JONES DAY | One Firm Worldwide℠

WHITE PAPER

February 2018

2018 California Employment Legislation and Regulatory Update

The California Legislature in 2017 adopted multiple statutes that increase the complexity and scope of employment regulation. Most notable was the passage and signing of Assembly Bill 168, which prohibits employers from inquiring into or considering a job applicant's prior salary or benefits in hiring or setting compensation unless the applicant voluntarily discloses that information without prompting. Further, in response to actions by the Trump Administration, the California Legislature passed legislation that, among other things, more robustly protects the rights of immigrants.

In addition to legislation signed into law in 2017, two notable developments are worthy of mention. First, Governor Brown vetoed AB 1209, which would have required larger employers (those with 500 or more employees) to publicly disclose average and median salaries of exempt employees by their genders. Second, the California minimum wage for employers with 26 or more employees increased to $11.00 on January 1, 2018.

TABLE OF CONTENTS

NEW EMPLOYMENT-RELATED LEGISLATION

Prohibition on Salary History Inquiries—AB 168

Arguably the most significant legislative development of the past year was the passage and signing of Assembly Bill 168. In a nutshell, AB 168 prohibits employers from inquiring about a job applicant's prior salary history or relying on such information "as a factor" in making a hiring or a compensation decision with respect to an applicant. The goal of this legislation is to help eradicate wage gaps between men and women. The theory is that utilizing a woman's past salary information to set her new salary perpetuates structural wage disparities.

AB 168 also prohibits employers from even *seeking* a job applicant's prior salary history regardless of whether the employer attempts to do so "orally or in writing, personally or through an agent." Further, "upon reasonable request," the employer must provide the job applicant the pay scale for the position to which he or she is applying. The Legislation does not define "pay scale," and there is no court decision or regulatory definition at present. Finally, AB 168 applies to *all* employers, "including state and local government employers and the Legislature." Most observers believe that the new statute does *not* prohibit an employer from asking a job applicant about her salary expectation for the position, as long as there is no inquiry into her past salary.

AB 168 contains only two exceptions. First, AB 168 does not apply to salary history information that is open to the public under California or federal law, including the California Public Records Act and the federal Freedom of Information Act. Second, AB 168 does not prohibit an employer from considering or relying on salary history information "in determining the salary for the applicant" if the applicant (i) voluntarily and (ii) without prompting discloses his or her prior salary history. Significantly, the plain language of this second exception mentions only that the employer can rely on this voluntary and unprompted information in determining what *salary* to offer a job applicant; it makes no mention whether the employer can utilize this same information in determining whether to offer *employment* to the applicant. Further, AB 168 makes clear that, consistent with the provisions of the California Equal Pay Act, AB 168 does not allow prior salary, by itself, to justify any disparity in compensation.

AB 168 took effect on January 1, 2018.

Recommendations for Employers. Employers must remove any questions concerning salary history from employment applications or similar documentation. Similarly, they must review any hiring protocols or guidelines to ensure that past salary is not a consideration in setting the salary of a successful applicant. Additionally, employers should be aware of the somewhat ambiguous language of AB 168 that could lead to unanticipated liability. For instance, AB 168 applies to "applicants for employment," but it does not specify who qualifies as an applicant. Although the statute does not define "pay scale," we recommend that employers provide accurate information concerning pay ranges for positions where an applicant inquires about the pay scale.

Fair Pay for Public Employees—AB 46

The California Fair Pay Act already prohibits a private employer from paying any of its employees less than employees of the opposite sex or different race or ethnicity for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions. AB 46 extends the Act to public employers, defining "employer" to include both public and private employers.

Ban the Box—AB 1008

Another very important legislative development was the enactment of Assembly Bill 1008, which is commonly referred to as the "Ban the Box" law. The purpose of this legislation is to "reduce barriers to employment for people with conviction histories," which, in theory, should help lower unemployment rates throughout California. AB 1008 seeks to accomplish this purpose by adding a section to the California Fair Employment and Housing Act ("FEHA") that prohibits all employers with five or more employees from:

- Listing a question on an application for employment that seeks the disclosure of an applicant's conviction history before making a conditional offer of employment to the applicant;
- Inquiring into or considering an applicant's conviction history until after making a conditional offer of employment to the applicant;
- Considering, distributing, or disseminating information, while conducting a conviction history background check in connection with any application for employment, about an arrest that did not result in a conviction (except in the circumstances under Labor Code § 432.7(a)(1) and (f)); a

referral to or participation in a pretrial or post-trial diversion program; or convictions that have been sealed, dismissed, expunged, or statutorily eradicated pursuant to law; and
- Interfering with, restraining, or denying the exercise of, or the attempt to exercise, any right provided by AB 1008.

AB 1008 became effective January 1, 2018. AB 1008 mandates that most employers can inquire about and/or consider an applicant's criminal history only once the employer has made a conditional offer of employment to the applicant. And even then, AB 1008 explicitly outlines the process by which an employer can deny an applicant a position of employment based on that criminal history. Specifically, an employer that intends to deny the applicant a position "solely or in part because of the applicant's conviction history" must first make an "individualized assessment" of whether that conviction history "has a direct and adverse relationship with the specific duties of the job that justify denying the applicant the position." In making that assessment, which is allowed but not required to be in writing, the employer must consider:

- The nature and gravity of the offense or conduct;
- The time that has passed since the offense or conduct and completion of the sentence; and
- The nature of the job held or sought.

An employer's obligations under AB 1008 do not end even after the individualized assessment leads the employer to conclude it should not offer the applicant a job. The employer must *then* notify the applicant of such a "preliminary decision"—that is, that the applicant's conviction history disqualifies him or her from the job—*in writing*, at which point the applicant has five days to respond to this notice. The notice from the employer must contain:

- The disqualifying conviction or convictions that are the basis for the preliminary decision to rescind the offer;
- A copy of the conviction history report; and
- An explanation that before the preliminary decision becomes the employer's final decision, the applicant has the right to respond to the notice within five days. The explanation must also notify the applicant that he or she can submit evidence that challenges the accuracy of the conviction history report, shows he or she has been rehabilitated, or outlines any mitigating circumstances of the conviction.

If the applicant responds to the notice of preliminary decision within five days—as is his or her right—and tells the employer that he or she disputes the accuracy of the conviction history report and is taking "specifics steps" to obtain evidence supporting that assertion, the applicant must have an *additional* five days to respond to the notice. The employer must also consider all information submitted by the applicant in response to the notice of preliminary decision.

If the employer remains unpersuaded by the applicant's response to the notice of preliminary decision, the employer can make a final decision not to hire the applicant solely or in part because of the applicant's conviction history. In so doing, however, the employer must notify the applicant *in writing* of the following:

- The final denial or disqualification, although the employer is not required (but may do so if it wishes) to justify or explain the employer's reasoning behind this denial or disqualification;
- Any existing procedures the employer has for the applicant to challenge the decision or request reconsideration; and
- The applicant's right to file a complaint with the Department of Fair Employment and Housing.

AB 1008 does include several exemptions. The most important exemption permits an employer to inquire and consider criminal history if the employer is required by state, federal, or local law to conduct criminal background checks for employment purposes or to restrict employment based on criminal history. The exemptions also exclude positions with criminal justice agencies, positions as a farm labor contractor, and any position for which a state or local governmental agency is required by law to conduct a conviction history background check.

In July 2017, the California Fair Employment and Housing Council ("FEHC") issued final regulations on the same subject: inquiries about criminal history and use of criminal history in hiring and promotion decisions. Those regulations are to an extent inconsistent with AB 1008. We understand that the FEHC staff is planning to amend its regulations in light of the enactment of AB 1008.

Recommendations for Employers. AB 1008 is clearly an important development, and employers should review and, if

necessary, update their hiring practices to avoid any liability. As a fundamental matter, employers should eliminate all questions in their job applications and other similar documents that inquire about criminal history. Any questions concerning criminal history should be made in a document presented to the applicant only *after* a conditional offer is made. Thus, employers should ensure all interviewing personnel (whether human resource staff, hiring supervisors, or others) are trained and advised to make sure that no questions about criminal history are asked until after a conditional offer is made. Even when the employer may legally consider an applicant's conviction history after making a conditional offer of employment, the employer should carefully engage in the individualized assessment via a privileged conversation with its attorney.

A significant number of employers will be able to use the exception for positions where a criminal background check or the absence of certain criminal convictions is a prerequisite for employment. However, those employers should review their policies to make sure that only persons applying for such positions are asked about criminal history at the pre-offer stage.

Immigrant Worker Protection Act—AB 450

In an obvious response to the efforts of the Trump Administration, Assembly Bill 450, effective January 1, 2018, generally limits a California employer's ability to *voluntarily* comply with federal immigration authorities. AB 450 states that, except as otherwise required by federal law, an employer or its agent shall not voluntarily allow an immigration enforcement agent to enter nonpublic areas of a place of labor unless the agent provides a judicial warrant. The employer may, however, take the agent to a nonpublic area where employees are not present to verify whether the agent has a judicial warrant, as long as the employer does not give the agent consent to search that area. An employer who violates this mandate is subject to civil penalties from $2,000 to $5,000 for the employer's first violation and $5,000 to $10,000 for each subsequent violation. Notably, the definition of "violation" is intentionally broad under this section: it refers to each time an employer voluntarily allows an immigration agent to enter a nonpublic place of labor "without reference to the number of employees, the number of immigration enforcement agents involved in the incident, or the number of locations affected in a day." The Labor Commissioner and Attorney General have exclusive authority to enforce this mandate through civil action.

AB 450 also prohibits an employer from voluntarily allowing an immigration enforcement agent to access, review, or obtain an employee's records without a subpoena or warrant, with the exception of I-9 Employment Eligibility Verification forms and other forms for which a Notice of Inspection has been provided to the employer.

Finally, the law requires that employers provide their employees notice of certain immigration enforcement actions. For example, an employer must provide notice to an employee (and his or her authorized representative) within 72 hours of receiving a notice of inspection for I-9 Forms or other employment records by an immigration agency. Additionally, once an employer has received the results of that inspection, the employer has 72 hours to provide the affected employee a copy of the written results and the obligations of both the employer and the affected employee that arise from the results of the inspection.

Recommendations for Employers. First, all personnel who may interact with incoming federal immigration agents should be advised about the prohibition on allowing access unless the agent presents a judicial warrant. This would include not only receptionists but also human resources personnel, plant managers, and other supervisors who might be required to interact with the federal immigration agent. Next, the employer should make sure that the same personnel confirm, prior to making I-9 forms available to a federal immigration agent, that the employer has received a Notice of Inspection. While we expect this law will be challenged on constitutional and federal preemption grounds, employers should implement compliance strategies until its fate is decided.

Retaliation Complaint Protections—SB 306

Senate Bill 306, effective January 1, 2018, authorizes the Labor Commissioner's office to investigate an employer when it suspects retaliation or discrimination during the course of adjudicating a wage claim, during a field inspection concerning labor standards, or in instances of suspected immigration threats. Under the new law, the Labor Commissioner is authorized to investigate with or without receiving a complaint from an employee. Most significantly, if the Labor Commissioner believes that the employer has retaliated against an employee, it can seek injunctive relief from a court while the investigation is underway. Presumably, the "injunctive relief" would be

an order to reinstate the potentially aggrieved employee, even though no final adjudication of the retaliation issue has occurred. The Labor Commissioner would have to show "reasonable cause" of a violation in order to obtain injunctive relief.

Recommendations for Employers. SB 306 is another in a series of expansions of protections for employees against employer retaliation. This statute gives the Labor Commissioner an extraordinary ability to obtain reinstatement of a putative victim of retaliation, without having to prove an underlying violation. As a result, employers must be extremely careful in taking any significant personnel action against an employee who has filed a wage claim or who is assisting in an audit by the Labor Commissioner, or where there may have been threats of immigration activities by the employer's supervisors.

Parental Baby Bonding Leave—SB 63

The New Parent Leave Act, or Senate Bill 63, effective January 1, 2018, expands to employers with 20 or more employees California's requirement that employers provide parental bonding leave to eligible employees under the California Family Rights Act. Under the new law, such employees may take 12 weeks of unpaid protected leave to bond with their child if they have worked at least 1,250 hours for the employer during the previous year. The leave may be taken at any time 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, and the employer must guarantee the employee the same or a comparable position at the end of the leave. Additionally, the employer is required to maintain health coverage under a group health plan at the same level and conditions as employees not on leave.

Recommendations for Employers. Employers with 50 or more employees should already be familiar with this obligation under the California Family Rights Act ("CFRA"); the new law merely expands those rights to employers who have 20 to 49 employees within 75 miles of each other. However, SB 63 does not extend *all* of the CFRA rights to employees of smaller employers: it applies only to the parental bonding leave provisions in CFRA.

Training Regarding Gender Identity, Gender Expression, and Sexual Orientation—SB 396

Effective January 1, 2018, the Transgender Work Opportunity Act amends the FEHA, requiring employers with 50 or more employees to include harassment based on gender identity, gender expression, and sexual orientation in their mandatory two hours of sexual harassment training. Additionally, the bill requires each employer to prominently display a poster regarding transgender rights in an accessible location in the workplace.

The FEHC has approved regulations on general identity, gender expression, and transgender individuals, which became effective July 1, 2017.

Recommendations for Employers. To the extent they have not already done so, employers must update their training protocols to include gender identity, gender expression, and sexual orientation in the training sessions that currently cover harassment, discrimination, "bullying," and related topics. Personnel policies that prohibit discrimination should also be reviewed to make sure they include reference to gender identity, gender expression, and sexual orientation. Employers must also ensure that the poster on transgender rights is posted in locations where other employee notifications are posted. The poster is available from the Department of Fair Employment and Housing website.

GENDER-NEUTRAL TERMS IN FAIR EMPLOYMENT AND HOUSING ACT—AB 1556

This new law, effective January 1, 2018, removes all gendered terms from the text of the FEHA, replacing terms such as "female," "she," and "her" with "person" or "employee." The law makes clear that all people, including transgender, non-binary, and gender-nonconforming employees, are protected by the FEHA.

Human Trafficking Posting Requirements—SB 225

Senate Bill 225 expands the list of businesses that are required to post a notice regarding slavery and human trafficking. The existing list includes emergency rooms, urgent care centers, liquor stores, truck and rest stops, bus stations, some airports, train and bus stations, massage parlors, and adult-oriented businesses. The new bill adds hotels, motels, and bed-and-breakfast inns. The bill became effective on January 1, 2018, and is available to download from the California Attorney General's website.

Recommendations for Employers. With the addition of the above two poster requirements, employers should review

their posting requirements to ensure compliance with California law.

General Contractor Liability for Violations by Subcontractors—AB 1701

Effective January 1, 2018, this new law makes general construction contractors liable for wage violations by their subcontractors. The new section of the Labor Code, section 218.7, makes clear that the general contractor's liability extends only to unpaid wages, fringe benefits, or other benefit payments and contribution, but not to penalties or liquidated damages. Employees do not have a private right of action to bring a claim to enforce the new Labor Code section on their own; only the Labor Commissioner, labor-management cooperation committees, and unions can bring an action against the general contractor.

Workers' Compensation for Employees Injured on the Job—AB 44

Prompted by the 2015 San Bernardino mass shooting, this new law requires employers to immediately provide a nurse case manager and information of the treatment options available to employees injured in an act of domestic terrorism. The law is applicable only if the governor declares a state of emergency in connection with the act of domestic terrorism.

Minimum Wage Increases

The annual minimum wage increases continue—beginning January 1, 2018, California minimum wage increases to $11.00 per hours for businesses with 26 or more employees, and $10.50 for business with fewer than 26 employees. Certain California cities—including Cupertino, El Cerrito, Los Altos, Mountain View, Oakland, Palo Alto, San Mateo, Santa Clara, and Sunnyvale—have specific local minimums that increase in the new year as well.

The minimum wage increase also results in increases for other, significant employment regulations. First, the minimum threshold for exempt status in California under the executive, federal, and administrative exemptions now is $45,760 annually or $3,814 per month. Additionally, the overtime exemption for employees covered by a collective bargaining agreement, where the collective bargaining agreement includes an internal overtime provision, now requires that the employee be paid at least $14.30 per hour in order to avoid the statutory overtime requirements.

DRAFT, FORTHCOMING REGULATIONS FROM THE FAIR EMPLOYMENT AND HOUSING COUNCIL

National Origin Discrimination Regulations

On June 2, 2017, the FEHC gave notice of its intention to amend existing regulations that prohibit employment discrimination on the basis of national origin. The proposed regulations are in part based on the guidance issued by the Equal Employment Opportunity Commission in November 2016. Nonsubstantial modifications to the Regulations were last considered by the Council on December 11, 2017.

While the FEHA already prohibits workplace discrimination on the basis of "national origin," it does not fully define the term. The expanded definition of "national origin" included in the most recent version of the draft regulations is: the individual's or ancestors' actual or perceived: (i) physical, cultural, or linguistic characteristics associated with a national origin group; (ii) marriage to or association with persons of a national origin group; (iii) tribal affiliation; (iv) membership in or association with an organization identified with or seeking to promote the interests of a national origin group; (v) attendance or participation in schools, churches, temples, mosques, or other religious institutions generally used by persons of a national origin group; and (vi) name that is associated with a national origin group. A "national origin group" includes, but is not limited to, ethnic groups, geographic places of origin, and countries that are not presently in existence.

This new definition of "national origin," as well as other aspects of the draft regulations, has the potential to significantly broaden an employer's liability. The draft regulations would prohibit discrimination based on language, accent, and immigration status. Additionally, they would prohibit discrimination based on actual or perceived memberships and associations, so that a plaintiff could allege discrimination, for example, based on the erroneous belief that his or her spouse was foreign born. The peculiar results that the broad definition of "national origin" invites may make the regulations vulnerable to challenge on the ground that they exceed the authority of the FEHC.

PROPOSED LEGISLATION

Secret Settlements in Sexual Misconduct Cases—AB 820

In January 2018, Senator Connie M. Leyva, a Democrat from Chino, introduced a new bill that would prohibit an individual accused of sexual assault, harassment, or discrimination in the workplace from settling allegations with an agreement that includes a confidentiality provision. The bill is co-sponsored by the Consumer Attorneys of California and the California Women's Law Center. The current version of the bill bans confidential settlement agreements only when a lawsuit has been filed. The goal of the bill is to protect victims and was inspired by the plethora of recent reports of sexual misconduct in the workplace that included nondisclosure agreements. Employer groups will oppose the bill, arguing that it will actually deter settlements and force employers and those accused of harassment to litigate the claim once a lawsuit is filed.

BILLS VETOED BY GOVERNOR BROWN

Gender Pay Parity—AB 1209

On October 15, 2017, Governor Brown vetoed AB 1209, a bill that would have required larger employers (defined as 500 or more employees in California) to publicly disclose differences in average and mean salary levels of exempt employees and board members by gender. The bill specifically required employers to produce salary data based on "job classification or title," which employers criticized as being an unreliable way of comparing the responsibilities of an employee in practice. The bill would have required this information to be submitted to the California Secretary of State, who would in turn publish the data on a public website.

In his veto memo, the governor expressed his concern that the bill, given its ambiguous wording, would require employers to disclose data that would not "meaningfully contribute to efforts to close the gender wage gap." Further, he worried that the ambiguity "could be exploited to encourage more litigation than pay equity." That said, the governor reiterated his support of policies that ensure that women are compensated equitably and the work of the California Pay Equity Task Force.

OTHER FEDERAL AND STATE REGULATORY DEVELOPMENTS

DOL Test for Interns as Employees

In early January 2018, the U. S. Department of Labor ("DOL") issued a statement and new internship program fact sheet endorsing a new test for assessing whether interns are employees under the Fair Labor Standards Act. In doing so, the DOL rescinded guidance from 2010 and adopted a seven-factor "primary beneficiary" test that was laid out by the Second Circuit in its 2015 ruling in *Glatt v. Fox Searchlight Pictures Inc.*, which has been adopted by several other appellate courts, including the Ninth Circuit.

Under the "primary beneficiary" test, the court looks to the "economic reality" of the intern's relationship with his or her employer to determine which party is the primary beneficiary of the relationship. The seven nonexhaustive factors include whether there is a clear understanding that no expectation of compensation exists, whether interns receive training similar to what they would get in an educational environment, and to what extent the internship is tied to a formal education program. If the court finds that an intern is an employee, the intern is entitled to minimum wage and overtime under the FLSA.

The DOL guidance, however, will not bind the California Labor Commissioner, which has historically adopted a far more stringent test. California employers who retain interns should review carefully the Labor Commissioner's pronouncements on the subject.

New DLSE Guidance on Rest Breaks

In November 2017, the California Labor Commissioner updated its guidance on employer-provided rest breaks, which can be viewed on the FAQ section of the Commissioner's website. The new FAQs answers questions regarding whether an employer may require an employee to remain on work premises during his or her rest period. The new guidance explains that, after the California Supreme Court's decision in *Augustus v. ABM Security*, an employer must relieve nonexempt employees of all duties and relinquish control over how those employees spend their break time. However, the FAQ notes, as a practical

matter, that an employee would have only five minutes to travel from and back to work during a 10-minute break. The guidance additionally notes that an employer may not require an employee to keep in radio or electronic communication during a rest period. Further, the guidance states that an employee is not entitled to additional rest breaks if the employee is a smoker and that a bathroom break does not need to be taken during a rest period.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com/contactus/.

George S. Howard Jr.
San Diego
+1.858.314.1166
gshoward@jonesday.com

Rick Bergstrom
San Diego
+1.858.314.1118
rjbergstrom@jonesday.com

Fred W. Alvarez
Silicon Valley
+1.650.739.3977
falvarez@jonesday.com

Aaron L. Agenbroad
San Francisco
+1.415.875.5808
alagenbroad@jonesday.com

F. Curt Kirschner Jr.
San Francisco
+1.415.875.5769
ckirschner@jonesday.com

Michael J. Gray
Chicago
+1.312.269.4096
mjgray@jonesday.com

Matthew W. Lampe
New York
+1.212.326.8338
mwlampe@jonesday.com

Cindi L. Ritchey
San Diego
+1.858.314.1200
critchey@jonesday.com

Robert A. Naeve
Irvine
+1.949.553.7507
rnaeve@jonesday.com

Liat Yamini
Los Angeles
+1.213.243.2317
lyamini@jonesday.com

Steven M. Zadravecz
Irvine / Los Angeles
1.949.553.7508 / +1.213.243.2195
szadravecz@jonesday.com

Nora C. Tillmanns, an associate in the Los Angeles Office, assisted in the preparation of this White Paper.