# California Employers Face Significant New Requirements

BANNING THE BOX AND PROHIBITING PAY HISTORY INQUIRIES AMONG NEW STATE LAWS

Insights
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California employers will soon need to adjust themselves to a new reality once again as a number of new workplace restrictions have been passed by the state legislature and just signed into law by Governor Jerry Brown. State lawmakers were quite active this year, with almost 2,500 bills introduced and over 1,000 making it to the Governor's desk. Of those approved by yesterday's October 15 deadline, a substantial number relate to the workplace, and several will be quite significant for employers.

Perhaps the theme of this legislative session was California's vocal opposition to President Trump and his policies. From immigration to environmental standards to pay equity to countless other areas, the California State Legislature was active in passing bills designed to respond to, or anticipate actions of, the Trump administration. Here are summaries of the more important workplace bills that were signed this year about which you need to be aware. Unless otherwise noted, these new laws go into effect on January 1, 2018.

**California "Bans the Box"**
"Ban the box" laws seek to restrict when an employer may consider criminal conviction history information concerning applicants for employment. Nationally, 29 states and over 150 cities and counties have enacted some type of "ban the box" law. Some of these laws only apply to government sector employers when they hire their own employees. However, nine states and 15 cities have gone further and adopted ban the box laws that apply to private sector employers. In California, this includes San Francisco and Los Angeles, which have already adopted their own local ordinances to ban the box.

However, with the enactment of Assembly Bill 1008 (McCarty), California joins the list of states that have adopted law that apply to both public and private employers. You can read our longer summary of this bill here.

Largely based on the City of Los Angeles "ban the box" ordinance, AB 1008 applies to public and private employers with *five or more* employees. The new law prohibits an employer from including on any application, before the employer makes a conditional offer of employment, any question that seeks the disclosure of the applicant's conviction history. For many California employers, this will

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necessitate revising initial employment applications to remove “boxes” or questions that ask applicants to disclose criminal convictions.

The new law also prohibits an employer from “inquiring into or considering” the conviction history of the applicant until after a conditional offer of employment has been made. This means employers cannot ask questions of the applicant about conviction history during the hiring and interview process, until an offer of employment is made. And this also means not utilizing background checks that reveal criminal conviction history until after an offer is made.

Under AB 1008, if an employer decides to deny employment to the applicant solely or in part because if the applicant’s conviction history, the employer must embark on a specified process. In some local ordinances, this procedure is referred to as a “fair chance” process. First, employers must make an individualized assessment of whether the applicant’s conviction history has a direct and adverse relationship with the specific duties of the job that justify denying the applicant the position. In making this assessment, the employer is required to consider (1) the nature and gravity of the offense or conduct, (2) the time that has passed since the offense or conduct and completion of the sentence, and (3) the nature of the job held or sought.

Second, if the employer makes a preliminary decision that the applicant’s conviction history disqualifies the applicant for employment, the employer must notify the applicant in writing. The notification must contain (1) notice of the disqualifying conviction that is a basis for the preliminary decision, (2) a copy of the conviction history, if any, and (3) an explanation of the applicant’s right to respond before the decision becomes final and the deadline by which to respond.

Third, after the employer provides the written notification, the applicant shall have at least five business days to respond before the employer may make a final decision. The applicant’s response may include submission of evidence challenging the accuracy of the conviction history, evidence of rehabilitation or mitigating circumstances, or both. If the applicant notifies the employer that they dispute the accuracy of the conviction history and are obtaining evidence to support that assertion, the applicant shall have five additional business days to respond to the notice.

Finally, if (after receiving the response from the applicant), the employer makes a final decision to deny employment, it must notify the applicant in writing. This notice must notify the applicant of (1) the final denial or disqualification, (2) any existing procedure the employer has for the applicant to challenge the decision or request reconsideration, and (3) the right to file a complaint with the Department of Fair Employment and Housing (DFEH).

***Employer Takeaway -*** AB 1008 goes into effect on January 1, 2018. Prior to that date, you should carefully review your employment applications and hiring processes to ensure compliance with the law’s requirements – specifically not seeking or relying on criminal history information until *after* a conditional offer of employment has been made. If you wish to rely on criminal history information, you will need to understand and follow the specific individualized assessment and employee notice requirements contained in the new law.

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requirements contained in the new law.

**California Bans "Salary History" Inquiries**

California has joined the ranks of a growing number of jurisdictions to prevent employers from asking about salary history information. Proponents of salary history bans generally argue that they are necessary to eradicate the gender pay gap, which they contend is exacerbated when employers base compensation on prior rates of pay which may reflect historic inequities.

On October 12, Governor Jerry Brown signed Assembly Bill 168 (Eggman), a bill that prohibits public and private employers from seeking or relying upon the salary history of applicants for employment. You can read our longer summary of this bill here.

AB 168 makes it unlawful for an employer to seek salary history information, orally or in writing, personally or through an agent, about an applicant for employment. "Salary history information" includes compensation and benefits. In addition, the new law prohibits an employer from relying on the salary history information of an applicant as a factor in determining whether to offer employment to an applicant or what salary to offer an applicant. However, AB 168 specifies that it 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.

In addition, the new law provides that it does not apply to salary history information disclosable to the public pursuant to federal or state law, such as the California Public Records Act or the federal Freedom of Information Act. Salary information for public employees is largely a matter of public record.

AB 168 also requires an employer, upon reasonable request, to provide the pay scale information to an applicant applying for employment. Therefore, if an applicant inquires as to how much a specific position pays, the employer is required to provide the pay scale for that position.

***Employer Takeaway* -** You should carefully review your employment applications and hiring processes to ensure that they do not impermissibly inquire into, or rely upon, salary history information. In particular, job applications and new hire packets should be amended to remove any inquiries into prior salary history. In addition, all staff involved in the hiring process should be trained about the law's new requirements and how it impacts the types of inquiries and questions that are permissible and not permissible.

**California Enacts Job-Protected Parental Leave for Smaller Employers**

For several years, labor and worker advocates have pushed for legislation that would extend job-protected unpaid leave rights for new parents who work for smaller employers. Both the federal Family and Medical Leave Act (FMLA) and the California Family Rights Act (CFRA) apply to employers with 50 or more employees.

Those advocates just gained a victory when Governor Jerry Brown signed Senate Bill 63 (Jackson) – entitled the "New Parent Leave Act" – into law to provide up to 12 weeks of job-protected parental

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leave for employers with 20 or more employees. Read our longer summary about this bill here.

The new law applies to employers that employ at least 20 employees within 75 miles. It does not apply to an employee who is covered under both CFRA and the FMLA, which apply to employers with 50 or more employees. Therefore, the practical effect is that this bill applies to employers with between 20 and 49 employees within 75 miles of each other. The new law applies to employees with more than 12 months of service with the employer, and who have at least 1,250 hours of service with the employer during the previous 12-month period.

SB 63 makes it unlawful for a covered employer to refuse to allow a covered employee to take up to 12 weeks of parental leave to bond with a new child within one year of the child's birth, adoption, or foster care placement. It is important to note that this leave is not for the entire panoply of employee and family member "serious health conditions" for which leave is available under CFRA and the FMLA. Rather, leave under this new law is limited to the "parental leave" purposes described above.

In addition, if before the start of the leave the employer does not provide the employee with a guarantee of employment in the same or a comparable position following the leave, they will be deemed to have refused to allow the leave. In other words, a covered employer is required to provide up to 12 weeks of "job-protected" unpaid leave to covered employees for new parental responsibilities.

The leave under this new law is unpaid. However, the employee shall be entitled to utilize accrued vacation pay, paid sick time, other accrued paid time off, or other paid or unpaid time off negotiated with the employer, during the period of parental leave. In addition, similar to CFRA, it is unlawful for an employer to refuse to maintain and pay for continued group health coverage for employees during the duration of the parental leave at the same level and under the same conditions that would have been provided had the employee continued to work. Just as under CFRA, where both parents are employed by the same employer, SB 63 specifies that the employer is not required to grant leave allowing the parents leave totaling more than 12 weeks. An employer may, but is not required to, grant leave to both employees simultaneously. Finally, the new law prohibits an employer from discriminating against an employee for exercising their rights, or from restraining or denying any rights provided under this law.

Last year, Governor Brown vetoed a similar bill, SB 654 (Jackson) that provided only six weeks of parental leave. In his veto message, he raised concerns about the burdens on small businesses and the threat of litigation. In an apparent attempt to respond to the Governor's veto message, the author of SB 63 inserted language at the last minute to establish a parental leave mediation pilot program within the Department of Fair Employment and Housing. Under this pilot program, an employer may (within 60 days of receiving a right-to-sue notice) request that all parties participate in mediation. An employee is not allowed to pursue a civil action until mediation is complete. However, the law's language says mediation is "complete" when, at any time, either party notifies DFEH that it is electing not to participate in, or is withdrawing from, the mediation. Therefore, all a plaintiff has to

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do to avoid the obligation to mediate it to send a letter stating that they choose not to participate in, or withdraw from, the mediation. That seems to be a pretty empty promise, and not a very meaningful requirement.

***Employer Takeaway -*** SB 63 goes into effect on January 1, 2018. Prior to that date, if you are an employer with between 20 and 49 employees within 75 miles, you should carefully review and revise your leave policies to comply with the new requirements of the law.

**California Jumps Into the Immigration Fray – And Employers Are Put Right In The Middle**
Immigration has been a hot topic in Sacramento this year, as the California State Legislature was active on a number of fronts to respond to anticipated immigration actions of the Trump administration. In the employment context, Governor Brown signed Assembly Bill 450 (Chiu) which, among other things, prohibits employers from voluntary consenting to Immigration and Customs Enforcement (ICE) access to the worksite without a judicial warrant, requires employers to provide their workers with notice of certain immigration enforcement actions, and imposes new statutory penalties for violations of the law. You can read our longer summary of this bill here.

Under current federal immigration law, when federal immigration authorities show up at a worksite to engage in enforcement activity, an employer may allow authorities to access nonpublic portions of the worksite by either requiring a judicial warrant or voluntarily consenting to access. AB 450 essentially removes the ability of employers to "voluntarily consent" to ICE access in this manner.

Employers (or persons acting on behalf of employers) would be prohibited from providing voluntary consent for access, and instead would have to insist on a judicial warrant. However, the new law does not prohibit the employer from taking the immigration enforcement agent to a nonpublic area, where employees are not present, for the purposes of verifying the warrant.

An employer that violates this requirement is subject to a $2,000 to $5,000 civil penalty for a first violation, and $5,000 to $10,000 for each subsequent violation. However, the bill provides that enforcement of these penalties will be under the exclusive authority of the Labor Commissioner or the Attorney General, and any penalties recovered will be deposited in the Labor Enforcement and Compliance Fund. Therefore, (and since this provision is in the Government Code rather than the Labor Code), there will be no private enforcement under the Labor Code Private Attorneys General Act (PAGA).

Similarly, AB 450 prohibits an employer (or person acting on behalf of the employer) from granting voluntary access to the employer's employee records without a subpoena or judicial warrant. This does not apply to I-9 forms and other documents for which a Notice of Inspection has been provided to the employer. Similarly, an employer that violates this requirement is subject to a $2,000 to $5,000 civil penalty for a first violation, and $5,000 to $10,000 for each subsequent violation.

The new law also imposes a number of new notification requirements on California employers. First, employers must provide current employees with a notice of any inspection of I-9 forms or other

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employers must provide current employees with a notice of any inspection of I-9 forms or other employment records within 72 hours of receiving notice of the inspection. Written notice must also be provided to any collective bargaining representative within this same time frame. The Labor Commissioner is tasked with developing a template that employers may use by July 1, 2018. Second, upon reasonable request, an employer must provide an affected employee with a copy of a Notice of Inspection of I-9 forms. Third, employers must provide affected employees (and their representative) a copy of the notice that provides the inspection results within 72 hours of receiving it, as well as written notice of the obligations of the employer and the affected employee arising from the results of the inspection. This notice shall be delivered by hand at the workplace if possible, or by mail and email if hand delivery is not possible. An employer who fails to provide these required notices is subject to a $2,000 to $5,000 civil penalty for a first violation, and $5,000 to $10,000 for each subsequent violation, recoverable by the Labor Commissioner.

AB 450 also prohibits an employer from re-verifying the employment eligibility of a current employee at a time or in a manner not required by federal law. The Labor Commissioner is authorized to recover civil penalties of up to $10,000 for violations.

***Employer Takeaway –*** This new law goes into effect on January 1, 2018. In the meantime, you should review your policies and procedures to verify compliance with the law. In particular, you should train supervisors and front-line staff on how to handle the law's new requirements with respect to judicial warrants and subpoenas. It may be prudent to have a documented policy in place on how to handle these situations when they arise. In addition, you will have to pay close attention to the employee notification provisions of the bill, and make sure that you are providing any required notices within the applicable timelines.

**New Retaliation Bill Tilts Law In Favor Of Employees**

On October 3, Governor Jerry Brown signed into law Senate Bill 306 (Hertzberg), a bill that dramatically tilts the scales in favor of employees when it comes to retaliation and whistleblower claims. Among other things, SB 306 allows an employee or the Labor Commissioner to obtain a preliminary injunction (ordering the employee to be reinstated pending their retaliation claim) upon a mere showing of "reasonable cause" that a violation of the law occurred. Under this new law, employers may be forced to put an employee back to work pending the two or three years it can take to litigate a claim that the employee was subject to unlawful retaliation. You can read our longer summary of this bill here.

The most concerning aspect of SB 306 is that it dramatically reduces the burden of proof for injunctive relief in retaliation cases. Currently, the general standard for a temporary restraining order or a permanent injunction requires the individual to establish (1) irreparable harm if the injunctive relief is not granted, (2) likelihood of success on the merits of the claim, and (3) that these interests outweigh the harm that the defendant will suffer from granting the injunctive relief. However, SB 306 changes all of that for workplace retaliation claims and greatly reduces the burden of proof in these cases. Under SB 306, relief shall be granted under a mere showing that

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“reasonable cause” exists to believe the employee has been unlawfully discharged or subjected to adverse action.

This is a much lower burden of proof than that which exists for any other form of injunctive relief. In addition, SB 306 instructs the court to consider “the chilling effect on other employees asserting their rights under those laws in determining if temporary injunctive relief is just and proper.” Thus, the new law reduces the standard of proof for obtaining such relief, while at the same time instructing the court to consider an entirely new factor that exclusively favors the employee. However, SB 306 does specify that any temporary injunctive relief shall not prohibit an employer from disciplining or terminating an employee for conduct that is “unrelated to the claim of retaliation.”

SB 306 also authorizes the Labor Commissioner, “with or without receiving a complaint” to commence an investigation into alleged retaliation. Currently, the Labor Commissioner is authorized to conduct such investigations only after an employee complaint.

SB 306 also establishes a new citation process for the enforcement of claims of retaliation and discrimination, and provides that if the Labor Commissioner is a prevailing party in an enforcement action, the court shall determine the reasonable attorney’s fees incurred by the Labor Commissioner and enforce that amount against the employer. SB 306 also provides that any employer that willfully refuses to comply with an order of the court to hire, promote, or restore an employee, or refuses to comply with an order to post a specified notice, shall be subject to a civil penalty of $100 per day of noncompliance, up to $20,000. These penalties are paid to the affected employee.

***Employer Takeaway* –** You should be aware of these new provisions and procedures for litigating retaliation or whistleblower claims. The bottom line is that it will be much easier for the employee or the Labor Commissioner to obtain injunctive relief in retaliation cases.

**Mandated Sexual Harassment Training Must Now Include Gender Identity, Gender Expression, And Sexual Orientation**

Under current law, employers with 50 or more employees are required to provide at least two hours of training regarding sexual harassment to all supervisory employees every two years. This is often referred to as “AB 1825 training,” named after 2005 the legislation that mandated this requirement. Senate Bill 396 (Lara) now provides that, as a component of that training, a covered employer shall also provide training on harassment based on gender identity, gender expression, and sexual orientation.

The new law does not expand the total number of hours that must be devoted to the training overall, but the two hours of mandated training must include a component regarding these additional topics. The new law specifies that the training and education “shall include practical examples inclusive of harassment based on gender identity, gender expression, and sexual orientation, and shall be presented by trainers or educators with knowledge and expertise in those areas.” In addition, SB 396

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requires employers to display a poster (developed by the Department of Fair Employment and Housing) regarding transgender rights in a prominent and accessible location in the workplace.

***Employer Takeaway -*** You should ensure your mandated AB 1825 training includes training on harassment based on gender identity, gender expression, and sexual orientation under the standards articulated above. You should also ensure you display the mandated poster on transgender rights developed by DFEH in a prominent and accessible location in the workplace.

**California Enacts Joint Liability For General Contractors On Construction Projects**

Assembly Bill 1701 makes a general contractor on a private construction project liable for wage and fringe benefit liabilities incurred by subcontractors at any tier of the project. Although California law generally provides for joint liability for general contractors and subcontractors on public works projects, AB 1701 extends this liability to private construction projects. This liability would apply to contracts entered into on or after January 1, 2018.

Under AB 1701, the general contractor is liable for unpaid wages, fringe or other benefit payments or contributions, including interest, but not penalties and liquidated damages. Enforcement may be pursued through a civil action by the Labor Commissioner, a third party which is owed fringe or benefit payments (such as a union trust fund), or a joint labor-management cooperation committee. AB 1701 also authorizes the general contractor to request payroll records and information about the project and subcontractors, from the subcontractor and lower tier subcontractors.

***Employer Takeaway –*** General contractors should consult with legal counsel regarding potential liability on projects entered into on or after January 1, 2018, in order to mitigate against any liability. You may be wise to pay close attention to the subcontractors you are hiring on projects, particularly with respect to prior claims for unpaid wages and fringe benefit payments. During the project, you should consult with counsel to consider whether to take advantage of the bill's provisions that allow you to access payroll records and other information. Finally, the new law expressly states that it does not prevent you from establishing by contract "any otherwise lawful remedies" against a subcontractor for liability. You should consult with counsel regarding the possibility of including remedies such as indemnification into their contracts with subcontractors.

**Conclusion**

If you have any questions about these new laws, or how they may affect your organization, please contact your Fisher Phillips attorney or one of the attorneys in any of our California offices:
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