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PREPARING FOR THE NEW YEAR: SUMMARY OF CALIFORNIA'S NEW EMPLOYMENT LAWS AND OTHER YEAR-END CHANGES

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By Tom Geidt and Claire Hoffmann

As usual, the California Legislature enacted a host of laws this year that will impose strict new obligations on employers. We summarize the key laws and other changes below. Each will take effect on January 1, 2018, unless we specify otherwise.

The most significant changes are the new restrictions on using salary or criminal history information as part of the hiring process. These two laws alone make it critical that California employees reexamine all aspects of their hiring process, including their application forms, job postings, background check procedures, reference checks, and use of third-party recruiters.

Employers May Not Ask About or Use Applicants' Salaries (S.B. 168)

In an effort to reduce inequitable pay disparities, especially between men and women, new Labor Code section 432.3 prohibits all private and public employers from seeking salary history information about an applicant for employment, whether orally or in writing, personally or through an agent. Salary history information includes the applicant's *compensation and benefits*.

This means that written job applications may no longer request information about an applicant's current or past salaries or benefits, nor should employers inquire about this information in live interviews, pre-employment background checks or reference checks. Employers also are generally prohibited from relying on an applicant's salary history information as a factor in determining whether to offer employment or in deciding what salary amount to offer the applicant. The statute makes an exception for salary information that has already been disclosed as a matter of public record under federal or state law.

The statute does not prohibit applicants from disclosing their own salary information to a prospective employer *if this is done voluntarily and without prompting.* When an applicant makes a voluntary disclosure, the employer may then consider or rely upon the disclosed salary in determining what salary amount to offer the applicant. However, consistent with California's pay equity statute (Labor Code section 1197.5), employers may not allow prior salary, by itself, to justify any disparity in compensation between men and women, or a disparity that adversely affects persons of different races and ethnicities.

If an applicant asks to know the pay scale for the job in question, the prospective employer must provide it. The statute does not define "pay scale." It is not clear whether employers must create a pay scale from scratch in response to such a request, or need only provide any pay scales that may already exist. The statute merely states: "An employer, upon reasonable request, shall provide the pay scale for a position to an applicant applying for employment."

S.B. 168 does not specify any particular penalties or remedies for a violation. An affected applicant could argue that a violation is grounds for an award of civil penalties under the Private Attorneys General Act. Also, employees or applicants could cite any violation as supporting evidence in a suit brought under the pay equity statute.

Most Employers are Severely Restricted in Asking Applicants About Criminal Convictions or Denying Job Offers On That Basis (A.B. 1008).

Many cities and some other states have enacted laws – sometimes referred to as "ban-the-box" or "fair chance" laws – designed to make it easier for employees who have been convicted of crimes to enter the workforce. San Francisco's Fair Chance Ordinance has been on the books since 2014, and Los Angeles's Fair Chance Ordinance took effect in early 2017.

Now, California has adopted a state-wide fair chance law applicable to all private and public employers having five or more employees. A.B. 1008 amends the Fair Employment & Housing Act to make it unlawful for an employer to inquire into or consider an applicant's conviction history until after the employer has made a conditional offer of employment to the applicant. Employers are prohibited from including any question that seeks the disclosure of an applicant's conviction history on an application for employment before the employer makes a conditional offer.

Most employers also are prohibited from considering or disseminating information about an applicant's past arrests that were not followed by conviction; referral to or participation in a pretrial or posttrial diversion program; or convictions that have been sealed, dismissed or expunged. Employers may conduct post-offer conviction history background checks that do not conflict with the provisions of the statute.

The statute lays out a detailed set of steps employers must take if they make a post-offer inquiry into an applicant's conviction history which reveals the existence of one or more past convictions. An employer that is considering denying a job offer due to the conviction history must comply with the following procedures:

- Individualized assessment. First, the employer must make an "individualized assessment" of whether the conviction has a "direct and adverse relationship with the specific duties of the job" so as to justify denial of the job. In making this assessment, the employer must consider several factors, including (1) the nature and gravity of the offense; (2) the amount of time that has passed since the offense occurred; and (3) the nature of the job held or sought.

- Preliminary decision to disqualify applicant. If, after conducting this assessment, an employer makes a "preliminary" decision that the applicant's conviction history disqualifies the applicant from employment, the employer must notify the applicant of this preliminary decision in writing. The notice must specify the conviction or convictions that are the basis for the decision; enclose a copy of the conviction history report, if any; and inform the applicant of his or her right to submit a response before the hiring decision becomes final, challenging the accuracy of the conviction history information and providing any evidence of rehabilitation and/or mitigating circumstances.

- Consideration of Applicant's Response. The applicant must be given five business days to submit a response, and if more time is needed to gather evidence, five additional business days. Employers must consider any response that an applicant submits before making a final hiring decision.

- Final Decision to Deny Offer. If the employer makes a final decision to deny the job offer, based in whole or in part on the conviction history, it must notify the applicant in writing. This notice must inform the applicant of: (1) the final denial or disqualification; (2) any existing procedure the employer has for allowing the applicant to challenge the decision or request reconsideration; and (3) the applicant's right to file a complaint with the Department of Fair Employment & Housing.

The statute exempts employers that are required by federal, state or local law to conduct criminal background checks for employment purposes or to otherwise restrict employment based on criminal history.

Small Employers Must Provide 12 Weeks of Unpaid Parental Leave (S.B. 63)

Existing federal and California laws require employers with 50 or more employees to provide eligible employees with 12 weeks of job-protected leave to bond with a newborn or newly-adopted child, or when the employee or family member has a serious health condition. S.B. 63 expands the California Family Rights Act to employers with 20 to 49 employees employed within a radius of 75 miles. These employees may take up to 12 weeks off to bond with a new child within one year of the child's birth, adoption or foster care placement. The new law does not apply, however, to employees or family members who have a serious health condition – only to parental leave for bonding with a new child.

As with the FMLA and the existing CFRA, this parental leave is unpaid, although employees may use any accrued vacation pay or other paid time off. Covered employers must continue the employee's health benefits during the leave. S.B. 63 retains the FMLA and CFRA eligibility rule that employees must have completed one year of service with the employer and have worked at least 1,250 hours in the preceding 12 months to be eligible.

Note that employers in San Francisco with 20 or more employees already must provide employees with up to six weeks of *paid* parental leave in conjunction with the California Paid Family Leave Law under an ordinance that took effect on January 1, 2017, as we reported in an earlier Client Alert found here: http://www.gbgllp.com/assets/parental-leave-ord.pdf.

Employers Must Train Supervisors and Post a Notice on Gender Identity and Related Issues (S.B. 396).

Existing law requires employers with 50 or more employees to train supervisors on sexual harassment, bullying, and other prescribed topics within six months after each person is hired into a supervisory position and again every two years. This bill requires that employers include training on gender identity, gender expression, and sexual orientation as a component of the training. The training must include practical examples of harassment based on gender identity, gender expression and sexual orientation, and must be presented by trainers or educators with knowledge and expertise in those areas.

California employers with five or more employees also must post by January 1 a new workplace poster developed by the Department of Fair Employment & Housing entitled "Transgender Rights in the Workplace," found here: https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/11/DFEH_E04P-ENG-2017Nov.pdf

Employees Who Allege Retaliation for Asserting Labor Code Rights are Given Expanded Remedies (S.B. 306)

A new law that was strongly supported by organized labor will dramatically increase the powers granted to employees, the Division of Labor Standards Enforcement, and the courts to take action against employers accused of having retaliated against employees or job applicants under the "whistleblower" provisions of the Labor Code. The DLSE will now be able to investigate suspected retaliation with or without an employee complaint, issue citations without a hearing, and impose penalties up to $20,000 against employers it finds have engaged in unlawful retaliation.

Moreover, the DLSE can ask a superior court for a temporary or permanent injunction against "any *person* [who] has engaged in or is engaging in a violation" – that is, not just the employing entity but also individual managers or other third-party agents – merely upon a showing that there is "reasonable cause to believe" an employee has been subjected to retaliation for asserting rights under the Labor Code. There need be no showing of "irreparable harm," and the statute directs that the court "shall" issue any injunction it deems just and proper upon this "reasonable cause" showing, prior to any finding of an actual violation. Notably, the injunction cannot be stayed pending the outcome of the underlying retaliation claim. This means, for example, that a court could issue an order requiring that a discharged employee be reinstated immediately while the retaliation claim is being decided on the merits, which could take a year or longer to resolve. The statute also permits employees to file private court actions without

the DLSE, seeking similar injunctive relief and other penalties based on the same relaxed legal standards.

S.B. 306 continues the Legislature's recent trend of imposing draconian remedies and penalties against California employers accused of violating the State's complex wage and hour laws or its laws prohibiting retaliation.

California Employers Must Withhold Full Cooperation from Federal Immigration Agents (A.B. 450)

This unusual law requires employers to take various steps designed to protect undocumented workers in the face of federal immigration raids and inspections. Among other things, employers will be required to: (1) withhold consent to an immigration enforcement agent to enter nonpublic areas of a workplace unless the agent provides a judicial warrant; (2) withhold consent to an immigration agent to access or review the employer's records without a subpoena or judicial warrant, with certain exceptions; (3) provide advance written notice to employees of certain upcoming federal inspections of I-9 Forms or other employment records; and (4) notify "affected employees" that the immigration agency has identified them, following an inspection, as potentially lacking work authorization or as having deficient I-9 Forms.

An employer's non-compliance with these and other requirements can result in penalties ranging from $2,000 to $10,000 per violation. Meanwhile, California employers must still comply with applicable federal immigration laws.

While this law may be well-intentioned, it will place employers squarely in the middle of a difficult balancing act in the clash between federal and California immigration policies. Unfortunately, compliance with the law also will force employers to familiarize themselves with complex immigration law concepts to avoid incurring stiff monetary penalties.

Reminder: Employers Must Provide Notices on Domestic Violence, Sexual Assault and Stalking.

Last year, the Legislature passed a law requiring employers to provide all new employees – and current employees upon request – with a written notice informing them of their rights in the event they are victims of domestic violence, sexual assault or stalking. This includes the right to time off from work, to be free from discrimination or retaliation, and to request workplace changes for safety reasons as a reasonable accommodation. The Legislature directed the Labor Commissioner to prepare a notice for this purpose by July 2017. Earlier this year the DLSE posted the required notice on its website. It can be found here: http://www.dir.ca.gov/dlse/Victims_of_Domestic_Violence_Leave_Notice.pdf.

All California employers should now be providing this notice to *all new employees* and, upon request, to current employees. Employers have the option to develop their own form of notice,

as long as it is substantially similar in content and clarity to the Labor Commissioner's template notice.

OTHER CHANGES TAKING EFFECT ON JANUARY 1, 2018

- ***California Minimum Wage***: The California minimum wage will increase on January 1 from $10.50 to $11.00 for employers with 26 or more employees. The minimum wage for small employers will increase from $10.00 to $10.50.

- ***Minimum Salary for Exempt Status***: The minimum salary threshold for exempt status under the California administrative, executive, and professional exemptions will increase from $43,680 to $45,760 ($3,813.33 per month). This is because the exempt status threshold is tied to the California minimum wage (minimum wage x 2 x 2,080).

- ***Computer Professional Pay Minimum***: The California overtime exemption for computer professionals will increase from $88,231.36 to $90,790.07 for salaried workers, and from $42.35 to $43.58 for those who are paid by the hour.

- ***CBA Exemption Pay Minimum***: Several provisions of the Labor Code provide an exemption for employers whose collective bargaining agreements meet certain criteria. One of those criteria is that the CBA provides for pay to the bargaining unit employees of at least 30% above the California minimum wage. Thus, as of January 1, 2018, this pay threshold will increase from $13.65 per hour to $14.30. The CBA exemption applies to the Labor Code's overtime, paid sick leave, Wage Theft Prevention Act, and (for employers in specified industries) meal period provisions.

- ***Minimum Wage in California Cities***: On January 1, the minimum wage will increase in various California cities; in other cities the minimum wage will remain the same, but will increase on July 1, 2018 or some other date. We understand the basic minimum wage for most private companies as of January 1, 2018 will be: $11 in Sacramento; $11.50 in San Diego; $12 in Los Angeles, Los Altos, Malibu, Pasadena, and San Leandro; $12.86 in Oakland; $13 in Santa Clara; $13.25 in Santa Monica; $13.41 in Richmond; $13.50 in San Jose, San Mateo, Cupertino and Palo Alto; $13.60 in El Cerrito; $13.75 in Berkeley; $14 in San Francisco; $15 in Sunnyvale and Mountain View; and $15.20 in Emeryville. These ordinances frequently change, and they contain various small-employer exceptions and special provisions, so employers should consult the websites of the cities in which they operate to double-check this information.

MORE NEW SAN FRANCISCO ORDINANCES

San Francisco Now Has Its Own Salary History Ordinance

This year San Francisco enacted a salary history ordinance of its own, the "Parity in Pay Ordinance," which will become operative on July 1, 2018. The ordinance mirrors some of the

key features of the California law described above. It broadly prohibits any form of inquiry about an applicant's current or past salaries. It defines "salary" to include any form of financial compensation in exchange for labor, including but not limited to wages, commissions, and monetary emoluments. Like the California statute, it prohibits employers from considering or relying on applicants' salary histories in deciding whether to hire them or how much to pay them.

However, the San Francisco ordinance goes further than the State law in several respects. It establishes a detailed enforcement mechanism through the City's Office of Labor Standards Enforcement ("OLSE"), including stiff penalties and fines if a violation is found. The ordinance prohibits taking any adverse action against an applicant for not disclosing his or her salary history, including refusal to hire. The ordinance also generally prohibits employers from disclosing the salary of a current or former employee in response to a reference request without the employee's written consent. It imposes special requirements on contractors with the City and County of San Francisco, requiring full compliance by the contractors and their subcontractors.

Like the State law, San Francisco's ordinance exempts situations in which an applicant voluntarily discloses his or her salary without any prompting. It also allows an employer to "engage in discussion" with applicants about their "salary expectations" and about any unvested equity, deferred compensation or bonus they may forfeit if they resign from their current employment. Employers may still conduct background checks, but if the report discloses salary history, the employer may not consider the salary history in the hiring or compensation decision.

Finally, the ordinance will require San Francisco employers to post a workplace notice describing its provisions, to be prepared by the OLSE prior to July 1, 2018.

San Francisco Employers Must Comply with New Lactation Accommodation Requirements

San Francisco's "Lactation in the Workplace Ordinance" will go into effect on January 1, 2018, covering *all* employers that employ an employee within the geographic boundaries of San Francisco. Although California law already requires employers to provide "a reasonable amount of break time" and to "make reasonable efforts to provide" a location other than a bathroom for lactation, the San Francisco ordinance imposes additional requirements for lactation locations, employer policies, and recordkeeping.

The ordinance sets forth several additional requirements for an employer's lactation location: (1) privacy from co-workers and the public; (2) a clean, safe environment free of toxic or hazardous materials; (3) a surface for belongings and a place to sit; (4) access to electricity; and (5) a primary function of being a lactation location during the duration of an employee's need to express milk. Employers must notify other employees that the primary use of the lactation location is lactation, and this takes precedence over other uses. The ordinance also requires employers to provide access to a refrigerator where employees can store breast milk and

access to a sink with running water in close proximity to the lactation location. The location may be the place where the employee ordinarily works, like a private office, if it otherwise meets the requirements. The ordinance has an undue hardship exemption for employers who can show that compliance would cause "significant expense or operational difficulty when considered in relation to the size, financial resources, nature, or structure of the employer's business."

The ordinance also imposes new policy requirements, which must be included in the employee handbook, distributed to all employees upon hiring, and distributed to any employee who inquires about pregnancy or parental leave. Employers must develop and implement a policy including: (1) a statement that employees have the right to request a lactation accommodation; (2) identification of a process for requesting an accommodation; (3) a statement that the employer will respond to any such request for accommodation within five business days; (4) a provision that the employer and employee will engage in an interactive process to determine the appropriate accommodations; (5) a statement that if the employer does not provide the accommodation, the employer must provide a written response which identifies the basis for denial of the request; and (6) notice that retaliation in response to an accommodation request is prohibited. The OLSE has posted a sample policy and a sample lactation accommodation form on its website: https://sfgov.org/olse/lactation-workplace.

Finally, the ordinance's new recordkeeping requirement requires employers to retain records regarding requests for lactation accommodation, including the name of the employee, the date of the request, and a description of the response. Employers must maintain records for three years from the date of the request for accommodation, and provide access to the OLSE upon request. The ordinance provides that failure to maintain records will lead to a presumption of an ordinance violation, absent clear and convincing evidence otherwise.

For employers who employ any employee in San Francisco, this new ordinance imposes requirements well beyond those under California law.

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If you have questions about any of these developments, please contact us.

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