Fisher Phillips

ON THE FRONT LINES OF WORKPLACE LAW™

2018 Employee Handbook and Employment Law Update

Golden Gate Restaurant Association
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Revisions and Additions

- Revised handbook to address new laws and guidance, such as:
  - Updated Rest Period provision: Removed provision prohibiting employee from leaving work premises while on Rest Period based on DSLE FAQ (rev. 11/2017)
  - New Parent Leave Act (NPLA): For Employers with 20-49 employees within 75 miles

Tip and Tip Pooling Policy

- Defines “tips”
- Discusses who is eligible to receive tips
- Discusses Employer/Employee responsibility regarding tips
- Tip pooling practices

NEW San Francisco Addendum to the GGRA Handbook

- Applicable to employees working within San Francisco
- To be read in connection with GGRA Handbook
- Covers:
  - Biweekly schedules: applies to San Francisco Formula Retail Employers with 20 or more employees within San Francisco and 20 or more locations worldwide
  - Lactation breaks: Includes San Francisco Lactation Ordinance provisions
  - Paid Parental Leave: Not truly a “leave,” but supplemental compensation
  - Pack Sick Leave: Includes San Francisco Paid Sick Leave Ordinance provisions
  - Health Care Security Ordinance

A Very Busy Legislative Year

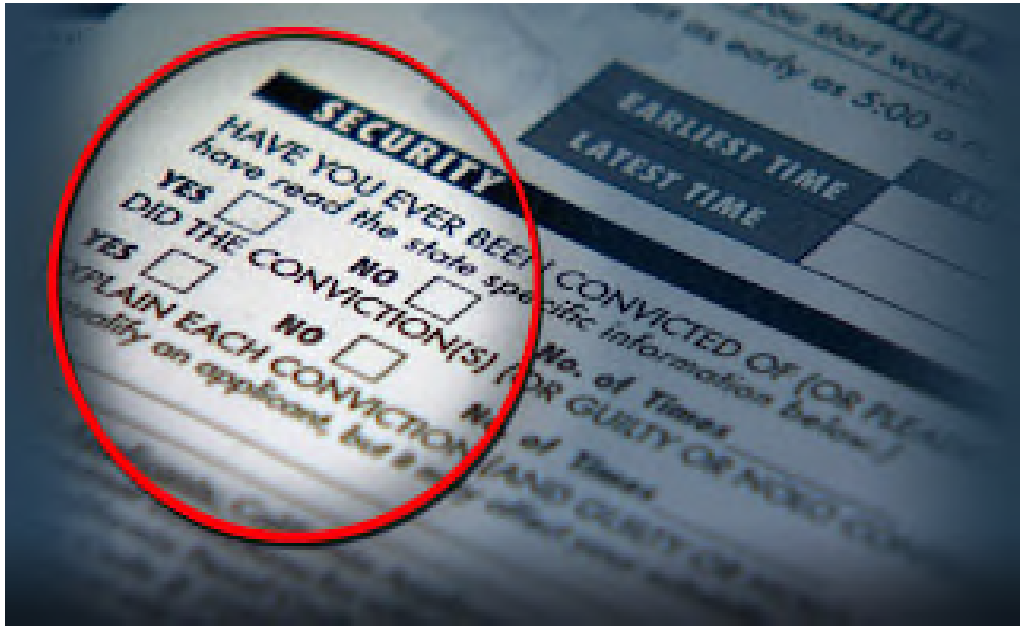
- ***2,495 bills were introduced in January!***
- Hundreds had to do with labor/employment issues.
- Legislative process dwindled these down.
- Governor Brown signed a number of bills aimed at countering Trump's agenda.

AB 1008 – Ban the Box

- Applies to employers with ***5 or more*** employees.

- ***GENERAL RULE - Cannot consider criminal history until a conditional offer of employment has been made.***

AB 1008 – Ban the Box



- Prior state law applied only to public employers (cannot inquire about criminal history until employer determines applicant meets minimum qualifications).
- This new law applies to public and ***private*** employers.
- Based on City of Los Angeles ordinance.

AB 1008 – Job Applications

- Employers are prohibited from including on any application, any question that seeks the disclosure of the applicant's conviction history *before the employer makes a conditional offer of employment*.
- Review job applications now.
- Any questions or "boxes" that ask about criminal conviction history should be eliminated.
- Can still advise applicants that this employer may consider conviction history after a conditional offer is extended.

AB 1008 – Practical Tip

- When conditional offer is made, the applicant should be asked to disclose in writing any criminal convictions, and to certify that all information provided on the form is true and correct.
- The form should include a written warning that in the event of falsification or omission of material fact, the applicant will not be hired or, if hired, will be subject to immediate termination.
- Applicant should be advised that the offer is contingent upon the outcomes of the criminal history inquiry, a background check (if conducted) and pre-employment drug test (if administered).
- ***This preserves the "honesty test" previously provided by the box on the application.***

AB 1008 – Interview Process

- An employer may not inquire into or consider conviction history *until after the employer has made a conditional offer of employment*.

- Review interview processes and questions.

- Train any staff that are involved in the hiring process.

AB 1008 – Individualized Assessment

- If the employer wants to deny the applicant the position based on the conviction history, the employer must conduct an ***individualized assessment***.
- The assessment must analyze whether the conviction has a direct and adverse relationship with the specific duties of the position.
- The **individualized assessment** must consider:
  1) Nature and gravity of offense.
  2) Time that has passed since offense.
  3) The nature of the job held or sought.

AB 1008 – Notice Requirement # 1

- If employer disqualifies applicant, must notify them in writing.
- The notice may (but is not required to) explain the employer's reasoning (but must identify the conviction used).
- Notice must contain:
  1) Notice of the disqualifying conviction or convictions that are the basis for the decision to rescind the offer.
  2) Copy of the conviction history report, if any.
  3) An explanation of the applicant's right to respond and the deadline to respond. Must inform the applicant they can submit evidence challenging the accuracy of the information or evidence of rehabilitation or mitigating circumstances.

AB 1008 – Applicant Response

- Applicant then has **5 business days** to respond to challenge accuracy of the criminal history information or submit evidence of mitigation or rehabilitation **before the employer can make a final decision**.

- If the applicant challenges accuracy of information, must be given an **additional 5 business days**.

- Employer must consider any response from applicant.

AB 1008 – Notice Requirement # 2

- If employer makes final decision to deny employment, **must notify the applicant in writing.**

- Notice must contain:
  1) The final denial or disqualification. The employer may, but is not required to, justify or explain the reasoning.
  2) Any existing procedure the employer has for challenging the decision or requesting accommodation.
  3) Notice that the employee may file a complaint with ***the Department of Fair Employment and Housing (DFEH).***

AB 1008 – Exceptions

The new law does not apply to the following:

- A position with a state or local agency required by law to conduct a conviction history background check.
- A position with a criminal history agency (Penal Code 13101).
- A position as a Farm Labor Contractor.
- A position where the employer is required by state, federal or local law to conduct criminal background checks or restrict employment based on criminal history (includes the Securities Exchange Act).

AB 1008 – Local Ordinances

Does AB 1008 supersede local ordinances (LA, SF)?

- Unfortunately no.
- The new law specifically provides that it does not affect other rights and remedies that an applicant may have under any other law, "including any local ordinance."
- Employers in local jurisdictions with ordinances will have to comply with both AB 1008 and the local ordinance.

AB 1008 – Ban the Box

Employer Dilemma

- Do I deny employment based on criminal history and risk FEHA lawsuit?

Or

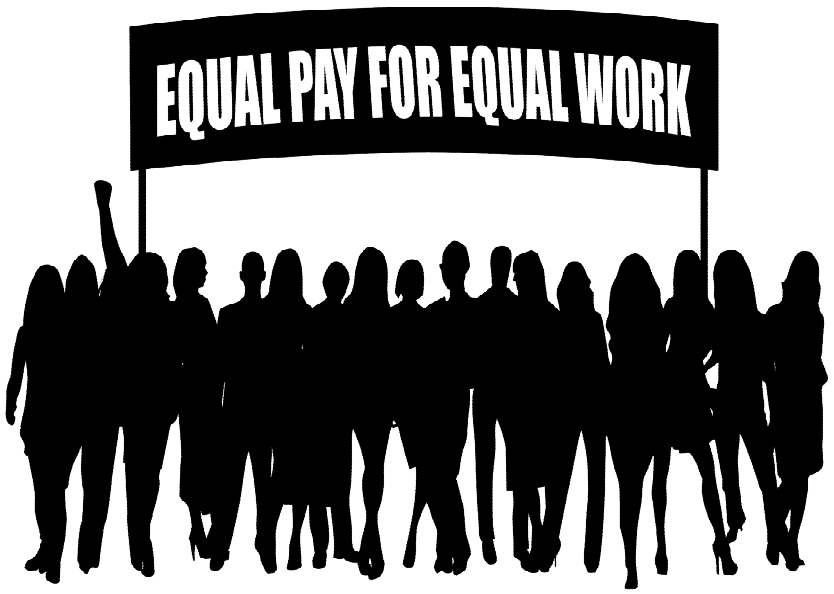
- Do I hire applicant and risk liability for negligent hiring and retention?

Relation Between AB 1008 and New FEHC Criminal History Regulations

- Some overlap.
- Similar terms and procedural requirements.
- But some contradictions as well.
- AB 1008 imposes a ***process***.
- FEHC says may have to "revisit" the regulations in light of passage of AB 1008, but no timeline.

AB 168 – No Salary History Inquiries

- Part of growing nationwide trend (Delaware, Oregon, Massachusetts, **San Francisco**, NYC, Philadelphia).
- Proponents argue that salary history inquiries perpetuate wage inequality when employers base compensation on prior rates of pay.



AB 168 – What ***Can't*** Employers Do?

- It is unlawful for an employer to seek salary history information, orally or in writing, personally or through an agent, about an applicant for employment.
  - Includes indirectly (recruiter, reference checks).
- "Salary history information" includes compensation and benefits.
- Employers cannot rely on salary history as a factor in determining whether to offer employment or what salary to offer.

AB 168 – What ***Must*** Employers Do?

- Upon reasonable request, an employer must provide the pay scale information to an applicant applying for employment.

AB 168 – Does Not Prohibit Voluntary Disclosure

- Does not prohibit an applicant from ***"voluntarily and without prompting"*** disclosing salary history information to a prospective employer.

- If the applicant does so, the employer may consider or rely on that information in determining the salary for that applicant.

AB 450 – Immigration

- Largely a response to actions of Trump Administration.
- ***Resist!***
- Puts employers right in the middle of the immigration debate.

AB 450 – No More “Voluntary Consent”

- Employer must demand a **judicial warrant** before granting ICE access to any non-public area of the worksite.
- Employer must demand a **subpoena or judicial warrant** before granting ICE access to review or obtain employee records.
- Does not apply to “Notice of Inspection” for I-9 and other forms.
- Bottom line – the employer can no longer **“voluntarily consent”** to ICE access.

AB 450 – Notice of Worksite Inspection

- Employer shall post a **notice** at the worksite (in the language the employer normally uses to communicate) within 72 hours of receiving a Notice of Inspection (NOI) with the following info:
  1) The name of the agency conducting the inspection.
  2) The date the employer received the notice.
  3) The "nature of the inspection" to the extent known.
- Written notice must also be provided to the employee's "authorized representative" (union) within 72 hours.
- Labor Commissioner will develop a template by July 1, 2018.
- Must provide an employee with a **copy** of the NOI "upon reasonable request."

AB 450 – Notice of Results

- Employer must provide each affected employee (and their representative) with a **copy** of the notice that provides the results of inspection (typically a "Notice of Suspect Documents") within 72 hours of receipt.
- Must also provide written notice (within 72 hours) to affected employees (and their representative) of the obligations of the employer and the employee with the following:
  1) Description of any deficiencies or other items identified.
  2) The time period for correcting any deficiencies.
  3) The time and date of any meeting with employer to correct deficiencies.
  4) Notice that the employee has the right to representation during any meetings with the employer.

AB 450 – No Re-Verification of Current Employees

- Employer may not **re-verify** the employment eligibility of a **current** employee at a time or in a manner not required by federal law, or that would violate any E-Verify MOU the employer has with the Department of Homeland Security.

AB 450 – Immigration

- Any violation of any of the above is punishable by civil penalty of between **$2,000 and $10,000**.
- Was amended to provide exclusive enforcement is to Labor Commissioner or Attorney General by civil action…
- …No PAGA!
- Challenged by the Trump administration!

Related Issue – SB 54 "Sanctuary State" Law

Trump Administration Response:

- *"ICE will have no choice but to conduct at-large arrests in local neighborhoods and at **worksites**."* (ICE Director Tom Homan 10/6/2017).
- *"We're taking worksite enforcement very hard this year. We've already increased the number of inspections and worksite operations, you're going to see that **significantly increase** this next fiscal year."* (ICE Director Tom Homan 10/18/2017).
- ICE Director has given instruction for workplace enforcement to increase "***four or five times***." (ICE Director Tom Homan 10/18/2017).

What will all of this mean for California employers?????

SB 63 – Parental Leave

Honey I Shrunk The CFRA!

Parental Leave for Employers of 20-49 Employees

SB 63 – Parental Leave - Overview

- Applies to employers with **20 or more** employees within 75 miles.
  - Does not apply if CFRA/FMLA applies (50 or more).
- Provides for **12 weeks** of job-protected parental leave (including birth, adoption, foster care placement).
  - Must maintain group health insurance coverage (similar to FMLA/CFRA).
- Part of ongoing effort to extend CFRA/FMLA type requirements to smaller employers.
- Contains other provisions similar to CFRA (retaliation, etc.)

SB 63 – Who's Covered?

Employers:

- At least **20 or more** employees within **75** miles. (Remember multiple worksites).
- Does not apply to employees covered under CFRA/FMLA (50 or more).
- Result - employers with **20-49** employees.

Employees:

- More than 12 months of service with the employer.
- At least 1,250 hours within the previous 12-month period.

SB 63 – What's Covered?

- **12 weeks** of leave to bond with a new child within one year of the child's birth, adoption or foster care placement.
- Parental leave ***only***. Not all of the other CFRA/FMLA types of leave.
- Unpaid leave. But employee shall be entitled to use accrued vacation, paid sick time, other accrued time off.
- Where both parents work for same company, employer is not required to grant more than 12 weeks of leave total. Employer may, but is not required, to grant leave to both parents simultaneously.

SB 306 – Retaliation

- Authorizes "**injunctive relief**" in retaliation cases.
- This is a court order forcing the employer to **reinstate** the employee while the case was pending.
- You ***can*** discipline employee for conduct unrelated to the retaliation claim.
- Allows the Labor Commissioner to cite for retaliation claims without an employee complaint.

SB 306 – Retaliation

- The employee can seek injunction on their own.
- Employee can petition for reinstatement in pending lawsuits that include a LC 1102.5 claim.
  - Whistleblower claims – internal and external.
  - Retaliation for refusing to participate in illegal activity.
- **Burden** – "reasonable cause" to believe unlawful retaliation has occurred (much lower standard than normally required for injunctions.

SB 306 – Retaliation

The Next Big Bargaining Chip

Pay up, or look at this face every day when you come to work!

SB 396 – Sexual Harassment Training (AB 1825)

The "Transgender Work Opportunity Act"

- Requires sexual harassment training to include harassment based on *gender identity, gender expression, and sexual orientation*.
- Does not increase overall "two hours" requirement.
- Also requires posting of a poster on "transgender rights."

AB 1701 – General Contractor Joint Liability

- Applies to **private** construction projects.
- General contractor is liable for any wage or fringe benefit debt owed by a subcontractor at any tier.
- Suit may be brought by Labor Commissioner, trust fund or joint labor-management committee.
- Applies to contracts entered on or after January 1, 2018.

Local Ordinance Update

Introduction

- All Employers
  - Minimum Wage Ordinance
  - Paid Sick Leave Ordinance
  - Lactation in the Workplace Ordinance (Jan. 1, 2018)
  - Consideration of Salary History (Jan. 1, 2018)

Introduction

- Employers with 20+ Employees (in any location)
  - Health Care Security Ordinance
  - Family Friendly Workplace Ordinance
  - Fair Chance Ordinance
  - Paid Parental Leave Ordinance (beginning Jan. 1, 2018)
- Formula Retail Establishments
  - Hours and Retention Protections for Formula Retail Employees Ordinance
  - Fair Scheduling and Treatment of Formula Retail Employees

San Francisco Minimum Wage

- $14.00 Per Hour
  - Increase to $15 per hour on July 1, 2018
- Applies to all employees working within San Francisco
  - At least two (2) hours of work per week in San Francisco
- Required poster in English, Spanish, Chinese, and any other language spoken by at least 5% of workforce

San Francisco Lactation in the Workplace Ordinance

- Effective Jan. 1, 2018
- Existing State law already requires accommodation for lactation
- Ordinance:
  - Lactation break (concurrently with existing break if possible)
  - Lactation location suitable and other than bathroom, multi-purpose ok
  - Undue hardship defense
  - Written and published policy for lactation accommodation
  - OLSE enforcement and penalties

San Francisco Consideration of Salary History

- Effective July 1, 2018
- Applies to any person applying for work to be performed in San Francisco
- Bans employers from considering current or past salary in determining whether to hire an applicant or what salary to offer the applicant
- Prohibits employers from asking applicants about current or past salary
- Prohibits disclosure of current/former employee's salary history without express authorization

San Francisco Family Friendly Workplace Ordinance

- Application to Employers: 20+ Employees
- Application to Employees
  - Has been employed by employer for at least six (6) months
  - Regularly works at least eight (8) hours per week in San Francisco

San Francisco Family Friendly Workplace Ordinance

- Employers must allow employees to request a flexible or predictable working arrangement to assist with caregiving responsibilities for
  - Child/children under the age of 18
  - Family member with a serious health condition
    - Spouse, domestic partner, child, parent, sibling, grandchild, grandparent
  - A parent age 65+ of the employee

San Francisco Family Friendly Workplace Ordinance

- Request may include
  - Number of hours employee is required to work
  - The times when the employee is required to work
  - Where the employee is required to work
  - Work assignments or other factors
  - Predictability in work schedule

San Francisco Family Friendly Workplace Ordinance

- Must meet with employee within 21 days of request
- Must provide employee with response within 21 days of meeting
- Must explain denial of request in writing and provide bona fide business reason
  - Identifiable cost (productivity; retraining/hiring; transfer)
  - Detrimental effect on ability to meet customer demand
  - Inability to organize work around other employees
  - Insufficiency of work to be performed during time employee proposes

San Francisco Fair Chance Ordinance

- Prohibits employers from ever considering:
  - Arrest not leading to a conviction
  - Participation in or completion of diversion or deferral of judgment program
  - Conviction that has been judicially dismissed
  - A conviction from the juvenile justice system
  - A conviction that is more than 7 years old
  - Information pertaining to an offense other than a felony or misdemeanor (e.g., an infraction)

San Francisco Fair Chance Ordinance

- Prohibits employers from considering other conviction history until after either
  - First live interview with person or
  - After a conditional offer of employment
- If employer intends to take adverse action against an employee based on conviction history, employer must first notify employee and give employee opportunity to explain

San Francisco Paid Parental Leave Ordinance

- Requires employers to supplement employee's California Paid Family Leave (PFL) benefits
- Provides eligible employees working in San Francisco with 6 weeks fully paid leave to bond with new child (newborn, adoptive, or foster)
- Applies to employers of 20 or more employees January 1, 2018!
- Covered employees
  - 180 days of employment
  - 8 hours per week in SF
  - 40% of all hours in SF
  - Eligible for Paid Family "Leave"
- Supplemental Compensation during six-week leave period up to cap

San Francisco PPLO: Covered Employer

- July 1, 2017: Employers with 35+ employees
- Jan. 1, 2018: Employers with 20+ employees
- Fluctuating Workforce: Average employees over PPLO Lookback Period
  - 12 weekly, 6 semi-monthly or bi-weekly, or 3 monthly pay periods before the first day of the employee's leave
    - Used to determine whether employer is covered when # of employees fluctuates
    - Used to determine whether employee is covered when hours fluctuate
    - Used to calculate average normal weekly wage when wages fluctuate

San Francisco PPLO: Covered Employee

- Works in San Francisco
- Commenced work for covered employer at least 180 days before leave period
- Works at least 8 hours per week in San Francisco for covered employer
- Work in San Francisco at least 40% of weekly hours for covered employer
- Apply for and receive California PFL benefits from EDD

San Francisco PPLO: Four Steps for Employers

San Francisco PPLO: Calculating Supplemental Compensation

- Sum of EDD PFL benefit and Supplemental Compensation equals 100% of normal gross weekly wages (capped at $2,133 for 2017)
  - EDD PFL Benefit: Amt. paid to employee by EDD
    - Typically 55% of normal weekly wages, up to cap of $1,173
    - Found on EDD Notice of Computation
  - Normal Gross Weekly Wages: Employee's salary during week prior to leave or, if weekly wages fluctuate, average wages over PPLO Lookback Period

San Francisco PPLO: Calculating Supplemental Compensation

Calculation Example

A – B = C

EDD Base Period Weekly Wage: $1,000

PPLO Normal Weekly Wage: $1,000

A.	Normal Weekly Wage	$1,000
B.	EDD Weekly Benefit	-$550
C.	Weekly Supplemental Compensation:	$450

San Francisco PPLO: Calculating Supplemental Compensation

- Employers may require employee to agree to use up to 2 weeks of accrued unused vacation to cover supplemental compensation payments
- For PTO plans that do not distinguish between sick and vacation, employer may require the employee to agree to use up to 2 weeks of accrued PTO only in excess of 72 hours

San Francisco Paid Parental Leave Ordinance

- What if the employee does not qualify for FMLA/CFRA/other leave?
  - Although PPLO does not explicitly require employer to provide an employee with 6 weeks off to bond with a new child, it contains very robust anti-retaliation provisions, which prohibit retaliating against an employee for exercising any of his/her rights under the Ordinance

Final Questions

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Thank You

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