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WHITE PAPER

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2017 California Employment Legislation and Regulatory Update

2016 proved to be another notable year for California employment law, as the state's legislature enacted a number of statutes which expanded government reach and scope in worker-related matters. The California Fair Pay Act was expanded to require "pay equity" for race and "ethnicity" as well as gender, and the Golden State's minimum wage was raised to $10.15 per hour. Other actions included the adoption of additional restrictions on employer verification of the work eligibility of employees and applicants, and increases to the benefits payable to employees under the California Paid Family Leave and State Disability programs. In January 2017, the state Fair Employment and Housing Council approved detailed regulations on the use of criminal convictions in hiring and promotion decisions.

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NEW EMPLOYMENT-RELATED LEGISLATION

The California Legislature in 2016 continued to expand the reach and scope of California employment statutes. Governor Jerry Brown signed most of the significant measures, although he did veto two potentially problematic bills. Most notably, the Legislature expanded the California Fair Pay Act. This statute, first enacted in 2015, provides much greater protection against discrimination in compensation than what is provided by the federal Equal Pay Act, and in 2016, the California Fair Pay Act was expanded to prohibit pay discrimination based on race and "ethnicity." The Legislature also: (i) adopted additional restrictions on employer verification of the documentation status or work eligibility of employees and applicants; (ii) outlawed most "choice of law" and venue provisions in employment agreements that require a California employee to adjudicate disputes elsewhere or to apply a different state's law; (iii) increased the benefits payable to employees under the California Paid Family Leave and State Disability programs; and (iv) corrected an anomaly in the pay stub disclosure statute pertaining to exempt employees who are paid commission or bonus compensation in addition to their base salary.

Additionally, the California minimum wage increased to $10.50 per hour on January 1, 2017.

Fair Pay Act Expansion: Assembly Bill 1676 and Senate Bill 1063

These two bills amend the Fair Pay Act to require "pay equity" for race and "ethnicity" as well as gender. The term "ethnicity" is not defined in the statute, and there is also no settled court decision that defines the term. As a result, employers associations are engaging in efforts to further amend the statute to provide a definition of this term. In addition, Assembly Bill 1676 states that an employee's salary history cannot be the sole basis for an employer's defense that a salary differential is based on a legitimate, nondiscriminatory reason. Notably, as originally drafted, Assembly Bill 1676 would have banned outright any pre-employment inquiry into salary history, but that provision was dropped in the final bill.

Recommendations for Employers**.** With the expansion of the Fair Pay Act to include race and ethnicity, employers should consider consulting with counsel to identify categories of "substantially similar jobs" based on "skill, effort, and responsibility," and analyze any compensation discrepancies in those positions as between men and women or persons of different races or ethnicities. Additionally, employers should consider training programs for supervisors and managers in order to educate them on the dangers of preventing or discouraging employees from discussing their wages or inquiring about wages. Written policies such as employee handbooks should also be reviewed to remove any policies that prohibit the disclosure or discussion of wages among employees. Finally, because of the new provision that salary history, alone, cannot justify a wage disparity if the disparity relates to gender, sex, ethnicity, or race, we recommend either not asking for salary history at the time of hire or doing so only if salary history will not be used to establish definitively the starting wage or salary for the position in question.

Employment Agreement Provisions on Choice of Law and Forum: Senate Bill 1241

This measure states that it is unlawful to include in any employment contract a provision that requires an employee to adjudicate a claim outside of California or that requires, as a condition of employment, the application of the law of another state. However, an exception exists for an employee who is represented by legal counsel during contractual negotiations. The bill applies to employees based in California and to controversies arising in California between a California-based employee and his or her employer (regardless of where the employer is located). The statute also includes an attorneys' fee provision permitting the employee to obtain attorneys' fees required to enforce his or her rights under the statute. However, the statute does not apply to agreements that are not a condition of employment, such as some stock option or restricted stock agreements.

Recommendations for Employers**.** Employment contract forms should be reviewed to ensure that they do not require the application of state law other than California's (if the person in question is being hired to work in California) and do not require adjudication of a California employee's claim in some other state. However, when hiring an applicant who is represented by counsel, these provisions can be included in the employment agreement. Certain compensation and other agreements that are not a condition of employment, such as stock option agreements, may not be affected by the statute.

Verification of Immigration Documentation: Senate Bill 1001

This bill makes it unlawful for an employer to request more or different documentation than required under federal law to verify that an applicant or employee is properly authorized to work in the United States. The measure also makes it unlawful for an employer to refuse to honor documents tendered by an applicant or employee that are on their face reasonably genuine, or to refuse to honor documents or work authorization based on "the specific status or term of status that accompanies the authorization to work." Further, Senate Bill 1001 makes it unlawful for an employer to "reinvestigate or re-verify" an incumbent employee's authorization to work using an unfair immigration-related practice (i.e., any practice or measure not authorized by federal law). The extent of this new statute is not entirely clear, and there are arguments that it is preempted by the federal Immigration Reform and Control Act. A similar bill was proposed in 2015 but died in committee.

Recommendations for Employers**.** Hiring personnel and hiring supervisors should be advised not to request any documentation to establish work authorization beyond the types of documentation permitted under federal law. Employers should not question documents submitted by applicants that appear genuine on their face. Existing employees should be "re-verified" only in accordance with federal law.

Pay Stub Disclosure for Exempt Employees: Assembly Bill 2535

This bill corrects an anomaly in the Labor Code pay stub disclosure provision (Labor Code Section 226(a)). If an employee is exempt from overtime and paid a salary plus other forms of compensation (e.g., commissions, bonuses), the employee's wage statements need not list the number of hours worked during the pay period. In 2015, a federal district court, interpreting the previous language of Section 226, held that the wage statements of an exempt employee were required to show the number of hours worked by that employee during the pay period, if the employee was paid a combination of salary and contingent compensation. This result was clearly not intended by the Legislature, and the Legislature corrected the statutory language accordingly.

Recommendations for Employers**.** This statute requires no change in the practice followed by most employers: The pay stubs for employees who are exempt from overtime under the California Labor Code and Industrial Welfare Commission Wage Orders do not need to show the number of hours worked by the exempt employee in the pay period.

Domestic Violence Disclosure and Mandatory Notice of Rights: Assembly Bill 2337

Employers must now provide written notice to employees of rights (including rights to unpaid leave) for victims of domestic violence, sexual assault, or stalking. The information must be provided to new employees upon hiring or to existing employees upon request. The Labor Commissioner is to develop a form that employers may use that will satisfy the notice requirements of the statute. No notice is required until the Labor Commissioner posts the form on the Commissioner's internet website. Such a form had not been posted as of December 26, 2016. This bill also prohibits discharge, discrimination, or retaliation against an employee who is a victim of domestic violence, sexual assault, or stalking or who takes time off from work for various purposes related to those crimes.

Recommendations for Employers**.** Employers should monitor the Labor Commissioner website to determine when the new notice form will be posted by the Labor Commissioner. Once that form is posted, the employer should provide it to all new hires and to any employee who requests information regarding the rights of victims of domestic violence, sexual assault, or stalking.

Minimum Wage Increase: Senate Bill 3

On April 4, 2016, the Legislature passed and Governor Brown signed Senate Bill 3, which creates minimum wage increases through January 2022, at which time the California minimum wage will be $15.00 per hour. Thereafter, the minimum wage will increase annually according to the U.S. Consumer Price Index ("CPI"), but not more than 3.5 percent a year. The first minimum wage increase, to $10.50 per hour, commenced on January 1, 2017.

Each increase in the minimum wage will affect other obligations under California law. For example, to qualify under the administrative, executive, or professional exemptions from overtime pay, an employee must be paid twice the minimum wage on a salaried basis. That amount increased on January 1, 2017, from the current $3,467 per month to $3,640 per month.

The new legislation creates two schedules for minimum wage increases: one for "large" employers with 26 or more employees and a slower schedule for employers with 25 or fewer employees.

Increases for Employers with 26 or More Employees. For employers with 26 or more employees, the minimum wage increases are as follows:

- January 1, 2017, through December 31, 2017—$10.50 per hour;
- January 1, 2018, through December 31, 2018—$11.00 per hour;
- January 1, 2019, through December 31, 2019—$12.00 per hour;
- January 1, 2020, through December 31, 2020—$13.00 per hour;
- January 1, 2021, through December 31, 2021—$14.00 per hour;
- Beginning January 1, 2022—$15.00 per hour;
- Beginning January 1, 2023—The $15.00 minimum wage will be increased annually according to the CPI, not to exceed more than 3.5 percent per year, with the revised amount rounded to the nearest $0.10. The annual increase will be calculated on August 1 of each year to take effect January 1 of the following year.

Increases for Employers with 25 or Fewer Employees. For employers with 25 or fewer employees, the minimum wage increases will be as follows:

- January 1, 2017, through December 31, 2017—the current $10.00 minimum wage remains in effect;
- January 1, 2018, through December 31, 2018—$10.50 per hour;
- January 1, 2019, through December 31, 2019—$11.00 per hour;
- January 1, 2020, through December 31, 2020—$12.00 per hour;
- January 1, 2021, through December 31, 2021—$13.00 per hour;
- January 1, 2022, through December 31, 2022—$14.00 per hour;
- Beginning January 1, 2023—$15.00 per hour, subject to the annual CPI increases beginning in 2024, as with the schedule for larger employers.

How is the Number of Employees Determined? Senate Bill 3 does not define how to count employees for the purposes of determining whether or not the employer has 26 or more employees. Presumably, part-time, full-time, and temporary employees are counted. It is unclear whether employees located outside of California are counted.

Senate Bill 3 provides that all employees treated as employed by a single taxpayer under section 23626 (h) of the California Revenue and Taxation Code are considered for purposes of the 25-employee "small employer" schedule of increases.

Section 23626(h) of the California Revenue and Taxation Code treats as employed by a single employer all employees "of all corporations that are members of the same controlled group of corporations" and all employees of businesses that are treated as "related" under several Internal Revenue Code Sections. To satisfy the "control group" test, one entity need only to control more than 50 percent of the other entity. The effect of this provision is to aggregate, for purposes of the 26-employee provision, employees who may be nominally employed by multiple, related organizations or entities.

California Revenue and Taxation Code Section 23626 is part of a statute permitting tax credits for certain qualified employers. The apparent intent of this provision is to use the "control group" concept in that statute as applicable to all employers for purposes of the 26-employee calculation.

Additionally, the statute defines "employer" as including any person who "directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person." This provision could require the aggregation of employees of subsidiary or related entities if one of the entities "exercises control" over the wages, hours, or working conditions of employees of a different entity.

The Governor May Suspend Minimum Wage Increases. Until the minimum wage reaches $15.00 per hour, Senate Bill 3 permits the governor to suspend minimum wage increases, but no more than twice, under certain circumstances. These include if there is: (i) a decrease in total non-farm employment in California, seasonally adjusted, for a three-month period from April to June of any year or (ii) for a six-month period from January to June of any year; and (iii) if retail sales and use tax cash receipts from July 1 to June 30, inclusive, are less than the receipts for the same taxes for the same six-month period ending 13 months prior to July 28 of the then-current year. The governor also could suspend the minimum wage increase if the State Director of Finance finds that a minimum wage increase would result in a state budget deficit in a current fiscal year or in either of the following two years.

A suspension of the minimum wage may occur until the minimum wage reaches $15.00 per hour. If there is a suspension, the remaining phased-in minimum wage increases are delayed by a year.

Effect of Minimum Wage Increases on Other California Wage Obligations. Any increase in the minimum wage results in an increase in the minimum amount payable, on a salaried basis, to any employee who otherwise qualifies under the administrative, executive, or professional overtime exemptions. When the full minimum wage increase reaches $15.00 per hour, the "threshold" for those overtime exemptions will be $5,200 per month.

Similarly, labor unions and employers may agree in a collective bargaining agreement to overtime provisions different than the otherwise applicable statutory overtime provisions, but only if the employees under the agreement are paid at least 130 percent of the then-current minimum wage, and if the alternative overtime rules and overtime premiums are contained in the collective bargaining agreement. Unions and employers may also agree in a collective bargaining agreement to include special sick leave or paid time off policies as an alternative to the otherwise applicable statutory paid sick leave requirements, if the regular hourly wage of the employees under the collective bargaining agreement is at least 130 percent of the state minimum wage. Additionally, employers in the construction industry, employers who employ commercial drivers, and employers who are electrical corporations, gas corporations, or local publicly owned utilities may agree with a union for special rules concerning meal periods, as long as the employees under the collective bargaining agreement are paid at least 130 percent of the then-current minimum wage, the agreement provides for premium wages for all overtime hours worked, and it contains a binding arbitration agreement for any disputes concerning meal period compliance.

The minimum amount required for exceptions based on the 130 percent "threshold" will increase on January 1, 2017, from $13.00 per hour to $13.65 per hour. When the minimum wage reaches $15.00 per hour, that threshold will be $19.50 per hour.

Recommendations for Employers**.** First, employers should confirm that any persons currently making the minimum wage receive the necessary wage increase effective January 1, 2017. Additionally, many municipalities and cities in California have "living wage" or similar minimum wage standards that are higher than the state minimum wage. For example, the San Diego minimum wage for 2017 is $11.50 per hour. The minimum wage for the City of Los Angeles will increase to $12.00 per hour on July 1, 2017. The minimum wage in the City of San Francisco is $13.00 as of January 1, 2017, and will increase to $14.00 on July 1, 2017. If there is an applicable city or municipality "living wage" higher than the state minimum, the higher amount must be paid to employees working in that jurisdiction. The local city or municipal ordinance should be reviewed. Such ordinances often have coverage provisions based on the number of hours worked by an employee within the city or municipality, and some require an employer to provide health insurance coverage or to pay amounts in lieu of such coverage. Further, employers should confirm that salaried/exempt employees are being paid a monthly salary sufficient to satisfy the minimum salary threshold for exempt status (this will be $3,640 per month in 2017). Employers who have union contracts with internal overtime provisions should confirm that employees under the union contracts are paid at least $13.65 per hour (130 percent of the new state minimum wage).

Increase in Paid Family Leave and State Disability Benefits: Assembly Bill 908

This measure, signed by Governor Brown in April 2015, increases the periods of disability benefits available to individuals under the state paid family leave ("PFL") and state disability insurance ("SDI") programs. The measure increases the level of benefits from the current level of 55 percent to either 60 percent or 70 percent of the applicant's income. Also, effective January 1, 2018, the statute removes the current seven-day waiting period before which individuals are eligible for benefits. The bill does not extend the current temporal limitation on PFL or SDI benefits.

Recommendations for Employers**.** Employers need to do little with regard to this statute. Claims for PFL and SDI should be handled as they have been in the past. The Economic Development Department will implement the new benefit levels.

Restrictions on Use of Juvenile Court Records: Assembly Bill 1843

This statute forbids employers from asking an applicant for employment to disclose information concerning an arrest, detention, supervision, adjudication, or court disposition that occurred while the applicant was subject to the jurisdiction of juvenile court law. Moreover, the statute forbids employers from using such records as a factor in determining any condition of employment such as hiring, promotion, termination, etc.

Recommendations for Employers**.** Hiring personnel should be cautioned to avoid asking job applicants questions concerning arrest, detention, supervision, or adjudication of juvenile court proceedings. Job applications should be reviewed to confirm that no improper questions on this subject are included.

All Gender Bathrooms: Assembly Bill 1732

Beginning March 1, 2017, this statute requires that all single-user toilet facilities in any place of business must be identified as "all gender." The new statute does not require employers to install or create an all-gender or single-user restroom; however, those who have such facilities must mark them as "all gender." Such facilities cannot be identified as specifically for either men or women.

Recommendations for Employers**.** Employers who have single-user toilet facilities must post them appropriately.

NEW REGULATIONS FROM THE FAIR EMPLOYMENT AND HOUSING COUNCIL

New Fair Employment and Housing Council Regulations on Use of Criminal History in Hiring

On January 10, 2017, the Fair Employment and Housing Council ("FEHC") approved regulations restricting the use of criminal history in hiring and other employment decisions. The regulations, which in many respects are similar to the published April 2012 guidance from the Equal Employment Opportunity Commission, potentially make it easier for applicants or employees to bring lawsuits if the employee or applicant is not hired or suffers some other adverse employment action as a result of a history of criminal conviction(s). Under the draft regulations, an employee can establish that the use of questions concerning criminal history result in an "adverse impact" through the use of "conviction statistics." Adverse impact may be established presumptively through the use of national or state-level statistics "showing substantial disparities in the conviction records of one or more categories enumerated in the act." However, the employer may rebut the national or statewide statistics to show there is a "reasonable persuasive basis to expect a markedly different result" after accounting for circumstances such as the geographic area encompassed by the applicant or applicant pool, the particular types of convictions being considered, or the particular job at issue.

If the employee establishes an apparent adverse impact through the "conviction statistics," the employer must then show that the use of criminal convictions in question relate directly to "the nature of the job held or sought." This part of the regulation will be problematic because, in the real world, many applicants apply not for a specific job but for a range of jobs or for any job that is available. In order to prove that the use of criminal history is "job related and consistent with business necessity," the employer must show that the conviction in question bears "a demonstrable relationship to successful performance on the job and in the workplace and measure the person's fitness for the specific position, not merely to evaluate the person in the abstract." The "business necessity" defense also requires the employer to demonstrate that the policy in question takes into account at least the nature and gravity of the offense or conduct, the time that has passed since the offense or conduct and/or completion of the sentence, and the nature of the job held or sought. Even then, the employee can rebut the "business necessity" by demonstrating that a "less discriminatory alternative exists" that is equally effective to achieve or satisfy the business necessity. These proposed regulations are directed at "bright line" or company- or classification-wide policies that do not allow the consideration of individualized circumstances such as the properties of the job(s) in question or individual applicants or employees. However, the regulations in their current form would apply even where an individualized assessment has been made by the employer with respect to the particular job or classification and the individual applicant or employee. Further, before taking an adverse action against an employee or applicant, the employer must give the individual notice of the disqualifying conviction and a reasonable opportunity to present evidence that the conviction information is factually inaccurate.

Notably, the "job relatedness/business necessity" defense is not even fully satisfied by compliance with other federal or state regulations that require inquiry about specific criminal violations and/or disqualify certain applicants or employees on that basis. According to the regulations, "compliance with federal or state laws or regulations that mandate particular criminal screening processes or requiring that an employer or applicant possess or obtain any required occupational licenses constitute a rebuttable defense to an adverse impact claim under the Act." The regulations do not explain how the state administrative agency can find that a federal or state

statute specifically requiring criminal history inquiry, or disqualifying persons on that basis, cannot be a complete (irrebuttable) defense to a claim.

Proposed FEHC Regulations on Gender Identity and Expression

The FEHC also is in the final stages of drafting regulations concerning gender identity and expression. The current version of the regulations define "gender expression" broadly, to mean a person's gender-related appearance or behavior, or perception of such appearance or behavior, whether or not stereotypically associated with the person's sex at birth. The definition of "gender identity" includes each person's self-identification of his or her gender or perception of such self-identification, which may include "male, female, a combination of male and female, neither male nor female, a gender different from the person's sex at birth or transgender." The new regulations as currently drafted require employers to "permit employees to use [restroom or locker room] facilities that correspond to the employee's gender identity or gender expression, regardless of the employee's assigned sex at birth." The draft regulations further state that, where employees raise "privacy interests" about the use of locker rooms or restrooms, "employers shall provide feasible alternatives such as locking toilet stalls, staggered schedules for showering, shower curtains or other methods of insuring privacy."

The draft regulations include a provision stating that it is unlawful to impose upon an applicant or an employee any physical appearance, grooming, or dress standard inconsistent with the individual's gender identity or gender expression, unless the employer can establish business necessity and does not discriminate based on a individual's sex, including gender, gender identity, or gender expression.

Because gender identity and gender expression are classifications protected under the Fair Employment and Housing Act, it is unlawful for an employer to deny employment or to discriminate against an individual based in whole or in part on the individual's gender identity or gender expression. In addition, according to the regulations, it is unlawful to discriminate against an individual who is transitioning (to a different gender), has transitioned, or is perceived to be transitioning. The regulations as currently drafted state that an employee may request to be identified by a preferred gender, name, and/or pronoun (including gender-neutral pronouns). If so, an employer must, with limited exceptions, abide by the employer's stated preference.

The Commission is expected to adopt the gender identity and expression regulations at its meeting in March 2017.

BILLS VETOED BY GOVERNOR BROWN

Parental Leave Expansion: Senate Bill 654

This bill would have significantly expanded California's Family Rights Act by lowering the threshold for employer coverage from employers with 50 or more employees to those with 20 or more employees. If the bill had been signed by Governor Brown, such smaller employers (with between 20 and 49 employees) would have had to provide up to six 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.

Arbitration: Senate Bill 1076

Governor Brown vetoed this bill, which would have prohibited a person serving as a neutral arbitrator from "soliciting," after January 1, 2017, for any other cases or service as an arbitrator, or from entertaining or accepting any offers of employment or offers of new professional relationships during the time the person continues to serve as an arbitrator, and until the conclusion of the arbitration. The bill also would have required disclosure in a consumer arbitration case of any solicitation made within the last two years by or at the direction of a private arbitration company to a party or lawyer for a party.

BILLS THAT DID NOT REACH THE GOVERNOR'S DESK

Two widely publicized bills did not reach Governor Brown's desk, although it is possible they, or similar measures, will be reintroduced in 2017.

Double Pay on Holiday Act

For the second year in a row, efforts were made to require retail and grocery establishments and restaurants to pay employees at least twice their regular rate of pay for work on Thanksgiving. This bill, AB 67, did not pass the Legislature.

Reliable Scheduling Act of 2016

This bill, which also is a rerun of a 2015 measure, did not make it out of the Assembly. Senate Bill 878, would have required a restaurant, grocery, or retail employer to provide nonexempt employees with a 21-day work schedule in advance of their first shift on that work schedule. The bill also would have required "modification pay," in addition to regular pay, if any scheduled shift was cancelled, moved, or added, and for each shift for which the employee was required to be on call but not called in to work.

Additionally, several measures to reform the Labor Code Private Attorney General Act failed.

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