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## *A Tale of Two Governments: Ten New Laws Impacting Employers with Operations in California*

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While the federal government seeks to scale back federal employment law regulations, California is forging ahead with new laws aimed at further protecting employees. President Trump took office less than a year ago and has already taken significant steps to pull back several of President Obama's employment law initiatives. In addition to proposing significant cuts to the Department of Labor's spending, President Trump's administration has declined to pursue President Obama's expansion of the federal overtime regulations, revoked Obama-era guidance on the joint employer standard, and derailed a rule that would have required large companies to report to the government what they pay employees, broken down by race and gender.

Meanwhile, the State of California and Governor Brown are going in a different direction — a trail California has been blazing for years. This year marked another year of proactive employment legislation, and, as usual, the new laws tip in favor of employees. The latest round of laws is led by key legislation in the areas of pay equity and criminal history that should demand immediate and serious attention from all employers in California. Unless otherwise specified, the new laws take effect on January 1, 2018.

### **Laws Related To The New Hire Process**

#### ***AB 168 (Job Applicant's Salary Information)***

Since the outset of the Obama administration, a priority of federal and state legislative action has been closing the "gender pay gap." According to the most commonly cited statistic, women working full time in the United States, on average, make approximately 80 cents for every dollar paid to men.<sup>1</sup> Uncertain of future federal action in this area, California has taken another significant stride this year toward closing that gap.

AB 168 creates three new duties on all California employers relating to the salary information of, and pay information provided to, job applicants. First, the new law prohibits an employer (orally or in writing) from seeking salary history information about a job applicant. Second, it prohibits an employer from relying on a job applicant's salary history information as a factor in determining (a) whether to offer employment, and (b) what salary to offer (except as noted below). Third, employers are required, upon reasonable request, to provide an applicant with the pay scale for the position to which he or she is applying.



These prohibitions come with one critical caveat. AB 168 does not forbid applicants from voluntarily disclosing — without prompting — salary history information to a prospective employer. Under such circumstances, employers are permitted to consider that information in determining the salary to offer the applicant.

With enactment of AB 168, California becomes the fourth state to enact similar legislation. Massachusetts, Oregon and Delaware (and multiple cities, including San Francisco and New York) have already passed similar laws, prohibiting employers from asking for salary information.

## ***AB 1008 (Prior Criminal Conviction History)***

Over the last decade, the “ban the box” movement has resulted in approximately 29 states and 150 cities and counties prohibiting employers from including a conviction history question on their job applications. The rationale behind the movement is that certain racial groups are over-represented in the criminal justice system, and limiting their employment opportunities based on their criminal history may disproportionately impact these groups. In 2013, California passed a “ban the box” law (formerly codified in Labor Code section 432.9) that applied only to state agencies, cities, and counties. AB 1008 repeals section 432.9 and adds section 12952 of the Government Code, which extends the prohibition to private and public employers, and imposes new obligations. These new obligations fall into two broad categories.

Conviction History Prior to a Conditional Offer of Employment. Employers with five or more employees are prohibited from:

- Including on any job application, before the employer makes a conditional offer of employment, any question asking for an applicant’s conviction history;
- Inquiring into or considering conviction history before a conditional offer is made; and
- Considering any of the following conviction history information in connection with a background check once a conditional offer is made: (1) arrests not followed by a conviction (with limited exceptions); (2) referral to or participation in a pre- or post-trial diversion program; and (3) convictions that have been sealed, dismissed, expunged, or statutorily eradicated pursuant to law.

In short, under AB 1008, inquiry into and consideration of an applicant’s criminal history is permissible only after the employer has made a conditional offer of employment.

Conviction History After A Conditional Offer of Employment. Once an offer has been extended, and the conviction history lawfully obtained, this new law provides that the employer cannot deny an applicant a position “solely or in part because of the applicant’s conviction history” until the employer performs “an individualized assessment of whether the applicant’s conviction history has a direct and adverse relationship with the specific duties of the job that justify denying the applicant the position.” In particular, the assessment would have to consider:

- The nature and gravity of the offense and 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.



AB 1008 provides that the employer “may, but is not required to, commit the results of this individualized assessment to writing.”

If the employer makes a preliminary decision that the applicant’s conviction history is disqualifying, the employer must notify the applicant of this preliminary decision in writing. Specifically, the employer must:

- Provide the written notice of the disqualifying conviction or convictions that are the basis for the preliminary decision to rescind the offer;
- Include a copy of the conviction history report, if any; and
- Provide an explanation that the applicant has the right to respond to the notice of the employer’s preliminary decision within at least five business days, and that the response may include submission of evidence challenging the accuracy of the conviction record, or evidence of rehabilitation or mitigating circumstances or both.

The employer cannot make any final determination based on conviction history during this five-business day period. If the applicant timely notifies the employer in writing that he or she is disputing the conviction history and is taking steps to obtain evidence to support this dispute, the employer must provide an additional five business days to respond to the notice. The employer also must consider any additional evidence or documents the applicant provides in response to the notice before making a final decision.

If the employer ultimately decides to deny an applicant based on the conviction history, the employer must notify the applicant of this in writing, and include notification of any existing procedure the employer has to challenge the decision, as well as notification of the applicant’s right to file a complaint with the Department of Fair Employment and Housing.

The above requirements do not apply to positions with criminal justice agencies, state, or local agencies required to conduct background checks, farm labor contractors, and employers required by state, federal, or local law to conduct background checks or restrict employment based on criminal history.

Employers that screen applicants and employees for criminal convictions should review and evaluate their job applications and background check practices — including those implemented by outside vendors — for compliance with these new requirements.

## **Laws Related to Policies and Training Obligations**

### ***SB 63 (Parental Leave For Small Employers)***

The California Family Rights Act (“CFRA”) and Family Medical and Leave Act (“FMLA”) provide up to 12 weeks per year of unpaid job-protected leave for eligible employees for specified family and medical reasons, including that of bonding with a newborn, child adoption, or foster care placement. SB 63 extends many of the protections of the CFRA and the FMLA to employers with 20 to 49 employees for leave to bond with a new child. Most importantly, under the new law, an employer must provide an employee with up to 12 weeks of parental leave to bond with a new child within one year of the child’s birth, adoption, or foster care placement if they meet the following requirements: (1) the employee has worked for the employer for more than 12 months; (2) the employee has at least 1,250 hours of service with that employer during the prior 12 months; and (3) the employee works at a



worksite in which the employer employs at least 20 employees within 75 miles. SB 63 mirrors many of the other protections that exist under the CFRA and FMLA, such as guaranteeing employment in the same or comparable position upon return, and maintaining continued group health coverage for employees during the duration of the parental leave at the same level and conditions that coverage would have been provided had the employee continued to work.

## ***AB 450 ("Immigrant Worker Protection Act")***

Several million undocumented immigrants reside in and make up a significant fraction of California's workforce. Facing an expected increase in workplace immigration enforcement activity under the Trump administration, the California legislature has enacted AB 450 to ensure that the federal immigration enforcement activity is consistent with the law, and that workers have sufficient notice and opportunity to correct any inaccuracies in their employment eligibility records before employers take adverse action against them in connection with immigration enforcement audits. AB 450's protective measures include the following:

- Employers cannot voluntarily consent to a federal immigration agent entering a nonpublic area of the worksite or to inspecting an employee's records without a warrant or subpoena.
- Employers must provide employees with a posted notice of an immigration worksite enforcement action at the employer's worksite within 72 hours of receiving the notice of inspection (the Labor Commissioner will develop a form notice by July 1, 2018).
- Employers must provide to an affected employee, and his or her representative, a copy of the written agency notice describing the results of an I-9 Employment Eligibility Verification inspection and written notice of the obligations of the employer and the affected employee arising from the action, which must be provided within 72 hours of receipt of the results.
- Employers are prohibited from checking the employment eligibility of a current employee at a time or in a manner not required by federal law.

A failure to abide by the requirements above can result in penalties between \$2,000 and \$10,000 per violation.

In light of the numerous new requirements, employers should promptly train their personnel to understand the limitations on their interactions with federal immigration agents who want access to the employer's property and to understand the law's pre- and post-inspection notice requirements to ensure that they meet the deadlines.

## ***SB 396 (Sexual Harassment Training to Include Gender Identity, Gender Expression and Sexual Orientation)***

According to one study, California is home to over 1.3 million lesbian, gay, bisexual, and transgender ("LGBT") adults, including over 100,000 transgender adults.<sup>2</sup> SB 396 seeks to better educate workforces about gender identity and gender expression discrimination in the workplace.



Employers with 50 or more employees are currently required to provide at least two hours of prescribed training and education regarding sexual harassment to all supervisory employees within six months of assuming supervisory duties and once every two years. SB 396 augments this requirement so that a component of the existing prescribed sexual harassment training and education involves harassment based on gender identity, gender expression, and sexual orientation. SB 396 also requires employers to post a poster released by the Department of Fair Employment and Housing in January 2017 (“Transgender Rights in the Workplace”) in a prominent and accessible location in the workplace.

### ***SB 295 (Sexual Harassment Training by Farm Labor Contractors)***

Sexual harassment and assault historically have been pervasive among workers in the agricultural industry, many of whom are undocumented immigrants. In 2014, to remedy this serious problem, the California legislature passed SB 1087 (now codified as section 1684 of the Labor Code), to reform the licensure requirements for farm labor contractors. The new requirements included providing mandatory sexual harassment training to employees and a prohibition on licensing of contractors who have committed sexual harassment. SB 295 was enacted to assist farm labor contractors with complying with the new sexual harassment prevention requirements, including by requiring contractors to provide the mandatory sexual harassment training in the language understood by the employee as well as requiring contractors to, as a condition of renewing their licenses, provide the Labor Commissioner with a list of all the materials used in the employee training in the prior year and the total number of employees trained in the prior year (which numbers the Labor Commissioner is to aggregate and publish online). SB 295 also authorizes the Labor Commissioner to assess a \$100 civil penalty for each violation of the sexual harassment preventing training requirements.

### **Law Related To Wage/Hour Obligations**

#### ***AB 1701 (Contractor Liability for Wages Unpaid by Subcontractor)***

AB 1701 focuses on the payment of wages in the construction industry. The objective of the bill is to ensure accountability for wage theft by construction subcontractors, while ensuring relief to impacted workers. As an example of the need for the legislation, the bill’s author described the scenario of a subcontractor leaving the state or filing for bankruptcy before paying its employees their wages, leaving the workers with limited or no remedies to collect their wages. To address these concerns, AB 1701 holds general contractors and subcontractors jointly liable for unpaid wages, including fringe benefits. Earlier versions of AB 1701 authorized a civil action by any wage claimant to enforce liability, but legislators later narrowed those authorized to bring a civil action to enforce liability to: (1) the Labor Commissioner; (2) a third party owed fringe or other benefit payments or contributions on a wage claimant’s behalf; or (3) a joint labor-management cooperation committee established pursuant to the federal Labor Management Cooperation Act of 1978.

### **Laws Related To Procedure**

#### ***SB 306 (Labor Commissioner’s Expanded Authority to Enforce Retaliation/Whistleblower Laws)***

Section 98.7 of the California Labor Code contains an administrative procedure that is invoked when an employee files a complaint with the Labor Commissioner claiming retaliation for exercising certain workplace rights, such as the right to demand payment of earned wages. The filing of the complaint by the employee, which must be done within six months of the incident, triggers the Labor Commissioner’s obligation to investigate the complaint, which it must do within 60 days of receiving



the complaint. If the Labor Commissioner's investigation results in a finding of a violation, the Labor Commissioner can order the employer to provide a variety of remedies, such as reinstatement or reimbursement of lost wages. If the employer fails to comply with the Labor Commissioner's instructions within 10 days, the Labor Commissioner must initiate a lawsuit to enforce the order.

SB 306 dramatically alters the above-described framework for enforcement of retaliation and whistleblower claims.

No complaint needed to investigate. Currently, the Labor Commissioner is authorized to conduct an investigation into retaliation only in response to an employee complaint. SB 306 authorizes the Labor Commissioner, "with or without receiving a complaint" to commence an investigation.

No requirement to wait until after an investigation for injunctive relief. Currently, the Labor Commissioner may seek appropriate relief from a court, including temporary and permanent injunctive relief, after it has investigated the retaliation claim and made a determination of a violation. Under this new law, the Labor Commissioner can seek temporary or permanent injunctive relief from the court before it has completed its investigation and made any violation finding. In fact, the Labor Commissioner can petition the court at any time "during the course of an investigation" if the Labor Commissioner has "reasonable cause" to believe that a violation has occurred.

No obligation to show a likelihood of irreparable harm. The "reasonable cause" language constitutes another significant revision of the current enforcement framework for retaliation claims. Ordinarily, when someone seeks a temporary or preliminary injunction from a court, the person seeking the injunction must make a series of showings to the court: (1) irreparable harm if the injunctive relief is not granted, (2) a likelihood of success on the merits of the claim, and (3) the prejudice from not granting relief will outweigh the harm the defendant would suffer from granting the injunctive relief. SB 306 significantly lowers the standard for injunctive relief for retaliation claims: the court can issue an injunction on a showing of reasonable cause to believe unlawful retaliation occurred.

Significant financial costs in enforcement action. Under SB 306, the financial repercussions of the Labor Commissioner prosecuting and prevailing on a complaint are much more significant. Currently, the Labor Commissioner does not get its attorneys' fees if it chooses to proceed to court and successfully prosecutes a complaint. Under SB 306, "if the Labor Commissioner is a prevailing party in an enforcement action . . . , the court shall determine the reasonable attorney's fees incurred by the Labor Commissioner in prosecuting the enforcement action and assess that amount as a cost upon the employer." Further, an employer that is found to have willfully refused to comply with an order of a court (including an order to post a notice to employees or otherwise cease and desist from the violation) will be subject to a penalty of \$100 per day for each day the employer continues to be in noncompliance with the court order, up to a maximum of \$20,000.

No requirement to prosecute in court. Finally, currently, the Labor Commissioner has the burden of enforcing the determination through a civil action. SB 306 provides the option for the Labor Commissioner to simply cite the employer for an alleged violation, and then places the burden on the employer to challenge the citation through an administrative hearing with the Labor Commissioner, and then further review by writ of mandate with a court.

In short, this new law makes it easier for an employee or the Labor Commissioner to obtain quick relief in retaliation cases.



## ***AB 1556 (Gender Neutral Terms In The FEHA)***

Most of the FEHA uses gender neutral terms, such as “person,” “employee,” and “employer.” There remain provisions, however, prohibiting discrimination that use gendered terms, such as “he” and “she.” AB 1556 replaces those terms with gender neutral such as “person” and “employee” to clarify that transgender or gender non-conforming employees are fully protected by the law.

## ***AB 1615 (Small Business Gender Discrimination In Services Compliance Act)***

California’s Gender Tax Repeal Act of 1995 prohibits businesses from charging different prices for substantially similar services on the basis of the customer’s gender. For example, hair salons cannot charge more to cut women’s hair than to cut men’s hair where the service provided is almost identical. AB 1615 was driven by the concern that unscrupulous attorneys have been unfairly targeting small (often immigrant-owned) businesses by alleging that they violated the law by charging different prices to men and women for a service, and hoping that such businesses are unaware of their rights and obligations under the law. AB 1615, therefore, seeks to educate small businesses to allow them to better comply with the law as well as defend themselves against frivolous lawsuits. The law requires an attorney who sends a demand letter alleging gender-based pricing discrimination to include two additional items with the letter or complaint: (1) a Judicial Council advisory notice that explains the business’ rights and obligations under the law; and (2) a pamphlet or other informational materials developed by the Department of Consumer Affairs (DCA). The Judicial Council and DCA have until January 1, 2019 to develop and approve these respective forms.

## **Vetoed Legislation**

### ***AB 1209 (Public Reporting of Gender Pay Differentials – Vetoed)***

We conclude by noting one area where California, for now, has not diverged from the current federal approach to pay equity.

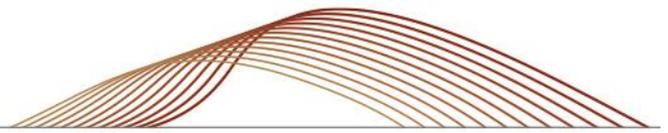
AB 1209 was referred to by some as California’s proposed “Wage Shaming” law. If enacted, it would have required all companies with 500 or more employees in California to collect wage-related information on gender wage differentials and report it to the Secretary of State, who would then publish the gender wage differential information on a website available to the public.

On October 15, 2017, Governor Brown vetoed AB 1209. While acknowledging the importance of transparency to achieving pay equity, Governor Brown stated that “it is unclear that the bill as written, given its ambiguous wording, will provide data that will meaningfully contribute to efforts to close the gender wage gap” and further commented that “this ambiguity could be exploited to encourage more litigation than pay equity.” Although AB 1209 did not become law this year, employers should expect to see the same or similar initiatives arise in future years and prepare for this type of obligation becoming a reality in California.

## **What Should Employers Do?**

California-based employers and out-of-state-employers with employees in California should immediately review their policies, procedures, and practices to ensure compliance with the new laws.





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<sup>1</sup> Senate Rules Committee, Senate Floor Analysis, AB 168, at 4 (Sept. 9, 2017).

<sup>2</sup> Senate Rules Committee, Senate Floor Analysis, SB 396, at 2 (Sept. 15, 2017).

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