October 2017

New Laws Affecting California Employers in 2018

The following is a summary of the most significant new laws that will affect California employers in the upcoming year.

New Parent Leave Act

Employers with 50 or more employees are already familiar with the obligation to provide baby bonding leave under the California Family Rights Act ("the CFRA").

Senate Bill 63 amends Section 12945.6 of the Government Code to expand the "baby bonding" protections of the CFRA to smaller employers. Effective January 1, 2018, employees who have at least 1,250 hours of service with the employer during the previous 12-month period and who work at a worksite in which the employer employs 20 to 49 employees within 75 miles will be permitted to take up to 12 weeks of unpaid parental leave to bond with a new child.

The parental leave must be taken within one year of the child's birth, adoption, or foster care placement. The employee may use accrued vacation pay, paid sick time, other accrued paid time off during the leave.

The employer must guarantee reinstatement of employment for the employee in the same or comparable position at the end of the leave.

If the employer employs both parents and they are entitled to leave pursuant to this law for the same birth, adoption, or foster care placement, the parents' mandated parental leave is capped at the 12 weeks that would be granted to one employee. The employer may, but is not required to, grant simultaneous leave to the parents.

The employer is required, during the employee's leave, to maintain health coverage under a group health plan at the same level and under the same conditions that would have been provided to the employee if the employee were not on leave (not to exceed 12 weeks over the course of the 12-month period following commencement of the parental leave). An employer can recover the costs of maintaining the health plan for employees who do not return to work after their leave is exhausted if the failure to return is due to a reason other than a serious health condition or other circumstances beyond the employee's control.

To the extent that the state regulations that apply to the CFRA are not inconsistent with this law or any other law, they are incorporated by reference and govern this new law.

Restriction on Obtaining Salary History

AB 168 amends California Labor Code Section 432. Effective January 1, 2018, employers and their agents are not permitted to directly or indirectly seek or inquire into a job applicant's salary history, compensation or benefits. Employers cannot use such information in determining whether to extend a job offer or in deciding

what salary to offer the applicant. In addition, employers must disclose pay scales for a position upon request from an applicant.

AB 168 does not prohibit applicants from disclosing wage history information "voluntarily and without prompting." If an applicant makes such a voluntary disclosure, then the employer may use it to determine whether to extend a job offer or to decide what compensation to offer the applicant. However, such use is still subject to the Equal Pay Act's caveat that prior pay cannot, by itself, be used as a justification for any disparity in compensation between employees of different races, sexes, or ethnicities.

The law also does not prohibit obtaining or using pay history information disclosable to the public under federal or state law.

"Ban the Box" Expanded Statewide

Los Angeles City earlier banned employers within its jurisdiction from asking employment applicants about their criminal conviction history until a conditional offer of employment had been made. Now Governor Brown has signed into law a similar ban that applies statewide to employers of five or more employees. The new law (AB 1008, to be codified at new Government Code Section 12952) goes into effect on January 1, 2018.

Under the new statewide law, employers may not ask applicants for employment, either in writing or orally, about their conviction history until a conditional offer of employment is made. Employers may not consider or disseminate information about the following at any time: (a) an arrest which did not result in conviction except in extremely limited circumstances; (b) referral to or participation in a pretrial or post trial diversion program; or (c) convictions that were expunged or sealed.

After an offer of employment is made conditioned on a background check, the employer may inquire into conviction history and conduct a background check. If that background check reveals a criminal conviction, and if the employer intends to deny the applicant the position at least in part because of any conviction, the employer must engage in an individualized assessment of whether the applicant's conviction history has a direct and adverse relationship with the specific duties of the job that would justify denying the applicant the position. This is similar to the Los Angeles City law, however, unlike the Los Angeles City law, the assessment is not required to be in writing, but it may be. The factors to be considered in determining whether the conviction should bar employment are very similar to those outlined in the Los Angeles City law, such as consideration of the nature and gravity of the conduct, the time that has passed since the criminal activity occurred, and the nature of the job sought.

The employer must then notify the applicant regarding the decision in writing which shall include the conviction(s) which form the basis for disqualification, a copy of the conviction history report and an explanation of the applicant's right to respond to the preliminary decision. The applicant then has at least five business days to respond to the preliminary decision and this time period can be extended under certain circumstances. The employer must consider the information subsequently provided by the applicant before making a final decision.

If the final decision is to deny employment, the employer must notify the applicant in writing and explaining any existing procedure the employee has to challenge the decision or to request reconsideration. The notification must disclose that the employee has the right to file a complaint with the Department of Fair Employment and Housing.

Note that this law does not apply to public agency positions that require a check of an applicant's conviction history, a position with a criminal justice agency, a position as a farm labor contractor, or any position where the law requires criminal background checks.

Harassment Prevention Training Regarding Gender Identity, Gender Expression, and Sexual Orientation

California recently enacted new legislation that simplifies the process for a person to change their legal gender to female, male, or nonbinary depending on their gender identity. This makes California the first state to recognize nonbinary as a gender.

Along with these changes, California also expanded its sexual harassment prevention training requirements to address issues of gender identity. Traditionally, the California Fair Employment and Housing Act has required employers with 50 or more employees to provide 2 hours of sexual harassment prevention training to all supervisory employees within 6 months of their assumption of a supervisory position and once every 2 years. Under SB 396, the prevention training requirement has been expanded to include training regarding gender identity, gender expression, and sexual orientation.

In addition, the Department of Fair Employment and Housing will develop a poster regarding transgender rights, which must be posted in a prominent and accessible location in the workplace.

Human Trafficking Poster

Senate Bill No. 225 amends California Code Section 52.6. This bill expands the list of businesses and establishments that are required to post a notice that contains information related to slavery and human trafficking. A copy of the notice poster is available here, or at http://bit.ly/2yRRg8f.

The businesses and establishments that must post the notice include the following, with number 13 being the latest expansion of the law:

1. On-sale general public premises licensees under the Alcoholic Beverage Control Act
2. Adult or sexually oriented businesses (as defined in Penal Code Section 318.5(a))
3. Primary airports (as defined in 49 U.S. Code Section 47102(16))
4. Intercity passenger rail or light rail stations
5. Bus stations
6. Truck stops (privately owned and operated facilities providing food, fuel, shower or other sanity facilities, and lawful overnight truck parking)
7. Emergency rooms within general acute care hospitals
8. Urgent care centers
9. Farm labor contractors (as defined in Labor Code Section 1682(b))
10. Privately operated job recruitment centers
11. Roadside rest areas

12. Businesses or establishments offering massage or bodywork services for compensation (and not described in Business and Professions Code Section 4612(b)(1))

13. Hotels, motels and bed and breakfast inns (as defined in California Business and Professions Code Section 24045.12(b) and not including personal residences)

Immigrant Worker Protection Act

AB 450, the Immigrant Worker Protection Act, is meant to protect workers from immigration enforcement through workplace raids. Pursuant to this law, which becomes effective on January 1, 2018, an employer or someone acting on behalf of the employer, must do the following:

- Require a judicial warrant before consenting to an immigration enforcement agent entering nonpublic areas of a place of labor (with certain exceptions).

- Require a subpoena or court order before an immigration enforcement agent can access, review or obtain employee records (with certain exceptions).

- Provide current employees with notice of an immigration agency's inspection of I-9 Employment Eligibility Verification forms or other employment records within 72 hours of receiving the federal notice of inspection. The notice must state: (1) the name of the immigration agency; (2) the date the employer received the notice of the inspection; (3) the nature of the inspection to the extent known; and (4) a copy of the Notice of Inspection of I-9 Employment Eligibility Verification. The Labor Commissioner will create a template for this required notice on or before July 1, 2018.

- Provide affected employees (defined as employees who may lack work authorization or whose documents have deficiencies) a copy of the Notice of Inspection of I-9 forms, upon reasonable request.

- Provide affected employees and their authorized representatives a copy of the immigration agency notice that provides for the inspection results and written notice of the obligations of the employer and the affected employee arising from the action, within 72 hours of receipt of the results notice. This notice should be delivered by hand to only the affected employee, and if not by hand, by mail or email. The notice must include: (1) a description of all deficiencies or other items identified in the written immigration inspect results notice; (2) the time period for correcting any potential deficiencies identified by the immigration agency; (3) the time and date of any meeting with the employer to correct any identified deficiencies; and (4) notice that the employee has the right to representation during any meeting scheduled with the employer.

If an employer is found to have violated any of these, the employer can be fined by the Labor Commissioner or Attorney General in an amount between $2,000 and $5,000 for a first violation and between $5,000 and $10,000 for each subsequent violation.

In addition, AB 450 prohibits employers from re-verifying the employment eligibility of a current employee at a time or in a manner not required by federal law. Violation of this prohibition can result in penalties of up to $10,000 for each violation.

Santa Monica Sick Leave

Although Santa Monica enacted its sick leave ordinance in 2017, employers should be aware that effective January 1, 2018, employees who work in Santa Monica will be entitled to more paid sick leave than in 2017. Santa Monica employees who work for employers with 25 or fewer employees will be entitled to 40 hours of sick leave per year, while employers with 26 or more employees must provide 72 hours of paid sick leave per year. Santa Monica employers can also review our prior discussion of the other elements of the ordinance here.

Reminder—New Domestic Violence, Sexual Assault, Stalking Notice Went Into Effect on July 1, 2017

As of July 1, 2017, California employers must provide all new hires and any current employee who so requests a written notice of rights of victims of domestic violence, sexual assault and stalking.

The form notice can be found here: http://bit.ly/2yJgm9R

Reminder – The State Minimum Wage is Increasing

The California minimum wage increases on January 1, 2018, from $10.50 an hour to $11.00 an hour for employers of 26 or more employees, and from $10.00 an hour to $10.50 an hour for employees of 25 or fewer employees. This means that exempt employees, in addition to meeting exempt duties requirements, must be paid a weekly salary of no less than $880 weekly and $45,760 annually ($840 weekly and $43,680 annually for employers of 25 or fewer employees). All employers should also determine if their local municipalities and cities have minimum wage requirements that exceed California's requirements. While this will not affect the exempt salary threshold, it will affect your minimum wage obligations to your non-exempt employees.

For advice or to answer questions, please contact anyone in our Employment Law Group:

Nancy Bertrando
nbertrando@greenbergglusker.com

Paul Blechner
pblechner@greenbergglusker.com

Olivia Goodkin
ogoodkin@greenbergglusker.com

Wendy Lane
wlane@greenbergglusker.com

Charles Shephard
cshephard@greenbergglusker.com

Priya Sopori
psopori@greenbergglusker.com

Karina B. Sterman
ksterman@greenbergglusker.com

Sofia Aguilar
saguilar@greenbergglusker.com

Kelly Raney
kraney@greenbergglusker.com

Daniel Stone
dstone@greenbergglusker.com