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Local measures may grow into state law

By Benjamin Ebbink

Recent years have witnessed a proliferation of local labor and employment ordinances throughout California, traditionally an area reserved for the state Legislature. Cities like San Francisco, San Jose and Los Angeles have created new workplace obligations on topics such as wage theft, local minimum and living wages, health care coverage, paid sick leave and countless other policy areas. Although some of the more creative — and onerous — proposals often start at the local level, they frequently work their way to the state capitol in the form of statewide legislation.

It's for this reason all California employers should pay attention to local measures, as they often provide a sneak preview of what's to come across the state. Unfortunately, 2017 is shaping up to be no different. Two of this year's most significant employment proposals had their genesis in local ordinances.

Assembly Bill 5:
The "Opportunity to Work Act"

One of the most controversial proposals this year is AB 5, introduced by Assemblymember Lorena Gonzalez Fletcher (D-San Diego). Loosely based on a San Francisco ordinance and San Jose's Measure E (approved as a ballot measure just this past November), AB 5 would require all employers with 10 or more employees in the state to first offer additional hours to current part-time workers before hiring a new employee — even through a staffing agency.

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Employers across many industries have strongly objected to this proposal. As a fundamental matter, determinations such as hiring levels and work schedules have traditionally been a matter of management discretion and control. In addition, AB 5 leaves many questions unanswered regarding how an employer is expected to comply with the bill's requirements. What mechanism may an employer use to "offer" extra hours to current employees? How long does an employer have to wait for a response before hiring a new worker? These sorts of questions raise serious doubt about how and whether an employer could even comply with this mandate.

By establishing a series of intricate steps, any of which could lead to an employer compliance mistake, AB 5 would lead to a vast increase in opportunities for lawsuits or enforcement actions filed against employers. Moreover, AB 5 would limit opportunities for new entrants into the job market — unfairly pitting "new" workers against incumbent part-time employees.

At a minimum, the state should give some time for the San Jose ordinance to be implemented and evaluated before deciding whether to impose such a requirement across the state.

Assembly Bill 1008:
Statewide "Ban the Box"

Responding to a nationwide movement, many local jurisdictions in California have recently adopted ordinances seeking to "ban the box" in local public hiring — forcibly removing questions about criminal history from the employment application and reserving consideration of any such information for later in the hiring process. In 2013, California enacted legislation to prohibit the state and local agencies from inquiring about criminal history information until they have determined that a job applicant meets the minimum qualifications for the position.

Since 2013, efforts have been underway at the local level to extend these prohibitions to private employers operating in such jurisdictions. To date, nine states and 15 cities or counties have adopted policies prohibiting private employers from inquiring into an applicant's criminal history.

It's of little surprise the most ambitious of these local proposals was enacted in our state. Effective Jan. 22, Los Angeles' expansive ban-the-box ordinance, titled the "Los Angeles Fair Chance Initiative for Hiring Ordinance," prohibits employers with at least 10 employees from asking about criminal history until a conditional offer of employment has been made. It also requires employers to engage in a "fair chance process" and prepare an individualized written assessment of the applicant to consider the job-relatedness of a conviction, time passed, mitigating circumstances and rehabilitation evidence before making a hiring decision. If the employer determines the criminal history warrants revoking a conditional offer of employment, it must provide the applicant with written notification and the opportunity to provide additional information or documentation.

The ink is barely dry on the local Los Angeles ordinance, but advocates have already proposed elevating the issue to a statewide mandate. Assembly Bill 1008, recently introduced in Sacramento by Assemblyman Kevin McCarty (D-Sacramento) largely tracks the Los Angeles ordinance and would mandate the "ban the box" and "fair chance process" for private employers throughout the state. Employers have expressed concern that this measure would make it more difficult to manage the hiring process and could result in employer liability even when an employer attempts to comply. For example, an employer that has made an offer of employment but only revokes it after reviewing an applicant's criminal history may be inviting legal action. This would also create tension for those employers worried about negligent hiring liability if they do not adequately screen applicants.

Along these same lines, the California Fair Employment and Housing Council recently approved regulations, effective later this year, which will prohibit employers from using criminal history information that has an "adverse impact" on employees based on protected categories. The rules set forth a complex procedural process and create mandatory standards for employers. If enacted, AB 1008 may create overlapping and conflicting standards, leaving employers in a quandary.

Conclusion

Assembly Bills 5 and 1008 represent merely the latest in a long trend of local labor ordinances that find their way into statewide proposals in Sacramento. With the election of President Trump and the changes his administration has already started to bring to federal labor and employment law, it is likely California employers will face even more aggressive policy activity at the local and state level.

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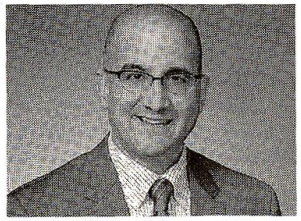

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