EMPLOYMENT LAW COMMENTARY

Volume 29, Issue 11
December 2017

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THE CALIFORNIA LEGISLATURE AND THE TRUMP ADMINISTRATION: DIFFERENT DIRECTIONS

by Nicole Elemen

It was another busy year in the California Legislature with regard to employment and labor issues. Of particular note for California employers are the new laws related to employee hiring practices with the prohibitions on requesting an employment applicant's salary history information, limitations on the use of an employment applicant's criminal conviction history, and the New Parent Leave Act, which provides 12 weeks of unpaid parental leave for employees of small employers (20 or more). Discussed in detail below are the most significant new laws pertaining to private employers in California that are effective January 1, 2018, unless otherwise noted. California employers should review their policies and procedures,

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especially those related to employee hiring, to ensure compliance with these new laws in 2018.

While California is busy providing additional protections for employees, the U.S. Department of Labor and the National Labor Relations Board under the Trump administration are busy undoing various Obama-era decisions and regulations in a pro-employer shift likely to continue throughout 2018.

AB 1008: BAN THE BOX – CRIMINAL CONVICTION HISTORY

Employers of five or more employees are prohibited from (1) including on a job application, prior to making a conditional offer of employment, any questions regarding an applicant's criminal conviction history; (2) inquiring into or considering an applicant's criminal conviction history prior to making a conditional offer of employment; or (3) considering, distributing, or disseminating information about arrests not resulting in a conviction, referral to or participation in a post-trial diversion program, or convictions that have been sealed, dismissed, expunged, or statutorily eradicated. (Government Code § 12952.) In addition, where an employer plans to deny an applicant employment solely or in part because of an applicant's criminal conviction history, the employer must first undertake an individualized assessment of whether the applicant's criminal history has a direct and adverse relationship with the specific job position. This assessment must include consideration of: (1) the nature and gravity of the offense or conduct; (2) the time that has passed since the offense or conduct and completion of the sentence; and (3) the nature of the job held or sought. The employer is not required to put the results of the individualized assessment in writing.

If the employer makes a preliminary decision that the criminal conviction history disqualified an applicant, the employer must provide the applicant with written notice, which may but is not required to explain the reasons for its decision. The notice to the applicant must include the following information: (1) notice of the disqualifying conviction(s); (2) a copy of the conviction history report (if any); and (3) explanation of the applicant's right to respond to the notice before the preliminary decision becomes final, which may include submission of evidence challenging the accuracy of the conviction history report and evidence of rehabilitation and mitigating circumstances. The applicant has five business days to respond to the notice. If within those five days the applicant informs the employer in writing that the applicant is taking specific steps to obtain evidence to dispute the accuracy of the criminal history report, the applicant is entitled to an additional five business days to respond to the notice. The employer must consider the information submitted by the applicant before making a final decision.

If the final decision is to deny employment, then the employer must provide written notice to the applicant which includes: (1) the final denial or disqualification; (2) any existing procedure of the employer to challenge the decision or request reconsideration; and (3) the right of the applicant to file a complaint with the Department of Fair Employment and Housing (DFEH).

Please note that certain limited exceptions apply, including where state, federal, or local law required the employer to conduct criminal background checks and restrict employment based on criminal history.

AB 168: EMPLOYEE SALARY HISTORY BAN

With the addition of Labor Code § 432.3, employers are prohibited from relying on the salary history information of an applicant as a factor for determining whether to offer an applicant employment or what salary to offer an applicant. Employers are also prohibited from seeking salary history information, including compensation and benefits, about an applicant. Further, upon request, employers must provide an applicant the pay scale for the position. However, if an applicant voluntarily and without prompting discloses the applicant's salary history to an employer, the employer is *not* prohibited from considering and relying on that information in determining the salary for the applicant.

California is not the only jurisdiction banning salary history inquiries as an effort to combat pay inequities. New York City recently enacted its own salary history ban, as detailed below. In doing so, New York City joins California, Delaware, Massachusetts, Puerto Rico, Oregon, Pittsburgh, New Orleans, and San Francisco (Philadelphia has passed a law, but it is presently being challenged; New York has a bill pending before the Senate).

NEW YORK CITY'S EMPLOYEE SALARY HISTORY BAN

New York City Local Law No. 2017/067 prohibits employers from inquiring about the salary history of an applicant for employment or relying on the salary history of an applicant in determining the salary, benefits, or other compensation for such applicant

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during the hiring process, including the negotiation of a contract. However, employers may discuss an applicant's expectations with respect to salary, benefits, and other compensation. If an applicant voluntarily and without prompting discloses salary history to an employer, the employer may consider salary history in determining salary, benefits, and other compensation for such applicant and may verify such applicant's salary history. Salary history may also be considered for current employees seeking an internal transfer or promotion. Penalties for non-compliance resulting in unlawful discrimination under the city Human Rights Law could be as much as $125,000 for an unintentional violation or $250,000 for a willful violation. This law went into effect on October 31, 2017.

SB 63: NEW PARENT LEAVE ACT.

Employers who employ at least 20 employees now must provide employees working at a worksite with at least 20 employees within a 75-mile radius who have more than 12 months of service and have worked at least 1,250 hours in the prior 12 months with 12 weeks of parental leave to bond with a new child within one year of the child's birth, adoption, or foster care placement. (Government Code § 12945.6.) The employer must guarantee employment in the same or a comparable position upon return. Leave is unpaid, but employees may use vacation, paid sick time, or other accrued paid time off during leave. Employers must maintain and pay for health care coverage during parental leave at the level and under the conditions that coverage would be provided if the employee continued to work. If both parents are employed by the same employer, the employer is not required to grant leave to the parents of more than 12 weeks, and may but is not required to provide these parents with simultaneous leave. Further, it is unlawful for employers to refuse to hire, discharge, fine, suspend, expel, or discriminate against employees for exercising their right to leave or giving information or testimony as to the employee's own or another person's leave during an investigation or proceeding related to New Parent Leave Act rights, as well as interfering with or denying an employee's right to leave.

The New Parent Leave Act does not apply to employees entitled to leave under the California Family Rights Act or the federal Family and Medical Leave Act. However, to the extent the California Family Rights Act regulations are within the scope and do not conflict with the New Parent Leave Act, the Fair Employment and Housing Council will incorporate those regulations by reference.

In addition, through January 1, 2010, the DFEH, upon receiving necessary funding, must create a parental leave mediation pilot program. The pilot program allows employers to request that all parties participate in the DFEH's Mediation Division Program within 60 days of receipt of a right-to-sue notice issued by the DFEH for a violation of the New Parent Leave Act. If an employer makes a timely request for mediation, an employee may not pursue any civil action until the mediation is complete. The employee's statute of limitations, including for all related claims not under the New Parent Leave Act, will be tolled upon receipt of the employer's request to participate in the DFEH's Mediation Division Program until the mediation is complete. A mediation will be deemed complete when, at any time after the employer's request, either party notifies the DFEH's Mediation Division Program and all other parties that it is electing not to participate in, or is withdrawing from, the mediation or the DFEH notifies the parties that it believes further mediation would be fruitless.

AB 450: EMPLOYMENT REGULATION – IMMIGRATION WORKSITE ENFORCEMENT ACTIONS

This law prohibits employers from voluntarily consenting to an immigration enforcement agent entering any nonpublic areas of a workplace unless the agent has a judicial warrant. (Government Code §7285.1.) Employers also may not voluntarily consent to an immigration enforcement agent accessing, obtaining, or reviewing employee records without a judicial warrant or subpoena. (Government Code §7285.2.) Violations subject employers to a penalty of $2,000 to $5,000 for a first violation and $5,000 to $10,000 for a subsequent violation. In addition, employers must provide employees notice in the language in which the employer regularly communicates employment-related information with any inspections of the I-9 Employment Eligibility Verifications forms or other employment records by an immigration agency within 72 hours of the employer receiving notice of the inspection. The posting must contain the following information: (1) the name of the immigration agency conducting the inspection; (2) the date the employer received notice of the inspection; (3) the nature of the inspection to the extent known; and (4) a copy of the Notice of Inspection of I-9 Employment Eligibility Verification forms for the inspection to be conducted. (Labor Code § 90.2.) The Labor Commissioner is required to provide a template for the required posting by July 1, 2018. Employers are further required to provide employees who are identified through the inspection as lacking work authorization or having deficiencies in

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their work authorization documents individual notice of the results of the inspection.

AB 1701: LABOR-RELATED LIABILITIES FOR GENERAL CONTRACTOR

All direct contractors making or taking contracts for the execution, construction, alteration, or repair of a building, structure, or other private work must assume and are liable for any debt owed to a wage claimant (or a third party acting on their behalf) incurred by a subcontractor. The direct contractor's liability includes unpaid wages, fringe and other benefit payment, and contributions and interest, but not penalties or liquidated damages. The new law will apply to all contracts entered into on or after January 1, 2018.

AB 2337: EMPLOYMENT PROTECTIONS – VICTIMS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT, OR STALKING

The Labor Commissioner has published a notice available on its website as required by Labor Code § 230.1 to notify employees of their rights in regards to protections against discrimination and retaliation and the availability of time off and use of vacation, personal leave, or compensatory time off due to their status as victims of domestic violence, sexual assault, or stalking. Employers must provide this notice (or a notice with substantially similar content) to new employees or to other employees upon request. This requirement went into effect when the notice was posted on the Labor Commissioner's website earlier this year.

AB 2899: MINIMUM WAGE VIOLATIONS

Labor Code § 1197.1 provides that an employer or other person who pays less than minimum wage is subject to a civil penalty, restitution of wages, liquidated damages, and penalties under Labor Code section 203. It further allows an employer or other person to appeal a Labor Commissioner's finding of a violation by a writ of mandate to the superior court. The new amendment to Labor Code § 1197.1 requires an employer or person challenging the Labor Commissioner's finding of a violation to post a bond with the Labor Commissioner equal to the total amount of any minimum wages, liquidated damages, and overtime compensation due and owing before filing a writ of mandate. The bond is forfeited to the employee to whom wages are owed if payment is not made to the employee where ordered by the Court, if the writ of mandate is dismissed, or if a settlement agreement is executed.

SB 306: RETALIATION ACTIONS – COMPLAINTS, ADMINISTRATIVE REVIEW

Labor Code § 98.7 has been amended to give the Division of Labor Standards Enforcement authority to initiate an investigation into an employer whom it suspects has discharged or discriminated against an individual in violation of any law under the Labor Commissioner's jurisdiction without first receiving a complaint. This includes suspected retaliation occurring during the course of the adjudication of a wage claim, a field inspection, or certain immigration-related threats. Once an investigation is complete, a report will be provided to the Labor Commissioner or a designee. The Labor Commissioner may hold an investigative hearing to fully establish the facts. Labor Code § 98.7 now also permits the Labor Commissioner, during an investigation, to petition the superior court for temporary or preliminary injunctive relief. If an employee has been discharged or otherwise faced adverse action for raising a retaliation claim, the court must order appropriate injunctive relief on a showing that reasonable cause exists to believe that an employee was discharged or otherwise retaliated against. However, temporary injunctive relief does not prohibit an employer from terminating an employee for conduct unrelated to the claim of retaliation.

SB 396: EMPLOYMENT – GENDER IDENTITY, GENDER EXPRESSION, AND SEXUAL ORIENTATION

Government Code § 12950.1 was amended to require that the mandatory two-hour sexual harassment training for supervisors include training inclusive of harassment based on gender identity, gender expression, and sexual orientation. The training must include examples of harassment based on gender identity, gender expression, and sexual orientation, and must be presented by trainers with knowledge and expertise in those areas. This training must be completed within six months of a supervisor assuming the supervisory positon, and employers must provide this training to all supervisors at least once every two years. In addition, Government Code § 12950 was amended to require employers to post a poster developed by the DFEH regarding transgender rights in a prominent and accessible location in the workplace.

UNDER TRUMP, THE DOL IS SHIFTING ITS REGULATIONS TO FAVOR EMPLOYERS

The federal Department of Labor (DOL) under the Trump administration is busy withdrawing Obama-era administrative guidance and proposing new rules in a pro-employer shift within the DOL. For example, in

June, the DOL withdrew 2015 and 2016 informal guidance on joint employment and independent contractor status. The informal guidance made it easier to find that two or more entities were joint employers under the FLSA and therefore liable to employees for FLSA violations and also increased the likelihood that independent contractors were misclassified and therefore entitled to wages under the FLSA.

The Overtime Final Rule, which was published by the Obama DOL in May 2016, would have raised the minimum salary requirement for exempt employees under the FLSA to $47,476. Then in August of that year, the Rule was invalidated by the U.S. District Court for exceeding the DOL's authority by setting any salary threshold. In July of this year, the Trump DOL issued a request for information regarding what changes should be made to the Rule. The DOL plans to appeal the decision on the lack of authority to set a salary threshold and then move to stay the action and engage in further rulemaking to determine what the minimum salary for exempt employees should be. It is expected that the minimum salary level will be significantly lower than the amount in the 2016 Rule.

On December 5, the DOL issued a Notice of Proposed Rulemaking regarding tip pooling. The new rule would allow employers to share tips amongst employees who do not traditionally receive direct tips such as cooks and dishwashers. The proposed rule applies to employers who pay tipped employees the federal minimum wage and do not take advantage of a tip credit under the Fair Labor Standards Act (FLSA).

NLRB TAKING ADVANTAGE OF ITS REPUBLICAN MAJORITY BEFORE CHAIRMAN MISCIMARRA'S TERM ENDS.

The National Labor Relations Board (NLRB) is having a busy end of the year, dismantling Obama-era board decisions seen as pro-union and pro-employee. The Republicans are taking advantage of their first majority status in a decade through the end of the year when Republican Chairman Phillip Miscimarra's term ends. It is not known who President Trump will nominate to be the next chairman. Until a new chairman joins the board, there is likely to be a stalemate with a two-Republican, two-Democrat Board.

The Board's recent activity includes 3-2 decisions on party lines overturning the 2015 *Browning-Ferris* decision, which set forth a more expansive test for joint employment; the 2011 *Specialty Healthcare* decision allowing micro-units of workers to organize; the 2004 *Lutheran Heritage Village-Livonia* decision regarding the standard to be applied in evaluating whether employee handbook policies violate the National Labor Relations Act by infringing on employees' rights, which had been used in recent years to invalidate numerous employers' policies; and the 2016 *DuPont* ruling requiring employers to bargain with unions before implementing changes to employment conditions even where those changes are consistent with the employers' past practice.

In addition, in September 2017, Peter Robb was confirmed as the new general counsel to the Board. It is expected that he will also play a key role in overturning Obama-era board decisions and instituting a pro-management shift within the board under the Trump administration based on the complaints he chooses to issue and the general counsel memoranda he issues to regional directors regarding his positions on current labor issues.

CONCLUSION

With these conflicting forces at work, it promises to be another busy year in employment law in 2018.

Nicole Elemen is an associate in our Palo Alto office and can be reached at (650) 813 5967 or nelemen@mofo.com.

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