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2017 LEGISLATIVE DEVELOPMENTS

An Employer's Guide to New Laws Impacting the Workplace in 2018 and Beyond

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The California Legislature has enacted a number of new laws that will impact employers and employees in 2018. These new laws are described below.

I. Hiring Practices.

A. SB 1008 (MCCARTY) CONVICTION HISTORY.

Commonly referred to as the "Ban the Box" bill, this bill adds Section 12952 to the Government Code, as part of the California Fair Employment and Housing Act (FEHA), and repeals Section 432.9 of the Labor Code.

This bill repeals the previously existing prohibition on state or local agencies from making certain pre-employment inquiries into an applicant's criminal history, and instead, provides that it is an unlawful employment practice for any employer (public or private) with 5 or more employees to do any of the following:

- To inquire on any employment application about an applicant's conviction history prior to making a conditional offer of employment;
- To consider, distribute, or disseminate information about an applicant's conviction history resulting from a background check that the employer is prohibited from considering under Labor Code section 432.7, e.g., arrests not leading to convictions, convictions that have been sealed

or expunged, or convictions that were dismissed pursuant to a drug diversion program; and

- To interfere with, restrain, or deny the exercise or attempted exercise, or any right provided by the new statute.

The bill further requires an employer who intends to deny an applicant a position solely, or in part, because of the applicant's conviction history to make an individualized assessment of whether the conviction has a direct or adverse relationship with the job's specific job duties that justifies denying the applicant employment. In making this assessment, the employer must consider:

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

The employer may, but is not required, to commit this assessment to writing.

If an employer makes a preliminary decision that an applicant's conviction history disqualifies him/her from employment, the employer must notify the applicant of this decision in writing. The written notification must include notice of the convictions that are the basis for the decision to rescind the conditional offer of employment, a copy of the conviction history report, if any, and an explanation of the applicant's right to respond by challenging the accuracy of conviction history or presenting evidence of rehabilitation or other mitigating circumstances. Applicants will have five (5) business days to provide a response and the employer will then have three (3) business days to make its final decision. If the final decision is to deny employment, an employer must then provide a second written notice of the final decision. This notice must include a statement of the applicant's right to file a complaint with the Department of Fair and Employment and Housing challenging the decision.

The bill exempts specified positions of employment from the provisions of the bill, including those for which a criminal

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background check is legally required, any position with a criminal justice agency, or Farm Labor Contractors.

The bill includes a series of legislative findings and declarations noting the number of states (29) nationwide that have adopted similar restrictions on employers' ability to make pre-employment inquiries into criminal history and affirming the conclusion of "experts," who have concluded both that employment is essential to reducing recidivism and that criminal convictions serve as a significant barrier to employment.

B. AB 168 (EGGMAN) SALARY HISTORY.

This bill adds Section 432.3 to the Labor Code.

This bill prohibits all employers from relying on the salary history information of an applicant as a factor in determining whether to offer employment or what salary to offer. The bill prohibits employers from seeking salary history about an applicant. Finally, the bill requires employers, upon reasonable request, to provide the pay scale for the position for which an applicant is applying. If an applicant voluntarily discloses salary history information, then the information may be used by an employer considering or relying on that information in determining the salary to offer to an applicant.

II. Gender Identity and Expression.

A. SB 179 (ATKINS) GENDER RECOGNITION ACT.

This bill, entitled the Gender Recognition Act, amends, repeals, and adds sections to the Code of Civil Procedure, the Health and Safety Code, and the Vehicle Code regarding gender identity. In addition to "male" and "female," the bill creates a third option,"nonbinary, by which individuals can identify their gender on various documents.

1. Birth certificates and Name-change Petitions.

Commencing on September 1, 2018, this bill deletes the requirement that an applicant must have undergone any type of gender reassignment procedure to submit

an application to change the gender on their birth certificate. The bill requires that an affidavit accompany the application attesting under penalty of perjury that the change is to conform the person's legal gender to their gender identity (female, male, or nonbinary) and not for any fraudulent purpose.

2. Driver's licenses.

The bill also authorizes applicants for driver's licenses to choose female, male, or nonbinary as their gender category and revises the enrollment form to allow applicants to mark their gender, as opposed to their sex.

B. SB 396 (LARA) AMENDMENT TO AB 1825 TRAINING REQUIREMENTS; POSTING.

This bill acts to amend sections of the Government Code and the Unemployment Insurance Code.

1. Training.

This bill amends the requirements for AB 1825 training by including prevention of harassment based on gender identity, gender expression, and sexual orientation as part of the mandatory content of that training.

2. Postings.

This bill would also require each employer to post a poster developed by the DFEH regarding transgender rights.

3. Employment barriers.

The California Workforce Innovation and Opportunity Act makes programs and services available to individuals with employment barriers and creates a board, including the Governor and Governor-appointed members, to carry out specified functions. This bill would expand the definition of an "individual with employment barriers" to include transgender and gender noncomforming individuals. The bill also authorizes the appointments to the board to include representatives of community-based organizations that serve transgender and gender nonconforming individuals.

C. SB 310 (ATKINS) NAME AND GENDER CHANGE: STATE PRISONS AND COUNTY JAILS.

This bill amends, repeals, and adds Section 1279.5 of the Code of Civil Procedure.

This bill removes limitations on inmates serving in California state prisons from petitioning for a name or gender change. The bill requires state prisons and county jails to use the new name, listing the prior name only as an alias.

D. AB 1556 (STONE) GENDER REFERENCES IN FEHA.

This bill revises provisions of the FEHA by deleting gender-specific personal pronouns and by making other conforming changes.

This bill also deletes all references to "female person" and "female employee" and replaces them with references to "person" and "employee" for purposes of pregnancy-related disability, leave, and discrimination and harassment laws.

III. Leaves.

A. B 63 (JACKSON) PARENTAL LEAVE.

Beginning January 1, 2018, employers employing 20 or more persons will be required to provide their employees with new parental leave rights following the birth, adoption, or foster care placement of a child.

The bill adds new Government Code section 12945.6. The new statute makes it an unlawful employment practice for an employer employing 20 or more employees to refuse to allow an eligible employee to take up to 12 weeks of unpaid leave during the first year following the birth, adoption, or foster care placement of a child.

In order to be eligible, the employee must meet some of the same eligibility requirements found in the federal Family and Medical Leave Act (FMLA) and the California Family Rights Act (CFRA): the employee must have been employed for 12 months with the employer and must have worked at least 1,250 hours during the 12-month period preceding the leave request. However, the FMLA/CFRA requirement that an employee also work at a worksite at which 50 or more employees are employed or within 75 miles of such a site has been reduced to a worksite at which 20 or more employees are employed or within 75 miles of such a site.

During the period of the leave, 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." The new statute is not clear, however, as to whether employers can compel the use of these paid leave benefits during the parental leave.

In addition to providing up to 12 weeks of leave, the new statute also requires employers to maintain healthcare coverage for an employee during the parental leave.

The new statute further requires an employer to guarantee to an employee taking leave that the employee will be reinstated to the same or a comparable position upon the termination of the leave. If an employer does not provide such a guarantee on or before the commencement of the leave, the employer is deemed to have refused to allow the leave and may be liable for recoverable damages under the statute.

For the first two years the statute is in effect (2018-2020), the Department of Fair Employment and Housing (DFEH) is required to establish a pilot mediation program. If, within 60 days of receipt of a right-to-sue- notice, an employer requests mediation, the employee may not pursue a civil action until the mediation is complete. During the time period in which the dispute is being mediated, the employee's statute of limitations is tolled. The mediation program sunsets as of January 1, 2020.

B. SB 728 (NEWMAN) SICK LEAVE FOR STATE EMPLOYEES WHO SUSTAIN DISABILITY IN CONNECTION WITH ACTIVE DUTY SERVICE IN ARMED FORCES.

This bill amends Government Code section 19859.

It provides an additional 96 hours of paid sick leave credits to a state employee who, after having been called up for deployment from the National Guard or federal military reserve force, sustains a service-connected disability while serving on active duty that is rated at 30% or more by the United States Department of Veterans Affairs.

C. SB 731 (NEWMAN) SICK LEAVE FOR EDUCATION EMPLOYEES WHO SUSTAIN DISABILITY IN CONNECTION WITH ACTIVE DUTY SERVICE IN ARMED FORCES.

This bill amends Education Code section 44978.2.

This bill is a companion bill to SB 728 and expands leave rights for certificated and classified employees who sustain a service-connected disability rated at 30% or more by the United States Department of Veterans Affairs as a result of serving on active duty after having been called up from the National Guard or federal military reserve force.

IV. Labor Relations.

A. AB 119 (COMMITTEE ON BUDGET) UNION ACCESS TO NEW HIRES.

AB 119, a budget trailer bill passed in June, requires public employers to provide the exclusive representative of represented employees mandatory access to new employees during the new employee orientation process as well as access to employee contact information. Specifically, an employer must give the exclusive representative notice of an orientation at least 10 days in advance, with an exception allowing shorter notice when an employer needs make an urgent hire. The employer must meet and confer with the exclusive representative over the structure, time, and manner of access. Failure to reach agreement results in compulsory interest arbitration.

Additionally, the bill requires that public employers provide the exclusive representative with the contact information of employees. An employer must disclose the name, job title, department, work location, work, home, and personal cellular telephone numbers, personal email addresses, and the home address of a new hire within 30 days of the date of hire or by the first pay period of the month following hire. The law also requires employers to provide the exclusive representative a list of that information for all employees in the bargaining unit at least every 120 days, though a different interval may be agreed to.

Lastly, the AB 119 amends the Public Records Act to include personal email addresses among certain information that shall not be deemed public records subject to disclosure,

except under certain circumstances, including disclosure to exclusive representatives as described above and when public employees use personal email to conduct public business as stated in *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608.

Because AB 119 was passed as a budget trailer bill, it went into effect immediately. Thus, employers are currently required to comply with the union access provisions described above.

B. SB 112 (COMMITTEE ON BUDGET AND FINANCE) REVISIONS TO AB 119.

SB 112 makes some alterations to the union access legislative provisions of AB 119, above. Under AB 119, when an employer and union representative cannot agree on the structure, time, and manner of access to new employees during orientation, the issue is subject to arbitration. The employer or exclusive representative can demand arbitration 45 days after the first meeting of the parties or 60 days after the request for negotiation. Under AB 119, the arbitrator selection process was to commence no later than 14 days prior to the end of the negotiation period (60 days). As a result of SB 112, the arbitrator selection process shall commence within 14 days of a party's demand for arbitration. This bill also provides that the arbitration is to be completed within 30 days (correcting an error in AB 119 requiring arbitration to be completed "within not less than 30 days"). (See Gov. Code, § 3557.)

C. AB 83 (SANTIAGO) – COLLECTIVE BARGAINING: JUDICIAL COUNCIL.

AB 83 enacts the Judicial Council Employer-Employee Relations Act providing Judicial Council Employees the right to form, join, and participate in the activities of employee organizations. (See Gov. Code, §§ 3524.50 et seq.) The new act excludes certain Judicial Council employees, including managerial, confidential, supervisory employees, judicial officers, employees of the Supreme Court, the courts of appeal, the Habeas Corpus Resource Center, and employees in positions designated by the Judicial Council as excluded positions. The bill would prohibit exempted and excluded positions from exceeding one-third of the total authorized Judicial Council positions as stated in the Department of Finance Salaries and Wages Supplement.

The bill sets forth rights, duties and prohibitions that parallel those of the Ralph C. Dills Act (Gov. Code § 3512, et seq.), which is the act governing collective bargaining between the state and recognized state public employee organizations. The bill prohibits the Public Employment Relations Board (PERB) from including Judicial Council employees in a bargaining unit that includes employees other than those of the Judicial Council.

D. AB 1455 (BOCANEGRA) CALIFORNIA PUBLIC RECORDS ACT: NEW EXEMPTIONS.

The California Public Records Act (Gov. Code §6250, et seq.) requires state and local agencies to make their records available for public inspection, unless the records are exempted under the provisions of the act. Exempted records include specific records of state agencies related to the collective bargaining activities governed by the Dills Act. AB 1455 amends Government Code section 6254 to create an exemption for certain records of local agencies related to activities governed by the Meyers-Milias-Brown Act.

Under this bill, local agency records related to collective bargaining that "reveal a local agency's deliberative process, impressions, evaluations, opinions, recommendations, meeting minutes, research, work products, theories, or strategy, or that provide instruction advice, or training to employees who do not have full collective bargaining and representation rights" are exempt from disclosure. (Gov. Code, § 6254(p)(2).)

E. SB 285 (ATKINS) PUBLIC EMPLOYERS: UNION ORGANIZING.

This bill adds Chapter 11 (commencing with section 3550) to Division 4 of Title 1 of the Government Code. The bill prohibits a public employer from deterring or discouraging public employees from becoming or remaining members of an employee organization. PERB has jurisdiction over violations of the new law.

V. Employment Discrimination/ Harassment/Retaliation.

A. AB 1102 (RODRIGUEZ) HEALTH FACILITIES: WHISTLEBLOWER PROTECTIONS.

AB 1102 amends section 1278.5 of the Health and Safety Code to increase the maximum fine against health facilities who retaliate against whistleblowers.

Existing law provides that no health facility shall discriminate or retaliate against any patient, employee, member of the medical staff, or any other health care worker because the person has presented a grievance, complaint, or report to the facility or some other authority, or who was involved in an investigation related to the quality of care, services, or conditions of the facility. Anyone who willfully violates this provision is guilty of a misdemeanor and subject to a fine. AB 1102 increases the fine from $20,000 to $75,000.

B. AB 1710 (COMMITTEE ON VETERANS AFFAIRS) PROHIBITED DISCRIMINATION AGAINST SERVICE MEMBERS.

This bill, along with SB 266, amends Military and Veterans Code section 394 to clarify that no person may be discriminated against with respect to the "terms, conditions, or privileges" of employment as a result of that individual's service in the armed forces.

C. SB 31 (LARA) CALIFORNIA RELIGIOUS FREEDOM ACT.

SB 31 creates the California Religious Freedom Act, adding section 8310.3 to the Government Code.

Under the new law, state and local agencies and public employees acting under the color of law are prohibited from disclosing to the federal government personal information regarding a person's religious beliefs, practices, or affiliation when the information is sought for the purpose of compiling a database of individuals based on religious beliefs, practices, affiliation, national origin, or ethnicity for law enforcement or immigration purposes.

The new law prohibits state agencies from using any resources to assist with the compilation of any such database. It also prohibits state and local law enforcement agencies from collecting personal information on the

religious beliefs of any individual except as part of targeted investigation or when necessary to provide religious accommodation. The bill also provides that an agency or employee would only be in violation of the new act if the agency or employee acted with actual knowledge that the information shared would be used for the purposes prohibited by the act.

D. SB 295 (MONNING) FARM LABOR CONTRACTORS: SEXUAL HARASSMENT PREVENTION.

Existing law requires that farm labor contractors attest in writing that certain employees have received sexual harassment prevention and reporting. SB 295 amends Labor Code section 1684 to require that training for each agricultural employee be conducted in the language understood by that employee. Further, as part of the farm labor contractor's license renewal process, each licensee is required to provide the commissioner with a complete list of all materials used to provide the sexual harassment training to his or her agricultural employees.

Also as part of the license renewal process, the licensee must provide to the commissioner the total number of agricultural employees trained in sexual harassment prevention. The commissioner is then required to aggregate that information and publish on the internet the total number of agricultural employees training the previous calendar year.

SB 295 also amends Labor Code section 1697.5 to authorize the commissioner to issue citations and assess civil penalties of $100 for each violation of the provisions of this bill or certain existing laws.

E. SB 306 (HERTZBERG) RETALIATION ACTIONS: ADMINISTRATIVE REVIEW.

Existing law prohibits a person from discharging, discriminating, retaliating, or taking any adverse action against an employee or applicant because that individual has engaged in protected activity. An aggrieved employee can file a complaint with the Division of Labor Standards Enforcement ("Division"), which will result in an investigation by a discrimination complaint investigator. Upon finding a violation, the commissioner can order the offender to cease, desist and remedy the violation and may subsequently bring a civil action against someone who does not comply with the order.

This bill amends Labor Code section 98.7 to authorize the Division to commence an investigation of an employer, with or without a complaint being filed, when retaliation or discrimination is suspected during the course of a wage claim or other investigation being conducted by the Labor Commissioner. Additionally, the bill authorizes the commissioner to seek injunctive relief upon finding "reasonable cause" to believe that someone is engaging in a violation. Under these provisions, a court shall order injunctive relief on a showing that reasonable cause exists to believe that the employee was discharged or subjected to adverse action for raising a claim of retaliation or asserting rights under laws subject to the Labor Commissioner's jurisdiction. The bill also provides 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 the retaliation.

The bill also authorizes the commissioner to issue citations for violations and establishes review procedures. The bill authorizes the commissioner to establish regulations for hearing procedures. Employers who willfully refuse to comply with a final order will be subject to civil penalties of $100 per day up to a maximum of $20,000, payable to the affected employee.

Finally, the bill expands the potential remedies for employees filing civil actions to include injunctive relief. Injunctive relief shall be issued on a showing that "reasonable cause" exists to believe a violation has occurred. Any injunctive relief granted under these provisions is not stayed pending an appeal.

VI. Wage and Hour.

A. AB 46 (COOPER) CALIFORNIA PAY EQUITY ACT APPLICABLE TO PUBLIC EMPLOYERS.

This bill amends Labor Code section 1197.5, California's Pay Equity Act, to make it expressly applicable to public employers.

B. AB 1701 (Thurmond) Contractor Liability for Unpaid Wages

This bill adds section 218.7 to the Labor Code.

For contracts entered into after January 1, 2018, a direct contractor who enters into a private works construction contract is liable for any unpaid wages, fringe benefits, or other benefit payment or contribution owed to an employee of any subcontractor for work performed on the project. A direct contractor may not evade the liability imposed by the new statute but the bill does not prohibit indemnity agreements between a direct contractor and a subcontractor.

The obligations imposed by the new code section may be enforced by the Labor Commissioner, the third party to whom the wages, fringe benefits, or other benefit payments or contributions are owed, or a joint labor-management cooperation committee established pursuant to the federal Labor Management Cooperation Act.

The bill provides that the property of the direct contractor is subject to attachment after trial for payment of the obligation.

The statute imposes a one-year statute of limitations for actions brought pursuant to it.

C. SB 621 (BRADFORD) OVERTIME COMPENSATION: PRIVATE SCHOOL TEACHERS.

This bill amends Labor Code section 515.8. It clarifies that for full-time private school teachers to be considered exempt they must earn the greater of (i) no less than 100% of the lowest salary offered by any school district to a person who is in a position requiring a teaching credential or (ii) the equivalent of no less than 70% of the lowest schedule salary offered by the school district or county office of education in which the private school is located to a person having a valid California teaching credential.

For part-time private school teachers to be considered exempt, they must be paid a proportional salary to a full-time private school teacher.

For budgeting purposes, the private school may determine the salary requirements by referring to the public school salary schedules in their jurisdictions in effect during the preceding 12 months.

VII. Immigration-Related Practices.

A. AB 450 (CHIU) –IMMIGRATION WORKSITE ENFORCEMENT ACTIONS.

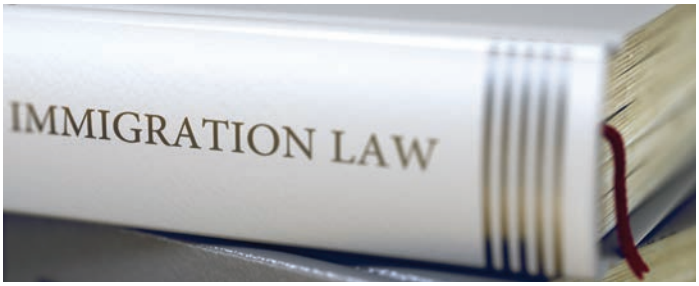
This bill adds Sections 7285.1, 7285.2, and 7285.3 to the Government Code and Sections 90.2 and 1019.2 to the Labor Code.

1. Immigration enforcement agency access to workplaces.

This bill prohibits employers from providing voluntary consent to an immigration enforcement agent to: (i) enter nonpublic areas of work without a judicial warrant, and (ii) access, review, or obtain the employee records without a subpoena or court order. The bill grants the Labor Commissioner or the Attorney General the exclusive authority to enforce these provisions and requires any penalty recovered be deposited in the Labor Enforcement and Compliance Fund.

The bill also requires employers to provide current employees notice of any inspection of I-9 forms conducted by an immigration agency within 72 hours of receiving the federal notice. Employers must provide affected employees with a copy of the notice when requested. The bill also requires employers to provide employees with copies of any inspection results.

Violations of these prohibitions are fined at $2,000-5,000 for the first violation and $5,000-10,000 for each subsequent violations.



2. Reverification.

The bill prohibits employers from reverifying the employment eligibility of current employees beyond any federal requirements. Violations of this provision could result in a civil penalty of not more than $10,000 imposed by the Labor Commissioner.

B. AB 699 (O'DONNELL) – EDUCATIONAL EQUITY: IMMIGRATION AND CITIZENSHIP STATUS.

This bill amends sections of and adds Article 5.7 to the Education Code.

Existing law states the policy of the State of California is to afford all persons in public schools equal rights and opportunities in the educational institutions of the state. Existing law prohibits discrimination on the basis of specific characteristics and requires the State Department of Education to assess whether local educational agencies have taken certain actions related to educational equity.

This bill would expressly include immigration status in the specified characteristics for purposes of such existing law. The bill further prohibits school officials and employees from collecting information or documents regarding citizenship or immigration status of pupils or their family members. The bill requires the superintendent of a school district to report in a timely manner any requests for information or access to a school site by an officer or law enforcement agency for purposes of enforcing the immigration laws.

The bill encourages schools, when they are aware that a pupil's parent or guardian is not available to care for the pupil, to work with parents or guardians to update emergency contact information and not to contact Child Protective Services to arrange for the pupil's care. The bill also requires schools to perform specific actions relating to pupils and immigration status, including, among others, providing information to parents and guardians regarding their children's right to a free public education, regardless of immigration status or religious beliefs.

VIII. Benefits.

A. AB 512 (RODRIGUEZ) PUBLIC EMPLOYEES' RETIREMENT: SAFETY MEMBERS, INDUSTRIAL DISABILITY RETIREMENT

The Public Employees' Retirement Law provides a state safety member of the Public Employees' Retirement System who

retires for industrial disability a retirement benefit equal to the greatest amount out of three possible calculations. The benefit amount is based on an actuarially reduced service retirement, a service retirement allowance, if the member is qualified, or 50% of the member's final compensation plus any purchased annuity. AB 512 extends these provisions through January 1, 2023.

B. AB 1695 (COMMITTEE ON INSURANCE) UNEMPLOYMENT INSURANCE.

AB 1695 makes several small and/or technical amendments to the Unemployment Insurance Code. Among those changes is a repeal of the authorization for employers to file reports of wages by telephone. Additionally, existing law provided that it was a violation of unemployment insurance law for any person to, among other things, procure counsel advice, or coerce anyone to willfully make a false statement or representation, or to knowingly fail to disclose a material fact in order to lower or avoid any contribution or to avoid being subject to certain provisions of law. AB 1695 amends the Unemployment Insurance Code to extend the law specifically to "business entities," which the code defines as a partnership, corporation, association, limited liability company, or Native American tribe as described in 26 U.S.C § 3306.

IX. Posting Requirements.

A. AB 260 (SANTIAGO) HUMAN TRAFFICKING.

The bill amends Civil Code section 52.6 by adding hotels, motels, and bed and breakfast inns to the list of business establishments that must post notices regarding slavery and human trafficking

B. SB 225 (STERN) HUMAN TRAFFICKING.

This bill makes additional amendments to Civil Code section 52.6 by modifying the model notice to be used and by directing the Department of Justice to so modify the notice and make it available on or before January 1, 2019.