforcement agent provides a judicial warrant. Under this section, employers may allow immigration enforcement officials into a non-public area, where no employees are present, for purposes of verifying whether the federal government immigration enforcement agent has a judicial warrant, so long as the

employer does not provide consent to search non-public areas in the process.

  - This section authorizes the California Labor Commissioner to recover civil penalties ranging from $2,000 to $5,000 for a first violation and $5,000 up to $10,000 for each subsequent violation. The Labor Commissioner or the California Attorney General have the exclusive authority to enforce the new statute through a civil action, and any penalties recovered shall be deposited in the Labor Enforcement and Compliance Fund.

- New Government Code section 7285.2 prohibits employers or their agents from voluntarily consenting to immigration enforcement officials accessing, reviewing, or obtaining the employer's employee records without a subpoena or judicial warrant. Additionally, employers or their agents may challenge the subpoena's validity in a federal district court. This section does not apply to I-9 Employment Eligibility Verification forms if the employer has been provided a Notice of Inspection.
  - This section authorizes the California Labor Commissioner to recover civil penalties ranging from $2,000 to $5,000 for a first violation and $5,000 up to $10,000 for each subsequent violation. The Labor Commissioner or the California Attorney General have the exclusive authority to enforce the statute through a civil action, and any penalties recovered shall be deposited in the Labor Enforcement and Compliance Fund.
- New Labor Code section 90.2 requires employers to provide several rounds of notice to employees. First, employers that receive a notice of inspection of I-9 records or other employment records by an immigration agency must post notice of this impending inspection within 72 hours of receiving notice from the immigration agency. The Labor Commissioner will be required by July 1, 2018, to develop and publish on its website a template posting that employers may use to inform employees regarding an impending I-9 form inspection by a federal immigration agency. The Notice must include: 1) the name of the immigration agency conducting the inspection, 2) the date the employer received notice, 3) the nature of the inspection, if known, and 4) a copy of the Notice of Inspection of I-9 Employment Eligibility Verification Forms for the inspection to be conducted.

Second, within 72 hours of receiving notice of the results of the employment record or I-9 forms inspection, the employer must provide to the "affected employee" (employee identified during the immigration agency inspection) and their "authorized representative" (exclusive collective bargaining representative) written notice of the employer's and affected employee's obligations arising from the results of this inspection. The notice shall relate to the affected employee only and must be hand-delivered at the workplace if possible, and by mail and email if not. The notice must contain: 1) a description of all deficiencies or other items identified in the written immigration inspection results notice related to the affected employee, 2) the time period for correcting any potential deficiencies identified, 3) the date/time of any meetings with the employer to correct the deficiencies, and 4) the employee's right to be represented during this meeting.

    - This section authorizes the California Labor Commissioner to recover civil penalties ranging from $2,000 to $5,000 for a first violation and $5,000 up to $10,000 for each subsequent violation. These statutory penalties are not required if the federal agency specifically directs the employer not to provide notice to an affected employee.

- New Labor Code section 1019.1 prohibits employers from engaging in various actions, like refusing documents that appear reasonably genuine, requiring more or different documents, etc., while determining the employment eligibility of an applicant or employee.
    - The Labor Commissioner may recover civil penalties up to $10,000.
- New Labor Code section 1019.2 prohibits employers or their agents from re-verifying the employment eligibility of a current employee at a time or in a manner required under federal law.
    - The Labor Commissioner may recover civil penalties up to $10,000. However, an employers' actions that violation this section cannot also form the basis for liability or a penalty under Labor Code section 1019.1.

AB 1008 – "Ban the Box" Bill

Like the cities of San Francisco and Los Angeles, the State of California has enacted its own legislation to limit when and how employers may consider applicants' criminal convictions. This legislation amends the Fair Employment and Housing Act ("FEHA") to preclude most employers from inquiring about an applicant's criminal record or conviction history until after a conditional employment offer is made, and imposes new notice and disclosure requirement if this information is sought.

Specifically, new Government Code section 12952 precludes employers with five (5) or more employees from including questions on employment applications seeking the disclosure of an applicant's conviction history, or to otherwise inquire or consider the conviction history of an applicant, until after a conditional employment offer is made. Employers also cannot consider, distribute, or disseminate the following specific items during any background checks: a) arrests not followed by conviction, b) referrals to or participation in a pretrial or post-diversion program, or c) convictions that have been sealed, dismissed, or expunged pursuant to law.

Before denying a position based upon an applicant's conviction history, the employer must also conduct an individualized assessment of whether the conviction history has a direct and adverse relationship with the specific duties of the position by considering: a) the nature and gravity of the offense, b) the time that has passed since the offense and completion of any sentence, and c) the nature of the job held or sought. Although not required, employers may choose to commit the results of this assessment to writing.

If, after an individualized assessment, an employer makes a preliminary decision to disqualify an applicant based on conviction history, the employer must provide written notice of this preliminary decision to the applicant. The notice must contain all of the following: a) notice of the disqualifying conviction or convictions that are the basis for the preliminary decision to rescind the offer, b) a copy of the conviction history report, if any, and c) an explanation of the applicant's right to respond to the

employer's preliminary decision before it becomes final and the deadline for doing so while also informing the applicant they may challenge the accuracy of the conviction history that is the basis for rescinding the offer and/or submit evidence of rehabilitation or mitigating circumstances.

Employers must consider the applicant's response before making a final decision. If the final decision is to deny an applicant is based in whole or in part on the applicant's prior conviction history, the employer must notify the employee in writing of the following: a) the final denial or disqualification, b) any existing procedure the employer has for the applicant to challenge this decision, and c) the right to file a complaint with the DFEH

Lastly, AB 1008 specifies that it would not affect the rights and remedies afforded by any other law, "including any local ordinance[s]."

SB 396 – Expanding Harassment Training and New Poster Requirements

This legislation amends Government Code section 12950 to require all employers to post the DFEH's poster regarding transgender rights, in addition to the posters all employers must already post regarding the prohibition of sexual harassment.

This legislation also amends Government Code section 12950.1 to require employers with 50 or more employees to include harassment prevention training based on gender identity, gender expression, and sexual orientation as a part of the already required two-hour supervisor training and education. The training and education must include practical examples inclusive of such harassment, and must be presented by trainers or educators with knowledge and expertise in those additional areas.

SB 306 – Expanded Labor Commissioner Powers

This legislation expands the Labor Commissioner's powers to investigate discrimination and retaliation claims. For example, new Labor Code section 98.7(a)(2) will permit the Labor

Commissioner to commence an investigation, even without receiving a complaint, of an employer that it suspects retaliated against an individual in violation of any law under the Labor Commissioner's jurisdiction. The Labor Commissioner is also authorized to proceed without a complaint in those instances where suspected retaliation has occurred during the course of adjudicating a wage claim under Labor Code section 98 (employee complaints), Labor Code section 90.5 (enforcement of minimum labor standards), or Labor Code sections 244, 1019, and 1019.1 (immigration-related threats).

The Labor Commissioner is also authorized to seek immediate injunctive relief during an investigation and before a determination is made. Specifically, upon finding reasonable cause to believe an employer has engaged in or is engaging in a violation, the Labor Commissioner may petition a California Superior Court for appropriate temporary or preliminary injunctive relief. The court will be authorized to award such relief and may consider not only the harm resulting directly to an individual, but also the "chilling effect" on other employees asserting their rights in determining whether temporary injunctive relief is appropriate.

This legislation also amends Labor Code section 98.7(c) to require courts to award the Labor Commissioner attorneys' fees and costs against the employer if the Labor Commissioner is a prevailing party in an enforcement action under this section. Further, an employer who willfully refuses to comply with a court order to reinstate/rehire an employee or to post a required notice or cease and desist shall also be liable for penalties up to $100 per day of non-compliance, up to a maximum of $20,000. Penalties collected pursuant to this section shall be paid to the affected employee.

New Labor Code section 98.74 allows the Labor Commissioner to issue a citation to the person responsible for the violation, directing that person to cease the violation and to take actions necessary to remedy the violation, without filing a civil action. Employers may challenge the Labor

Commissioner's determination by seeking judicial review, but the burden is now on the employer to bring a civil action to dispute the Labor Commissioner's determination, rather than the Labor Commissioner to bring a court action to enforce its orders. Willful refusal to comply with a final order under this section will subject an employer to a civil penalty of $100 per day up to a maximum of $20,000.

Finally, SB 306 amends Labor Code section 1102.5 (whistleblower retaliation) to allow employees to seek temporary or preliminary injunctive relief under new Labor Code section 1102.62, which courts may order as they deem just and proper. This temporary injunctive relief, however, does not prohibit an employer from disciplining or terminating an employee for conduct unrelated to the retaliation claim.

SB 189 – Expanded Workers' Compensation Exception for Board of Director Members

This legislation modifies the eligibility for business owners who are also employees of those businesses to voluntarily opt out of the legal mandate that all employees be covered by workers' compensation protections. The Workers' Compensation definition of "employee" presently excludes officers and directors of quasi-public or private corporations who own at least 15% of the issued stock and sign a sworn written waiver of their status and intent to waive workers' compensation protections. However, starting July 1, 2018, amended Labor Code section 3352 expands this exception to such officers or directors who own at least 10% of outstanding stock and execute a written waiver. It also expands this exception to owners or certain professional corporations who execute a written waiver of their workers' compensation rights and state under penalty of perjury that they are covered by a health insurance policy or health care plan. SB 189 also provides additional opt out options for members of cooperative corporations and close relatives of 10% owners of other companies.

Proposition 64 – Legalized Marijuana

With the passage of Proposition 64 in 2016, individuals cannot be arrested or prosecuted under California law for the possession, cultivation, and use of certain amounts of "non-medical," recreational marijuana, which is inconsistent with federal law. Retail sales are expected to begin some time in 2018. Though Proposition 64 does not directly address the workplace, employers should prepare themselves on addressing a myriad of marijuana-related issues in the workplace.

Questions? Concerns? Contact:

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