FEHC Proposes Regulations to Implement California's New "Ban the Box" and "New Parent Leave" Laws

Insights
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Recently, the California Fair Employment and Housing Council (FEHC) proposed new draft regulations to implement provisions of two key employment statutes enacted last year.

Last year, Governor Brown signed Assembly Bill 1008 to enact new "Ban the Box" provisions that generally prohibit an employer from considering conviction history until ***after*** a conditional offer of employment has been made. In addition, the Governor signed Senate Bill 63, which enacted the New Parent Leave Act to expand parental leave rights to employers of 20 to 49 employees. Both of these statutes became effective on January 1, 2018.

The FEHC will be discussing these proposed regulations at its upcoming meeting and public hearing on April 4, 2018 in Los Angeles, and there will be an opportunity for you to offer your thoughts before they are finalized. What do you need to know about these proposals?

Proposed "Ban the Box" Regulations
Last year, the FEHC adopted regulations related to the use of criminal conviction history in employment. Among other things, these regulations set forth the legal theory of "adverse impact" and its relationship to the Fair Employment and Housing Act and criminal conviction history. These regulations became effective on July 1, 2017. Check out our summary from last year for further discussion of these regulations.

However, following the enactment of the "Ban the Box" law, it became necessary for the FEHC to amend these regulations to incorporate the provisions of the new law into the existing regulatory scheme.

For the most part, the proposed regulations track the statutory language of AB 1008. However, in two important areas the proposal seeks to "clarify" the regulations by addressing issues not specifically contained in AB 1008.

Calculation of "Five Business Days" Requirement for Applicant Response

Under AB 1008, if an employer decides to revoke a conditional offer of employment after reviewing criminal conviction history, it is required to notify the applicant in writing and provide them at least "five business days" to respond. In order to "avoid disputes over the meaning of the statute's

potentially ambiguous use of 'five business days'," the FEHC proposes to specify that the "five business days" is calculated from the ***date of receipt*** of the notice by the applicant.

The proposed regulations also add the following language:

"If notice is transmitted through a format that does not provide a confirmation of receipt, such as a written notice mailed by an employer without tracking delivery enabled, the notice shall be deemed received five calendar days after the mailing is deposited for delivery for California addresses, ten calendar days after the mailing for addresses outside of California, and twenty calendar days after mailing for addresses outside of the United States."

Examples of Rehabilitation or Mitigating Circumstances

AB 1008 also provided that the applicant's response to a revocation of a conditional offer of employment may include evidence of rehabilitation or mitigating circumstances, or both. The statute does not specify what types of evidence may be used by the employee in this regard. The proposed regulations attempt to provide some clarity by specifying:

"*The types of evidence that may demonstrate rehabilitation or mitigating circumstances may include, but is not limited to: the length and consistency of employment history before and after the offense or conduct; the facts or circumstances surrounding the offense or conduct; and rehabilitation efforts such as education or training."*

It should be noted that this is not an exclusive or exhaustive list. An employee could present other evidence in an attempt to show rehabilitation or mitigating circumstances, but this language provides some illustrative examples. While AB 1008 allows an employer to make a final decision to deny employment, it requires the employer to consider information submitted by the applicant before making that final decision.

Proposed "New Parent Leave Act" Regulations

SB 63 enacted the "New Parent Leave Act" (NPLA) to make it an unlawful employment practice for an employer of 20 to 49 employees to refuse to allow an eligible employee 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 care placement. The NPLA also prohibits an employer from refusing to maintain and pay for coverage under a group health plan during the duration of the leave or retaliating against an employee for exercising their NPLA rights.

Existing regulations address other family leave provisions under the California Family Rights Act (CFRA), which applies to employers with at least 50 employees (and largely mirrors the federal Family and Medical Leave Act (FMLA)). The FEHC states that it is necessary to amend these current regulations to incorporate and implement the new NPLA.

SB 63 provided that, to the extent the CFRA regulations are "within the scope of, and not inconsistent with" the new law, the FEHC would be required to incorporate those regulations by reference to govern leave under the NPLA.

For the most part, the proposed regulations simply incorporate references to the NPLA into the existing CFRA regulations. However, there are a few important areas in which the FEHC proposes to distinguish the NPLA. They state that this is necessary to "identify differences between CFRA and NPLA, namely jurisdictional differences and the latter's lack of a 'key employee' defense and the lack of a provision allowing employers to mandate the use of vacation time or other accrued paid time off."

No "Key Employee" Defense Under NPLA

Under the CFRA, an employer may refuse to reinstate certain "key employees" to the same position or a comparable position following CFRA leave if certain conditions are met. However, SB 63 contained no statutory language providing for a similar "key employee" exemption.

The FEHC interprets this to mean there is no similar "key employee" defense to reinstatement under the NPLA. Therefore, it proposes to add language to the regulations to state that an "employer ***may not*** refuse to reinstate a 'key employee' at the conclusion of the employee's NPLA leave."

Employer May Not Force the Use of Paid Accrued Time Off Under NPLA

The CFRA regulations provide that an employee may elect to use, or an employer may ***require*** an employee to use, any accrued vacation time or other paid accrued time off (including undifferentiated paid time off) that the employee is eligible to take during the otherwise unpaid portion of the CFRA leave.

Again, because SB 63 does not specifically mention the ability of an employer to do so in the context of the NPLA, the FEHC interprets this to be constitute a significant distinction between CFRA and the NPLA.

Therefore, the proposed regulations would expressly state, "An employer does not have the right to require an employee to use accrued paid time off during an otherwise unpaid portion of a NPLA leave, though an employee may elect to do so."

Relationship Between CFRA, FMLA and NPLA

Many employers have expressed confusion over the provisions of the existing CFRA and FMLA (which apply to employers with 50 or more employees), and the NPLA (which applies to employers with 20 to 49 employees).

The FEHC states that these proposed regulations attempt to explain the relationship between CFRA leave, FMLA leave, and NPLA leave. In its Initial Statement of Reasons explaining the need for the regulations, the FEHC states that "NPLA is a separate and distinct entitlement only available to employees of employers with 20-49 employees."

Therefore, the proposed regulations state:

*"**If an employee is covered by CFRA Leave and FMLA Leave, then the employee is not also entitled to leave under the NPLA**. Thus, for an eligible employee that is employed by an employer who directly employs 50 or more persons within any state of the United States, the District of Columbia or any territory or possession of the United States to perform services for a wage or salary ("covered employer"), the employee's entitlement to leave for the birth, adoption, or foster care placement of the employee's child or for the employee's own serious health condition or that of their child, parent, or spouse comes from the CFRA and FMLA. **If an Eligible employee is employed by an employer who directly employs 20 or more persons within any state of the United States, the District of Columbia or any territory or possession of the United States to perform services for a wage or salary (but less than 50 persons), the employee's entitlement to leave for the birth, adoption, or foster care placement of the employee's child comes from the NPLA and the employee is not entitled to other forms of leave provided by the CFRA and FMLA (e.g. leave for the employee's own serious health condition or the serious health condition of the employee's child, parent or spouse)**."* (Emphasis provided).

What's Next?
These are proposed regulations, which means they may change before they are finally adopted. However, this proposal gives you a sense of how the FEHC views these issues, particularly those discussed above for which it attempts to provide "clarity."

As mentioned above, the FEHC will be discussing these proposed regulations at its upcoming meeting and public hearing on April 4, 2018 in Los Angeles. Interested parties may present statements or arguments at that time. In addition, any interested person may submit written comments to the FEHC prior to 5:00 p.m. on April 4, 2018.

It is likely that these regulations will be adopted and go into effect later this year. We'll keep you posted on changes to the draft rules and will let you know when they are final and go into effect.

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