New Employment Laws for the California Employer – 2018

In October, as in years past, Governor Brown signed a number of employment-related bills into law. Below is a summary of those laws that will take effect on January 1, 2018, of which employers need to be aware and prepare for.

SB 63 - Parental Leave

The New Parent Leave Act amends the California Family Rights Act ("CFRA") to require employers with less than fifty (50) employees, currently the requirement for application of CFRA, to allow employees to take twelve (12) weeks of unpaid leave for bonding with a new child. Under SB 63, employers with twenty (20) employees will be required to provide employees with twelve (12) weeks of job protected leave if the employee has worked for the employer for at least twelve (12) months and at least 1,250 hours during the twelve (12)-month period preceding the leave. Of import is the fact that CFRA was only expanded to smaller employers for purpose of new child bonding. It has not be expanded to care for a family member with a serious health condition.

If you are an employer with between twenty (20) and fifty (50) employees, you will need to update your Employee Handbooks in order to add a provision under the CFRA for child bonding.

SB396 - Anti-Harassment Training

The Anti-Harassment Training requirement that was implemented in 2005 and expanded in 2015, is being expanded again. The current law requires California employers with fifty (50) or more employees to provide two (2) hours of sexual harassment and abusive conduct training to supervisors every two (2) years. SB 396 adds a training component on the issue of harassment based on gender identity, gender expression and sexual orientation.

Additionally, SB 396 will require employers with five (5) or more employees to post a new workplace notice regarding transgender rights. (The notice is being developed by the Department of Fair Employment and Housing.)

AB 168 - Salary History

As of January 2018, California will ban employers from using or seeking a job applicant's salary history. AB 168 will prohibit all employers from relying on "salary history information" as a factor in determining whether to offer employment and at what salary to offer an applicant. Additionally, an employer may or not seek salary history information in writing, orally, personally or through an agent. Salary history information is defined to include information concerning compensation and benefits. The law will also require employers to provide a pay scale for a position upon the reasonable request of an applicant.

To the extent that job applications request salary history information, they should be revised. Additionally, if salary history information is part of the interview process or included anywhere in the hiring process, it should be discontinued. Also, employers should put in place a process to provide applicants with pay scale information if it is requested.

AB450 - Workplace Immigration Enforcement

AB 450 will bar employers, or anyone acting on behalf of an employer, from voluntarily consenting to allow an immigration enforcement

agent to enter nonpublic areas of a workplace. The exception, of course, is a warrant or where access is otherwise required under federal law. This law further prohibits employers from voluntarily allowing an immigration agent access to employee records without a subpoena or judicial warrant.

AB 450 also imposes new notification requirements on an employer:

1. Within 72 hours of receiving a Notice of Inspection from an immigration agency to inspect I-9 forms or other employment records, the employer must post a workplace notice to employees and provide written notice to a collective bargaining representative.
2. With 72 hours of receiving an immigration agency notice with results of the I-9 or record inspection, an employer must provide each current affected employee and the collective bargaining representative with written notice of the notice. In addition, the employer must provide notice of the employer's and employee's respective obligations arising from the inspection results.
3. Employers may not re-verify employment eligibility of a current employee at a time or in a manner that is not required by federal law.

Violations can carry civil penalties ranging from $2,000 to $5,000 for the first violation and $5,000 to $10,000 for each subsequent violation.

AB1008 – Ban the Box

AB 1008 amends the Fair Employment and Housing Act ("FEHA") to make it unlawful for an employer to ask an applicant any question that seeks disclosure of an applicant's conviction history, inquire or consider an applicant's conviction history before the applicant receives a conditional offer of employment and consider, distribute or disseminate information related to arrests that did not result in convictions, diversion program participation, and/or convictions that were sealed, dismissed, expunged or eradicated. There are a few very specific exceptions dealing with government agencies, positions with criminal justice agencies, farm labor contractors, and positions for which the employer is required by federal, state or local law to check criminal history or restrict employment based on criminal history.

Employers may only consider an applicant's conviction history after the applicant has received a conditional offer of employment. If an employer intends to deny hire solely or in part because of conviction history, the employer must conduct an individualized assessment in order to determine whether that history has a direct and adverse relationship with the specific duties of the job in question. When making that assessment the employer must consider the nature and gravity of the offense and conduct, the passage of time since the date of the offense/conduct and completion of any sentence, and the nature of the position held or sought. Employers may, but are not required to, record the results of their individualized assessments in writing.

If the individualized assessment leads to a preliminary decision that the conviction history is disqualifying, the employer must follow a "fair chance" process.

The "fair chance" process will start with the employer providing written notice to the applicant. The written notice must identify the conviction on which the preliminary decision is based, include a copy of the conviction history report, if any, and explain the applicant's right to respond to the notice within at least five (5) business days. The notice must also explain the applicant's right to submit evidence challenging the accuracy of the conviction

record, or evidence of rehabilitation, mitigating circumstances, or both. Employers are prohibited from making any final determinations based on conviction history during the minimum five (5) day business period.

If the applicant timely notifies the employer in writing that the applicant is disputing the conviction history and is taking steps to obtain evidence to do so, the employer must provide the applicant an additional five (5) business days to respond. Any additional evidence the applicant provides in response must be taken into consideration by the employer before a final decision is made.

Finally, if after receiving the response from the applicant the employer makes a final decision to deny employment based on conviction history, the employer must again notify the applicant in writing. This final notification must include: the final denial; information relating to any existing procedure to challenge the decision or request reconsideration; and the right to file a complaint with the Department of Fair Employment and Housing. The employer has the option to include an explanation for making the final denial.

SB 306 – Retaliation

SB 306 allows the Labor Commissioner to investigate certain retaliation and whistleblower claims without an employee complaint. Currently, an employee complaint is required before the Labor Commissioner may initiate such an investigation. This means that the Labor Commissioner, when adjudicating a wage claim, while conducting a field inspection or in instances of suspected unlawful immigration, may now initiate an investigation if the Labor Commissioner suspects that retaliation occurred.

Not only may the Labor Commissioner initiate its own investigation, but also the burden of proof for injunctive relief in retaliation or whistleblower cases under the jurisdiction of the Labor Commissioner has decreased. In order to obtain a preliminary injunction, which would most likely require the restoration of the employee to his or her position, "reasonable cause" that a violation of the law occurred is all that is required.

AB 1701 - Construction Contractor Liability for Wages

General contractors will now be responsible for any payments owed to a wage claimant by their subcontractors if the claimant's work is the subject of the contractors' relationship. This includes unpaid wages, fringe or other benefit payments and contributions. It does not include penalties and/or liquidated damages. Subcontractors are now required to provide payroll records to a general contractor upon request.

AB 44 – Employee Assistance After Acts of Domestic Terrorism

If employees are injured in an act of domestic terrorism, AB 44 requires employers to provide injured employees with immediate support from a nurse case manager. AB 44 applies only if the Governor declares a state of emergency in connection with the act or domestic terrorism.

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