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WHITE PAPER

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A Review of 2022 Labor & Employment Legislation in California

The California Legislature passed a number of new and important labor and employment laws during its 2022 session.

Pay equity remained a key issue as California legislators amended two of the state's equal pay laws. First, the Legislature mandated that certain employers disclose a "pay scale" on job postings. Second, the Legislature broadened the categories of pay data covered employers must report to the California Civil Rights Department; significantly, this requirement now includes reporting salary information of "employees hired through labor contractors." These amendments reflect the Legislature's continued focus on pay equity issues and should create urgency for employers both inside and outside of California to assess their pay practices and consider the need for pay equity audits.

The Legislature also updated its COVID-19 laws, removing some requirements while extending others. For example, the Legislature relaxed certain reporting requirements following a workplace COVID-19 exposure. California employers should expect some much-needed regulatory stability on the COVID-19 front, as Cal/OSHA is expected to roll out its nonemergency COVID-19 standard in early 2023.

The Legislature also actively regulated leave issues. Perhaps most notably, the Legislature expanded the definition of "family member" under California's paid and unpaid leave laws to include "designated persons," although the definition of that term differs depending on whether paid or unpaid leave is at issue. Additionally, most California employers must now offer employees up to five days of unpaid bereavement leave following the death of a family member.

In light of the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, the California Legislature also passed many abortion-related laws that will affect employers. For example, new California laws will protect employee access to abortion; prohibit employers from disclosing or discriminating against employees based on reproductive health choices; and ban certain employers from complying with out-of-state laws that seek to restrict abortion access.

As 2023 arrives, employers with California workforces must not only pay attention to new laws passed in 2022, but also ensure compliance with previously-passed laws taking effect in 2023—most importantly, the California Privacy Rights Act ("CPRA"). On January 1, 2023, the CPRA eliminated the employer and business-to-business exemptions of the California Consumer Privacy Act ("CCPA"). Accordingly, employers will need to comply with the full panoply of rights and obligations under the CCPA and CPRA, which include additional notice obligations to employees and expanded employee privacy rights. Although enforcement will not begin until July 1, 2023, employers should revise their processes and procedures to come into compliance in the new year.

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The following are summaries of the most important new enactments. Employers should consult with knowledgeable employment counsel about these new statutes.

WAGE & HOUR

SB 1162—Pay Transparency & Pay Data Reporting

SB 1162 amended two California laws: (i) it amended California's salary history ban law, Cal. Lab. Code § 432.3, to require certain employers disclose a "pay scale" on job postings, added enforcement procedures, added a record retention requirement, and granted the Labor Commissioner authority to assess penalties; and (ii) it revised Cal. Gov't Code §12999 to require additional pay data reporting for employees and a new pay data report for employees hired through labor contractors.

Pay Transparency

Beginning January 1, 2023, California employers with 15 or more employees must disclose a "pay scale" in any job posting. Pay scale is defined as "the salary or hourly wage rate that the employer reasonably expects to pay for the position." Cal. Lab. Code § 432.3 (m)(1). The wage disclosure requirement in job postings equally applies to third parties engaged by the employer to post the job opportunity. Additionally, under existing law, all employers, regardless of size, must disclose the pay scale of a position sought or held upon a reasonable request by either an applicant for employment or a current employee. While employers wait for additional guidance, covered employers should prepare to disclose pay data on job postings for the following positions: (i) jobs where the work is performed in California, either at the employer's facility or remotely; and (ii) jobs where the employee teleworks from another state, but is assigned to a California facility.

SB 1162 adds a record retention requirement. Employers must maintain records of job title and wage rate history for each employee for the duration of employment plus three years after the end of employment. If an employer fails to keep records, a rebuttal presumption arises in favor of an employee's claim for any violation under Labor Code section 432.3.

Additionally, the new law also includes a more robust enforcement mechanism and penalties for noncompliance with Labor Code section 432.3. The law grants individuals the right either (i) to file a written complaint with the Labor Commissioner within one year of learning of the alleged violation, following which the Labor Commissioner may investigate the claim; or (ii) to bring a civil action for injunctive and/or compensatory relief for alleged violations. The Labor Commissioner has discretion to assess penalties of no less than $100 and no more than $10,000. The Commissioner can determine the appropriate penalty amount based on the totality of the circumstances, including previous violations. For the first violation of the job posting requirement, there will be no penalty upon demonstration by the employer that all job postings for open positions have been updated to include the pay scale.

Pay Data Reporting

SB 1162 also amends California's pay data reporting requirements. Existing law requires certain employers to report pay data to the state. SB 1162 expands the reporting requirement in the following three ways: (i) employers with 100 or more employees, regardless of whether they have an obligation to file an EEO-1 report, must report on covered employees; (ii) employers with 100 or more employees hired through labor contractors must submit a separate pay data report covering labor contractors; and (iii) employers must disclose, for both direct employees and employees "hired through labor contractors," the median and mean hourly rate within each job category for each combination of race, sex, and ethnicity. Employers cannot rely on their EEO-1 report to satisfy the pay data reporting requirements for employees or employees hired through labor contractors.

SB 1162 defines "labor contractor" as "an individual or entity that supplies, either with or without a contract, a client employer with workers to perform labor within the client employer's usual course of business." In the report, the employer must disclose the ownership names of all labor contractors used to supply employees, and the labor contractor must supply all necessary pay data to the private employer.

Employers fall within the purview of California's pay data reporting requirements when the employer has 100 or more employees and/or 100 or more employees hired through labor contractors and *at least* one of those workers resides in California. However, the law does not require enterprise-wide reporting. Rather, the pay data report must include employees or employees hired through labor contractors that (i) work in California or (ii) work outside of California, but report to

a California facility. Employers may choose to report on all employees if they wish.

SB 1162 also changes the reporting deadline. Existing law required employers to submit the pay data report on or before March 31 each year. Going forward, reports must be submitted to the state by the second Wednesday of May each year, beginning on May 10, 2023.

Recommendation for Employers: With the number of states and localities mandating pay information on job postings quickly expanding (e.g., California, Colorado, and Washington), employers should anticipate that other state legislatures across the country may soon follow suit. As a result, employers with a nationwide workforce should consider adopting a company-wide pay information posting policy that complies with the varying requirements across multiple jurisdictions. Further, employers may want to utilize this law as a catalyst to address related issues such as wage compression, pay equity, and job banding or grading. Last, regarding pay data reporting, employers should consult with legal counsel to ensure they are properly reporting on employees and "labor contractors" as required by the law.

SB 1477—Caps on Wage Garnishment

Effective September 1, 2023, SB 1477 reduces the amount of an employee's wages that may be collected to satisfy a money judgment. The maximum amount of disposable earnings of a judgment debtor for any workweek that is subject to levy under an earnings withholding order shall not exceed the lesser of either: (i) 20% of the individual's disposable earnings for that week; or (ii) 40% of the amount by which the individual's disposable earnings for that week exceed 48 times the state minimum hourly wage in effect at the time the earnings are payable.

SB 1334—Meal & Rest Periods for Public Hospital Employees Extended

SB 1334 extends the meal and rest-break provisions of California Labor Code § 512 to include public sector and University of California workers who provide or support direct patient care in a hospital, clinic, or public health setting. It does not apply to employers covered by a valid collective bargaining agreement that provides for compliant meal and rest periods.

Recommendation for Employers: Public sector employers should not only prepare to comply with these laws come January 1, 2023, but also expect to face class and representative actions if they fail to properly provide meal and rest breaks for their employees. To deter class and representative action litigation in this area, employers should consider including class and representative action waivers in voluntary arbitration agreements to the extent permitted by applicable law.

DISCRIMINATION

AB 2188—Discrimination for Off-the-Job Use of Cannabis Prohibited

Beginning January 1, 2024, employers may not take any adverse action based on an employee's lawful use of cannabis off the job and away from the workplace. Employers also may not discriminate against employees or applicants when an employer-required drug screening returns evidence of nonpsychoactive cannabis metabolites in hair, blood, urine, or other bodily fluids.

"Nonpsychoactive cannabis metabolites" are what remain in the body after tetrahydrocannabinol ("THC") is metabolized. The presence of these metabolites do not indicate present impairment, but rather only show that an individual has consumed cannabis in the last few weeks.

AB 2188 does not give employees the right to possess, to be impaired by, or to use cannabis on the job. Employers may still maintain drug- and alcohol-free workplaces and administer drug screening tests, including (i) tests that only measure active THC in an individual's bodily fluids; and/or (ii) impairment tests that measure an individual employee against their own baseline performance.

AB 2188 does not apply to employees in the building and construction trades and applicants or employees hired for positions that require a federal government background investigation or security clearance. Further, the law does not preempt state or federal laws applicable to companies that

require testing of applicants or employees for controlled substances as a condition of employment in order to receive federal funding and federal licensing-related benefits or to enter into federal contracts.

Recommendation for Employers: In the face of this new law, employers who have used marijuana drug screens in the past should evaluate whether continued testing of employees and applicants for employment for marijuana is necessary. Employers who continue to use drug screens should review the methods used for screening and must discontinue screening for nonpsychoactive cannabis metabolites. Instead, employers may consider using tests that measure either active THC and/or present impairment. Likewise, employers should review and update any drug testing policies consistent with the new law. In light of narrower options for testing, employers should adopt policies and procedures that facilitate testing quickly in order to detect the presence of active THC in employees' bodily fluids that may dissipate over time. Although AB 2188 limits employers' ability to regulate off-duty cannabis use, employers can reaffirm, and may include in any Alcohol and Drug Policy, that the use, possession, or impairment by cannabis at the workplace is prohibited.

AB 2960—Filing Limitations on Fair Employment Claims

Under existing law, an employee who files a complaint with the California Civil Rights Department ("CRD") alleging unlawful employment practices may bring a civil suit if the Department does not act within a specified time period. Effective January 1, 2023, AB 2960 tolls those right-to-sue notice deadlines during a mandatory or voluntary dispute resolution proceeding. The tolling begins on the date the CRD refers the case to its dispute resolution division and ends on the date the dispute resolution division closes its mediation record and returns the case to the division that referred the case.

LEAVE LAWS

AB 1041—Paid and Unpaid Leave for Designated Persons

AB 1041 expands the definition of "family member" under the California Family Rights Act ("CFRA") and California's Healthy Workplaces Healthy Families Act ("HWHFA") to include "designated persons." However, AB 1041 defines "designated persons" for purposes of unpaid leave ("CRFA") and paid leave ("HWHFA") slightly differently.

Beginning January 1, 2023, an employee may take unpaid leave under CRFA for a "designated person," which includes "any individual related by blood or whose association with the employee is the equivalent of a family relationship." By comparison, a "designated person" for purposes of paid leave under HWHFA is defined more broadly as "a person identified by the employee at the time the employee requests paid sick days." Unlike under CRFA, there is no requirement that the person have any blood relation or any association that is the equivalent of a family relationship. Arguably, an employee could use paid leave under HWHFA to care for a neighbor, roommate, or coworker with whom they have little to no family-like connection.

Despite the different definitions, both amendments allow employers to limit the employee to one designated person per 12-month period. Additionally, under both, the employee can identify the "designated person" at the time the employee requests leave.

Recommendation for Employers: This law adds to the already complex web of state and federal paid and unpaid leave requirements. Employers with a California workforce should revisit their paid and unpaid leave policies, practices, and procedures to make any necessary changes in light of the new law permitting leave to care for a "designated person."

AB 1949—Bereavement Leave

Effective January 1, 2023, AB 1949 entitles certain employees to bereavement leave under the California Family Rights Act.

Employers with five or more employees nationwide (at least one in California) must provide up to five days of bereavement leave to their California workforce upon the death of an employee's family member. A "family member" includes a spouse, child, parent, sibling, grandparent, grandchild, domestic partner, or parent-in-law. Employees must commence bereavement leave within three months of the date of death of the family member. The five days of leave do not need to be taken consecutively. In order to be eligible for the leave, the employee must have worked with the employer for at least 30 days prior to the commencement of leave.

Employers may request documentation of the death of the family member within 30 days of the first day of leave. Documentation includes, but is not limited to, a death certificate, a published obituary, or a written verification of death, burial, or memorial services from a mortuary, funeral home, burial society, crematorium, religious institution, or government agency.

If an employer has an existing bereavement leave policy that offers at least five days of leave, employees may take leave pursuant to the existing policy. Generally, bereavement leave is unpaid unless the employer has an existing policy that provides for paid leave. However, employees may use any vacation, personal leave, accrued and available sick leave, or other compensatory time off that is available to receive pay for the otherwise unpaid days of bereavement leave.

Employers must maintain the confidentiality of any employees requesting bereavement leave. Further, employers may not take any adverse action for an employee exercising their right to bereavement leave.

AB 1949 does not apply to employees covered by collective bargaining agreements provided that the valid agreement includes the following: (i) bereavement leave equivalent to at least five days; (ii) for the wages, hours of work, and working conditions of the employees; and (iii) premium wage rates for all overtime hours worked, where applicable, and a regular hourly rate of pay for those employees of not less than 30% above the state minimum wage.

Recommendation for Employers: Employers should revise their employee handbooks, leave policies, and/or collective bargaining agreements to provide eligible employees with at least five days of bereavement leave pursuant to the new law. Human resources business partners should be aware of the new requirement and be advised that they must keep information received pursuant to a bereavement leave request confidential.

COVID-19

AB 152—COVID-19 Supplemental Paid Sick Leave

In February 2022, the California Legislature reinstated COVID-19 supplemental paid sick leave. Generally, the law requires employers with 25 or more employees to provide up to 80 hours of paid sick leave across two 40-hour buckets for reasons related to COVID-19. The supplemental leave requirement was set to expire on September 30, 2022.

Effective September 29, 2022, AB 152 extended California's COVID-19 supplemental paid sick leave requirements through December 31, 2022. Importantly, the law does not provide any additional leave to employees who have previously exhausted their COVID-19-related leave in 2022.

Generally, the eligibility requirements, categories of leave, and pay requirements all remain unchanged. However, there is one minor update regarding testing documentation. Under the existing law, if an employee tests positive for COVID-19, employers can require that the employee submit to testing on or after the fifth day. If the test on the fifth day demonstrates a positive result, employers may now require a second diagnostic test within no less than 24 hours. As before, an employer is not obligated to provide supplemental COVID-19 paid leave to any employee who refuses to submit to testing. Testing must still be provided at the cost of the employer.

Recommendation for Employers: Employers must continue to provide supplemental paid sick leave through the end of 2022. Employers who adopted COVID-19 sick leave policies should continue to provide leave pursuant to their existing policies.

AB 1751—Workers Compensation Related to COVID-19

Under existing law, there is a rebuttable presumption that an employee's COVID-19 illness was sustained during the course of employment for purposes of worker's compensation benefits. AB 1751 extends that presumption to January 1, 2024.

AB 2693—COVID-19 Workplace Notice and Reporting Obligations

Under existing law, employers are required to take specific actions within one business day after receiving notice of a potential COVID-19 exposure in the workplace. AB 2693 amends and extends employer obligations to notify employees of potential COVID-19 exposure in the workplace to January 1, 2024. Existing law also requires that employers provide written notice of an exposure. In lieu of written notice, employers may now prominently display a notice in all places where notices to employees concerning workplace rules or regulations are usually posted that contains the following:

- The dates on which an employee or employee of a subcontracted employee with a confirmed case of COVID-19 was on the worksite premises within the infectious period;
- The location of the exposures, including the department, floor, building, or other area, but not so specific as to allow individual workers to be identified;
- Contact information for employees to receive information regarding COVID-19-related benefits that the employee may be entitled to under federal, state, or local laws, including workers' compensation, company-provided sick leave, state-mandated sick leave, supplemental sick leave, and anti-retaliation and anti-discrimination protections; and
- Contact information for employees to receive the cleaning and disinfection plan that the employer is implementing per the guidelines of the CDC and Cal/OSHA Emergency Temporary Standards.

Employers must post this notice within one day from when the employer receives a notice of potential exposure and remain posted for not less than 15 calendar days. If employers post notices on an existing employee online portal, COVID-19 notices must also be posted online. The notice must be written in English and the language understood by the majority of employees. Employers must keep a log of all the dates the notice was posted at each worksite and must allow the Labor Commissioner access to these records.

As an alternative to the workplace notice, employers may continue to provide written notice to all employees.

AB 2693 also ends two COVID-19-era obligations for employers. First, employers are no longer required to notify a local public health agency when there is a COVID-19 outbreak in the workplace. Second, AB 2693 repeals Cal/OSHA's authority to prohibit the performance of an operation or process, or entry into a place of employment, when, in its opinion, a place of employment, operation, or process exposes workers to the risk of infection with COVID-19.

Recommendations for Employers: As more employees return to in-person work, employers must remember that notification and safety requirements pertaining to COVID-19 remain in effect for 2023. Employers should also be mindful of Cal/OSHA's nonemergency COVID-19 standard to be issued in the coming months.

ABORTION & REPRODUCTIVE HEALTH

SB 523—Discrimination Based on Reproductive Health Decisions Prohibited

Beginning January 1, 2023, SB 523 prohibits employers from taking any adverse action against an employee or applicant for their reproductive health decisions. It further prohibits employers from requiring employees or applicants to disclose their "reproductive health decision making" choices. "Reproductive health decision making" is defined to include, but is not limited to, a decision to use or access a particular drug, devise, product, or medical service for reproductive health.

Recommendation for Employers: Employers should continue to treat any medical information, including reproductive health information, as confidential. Further, employers should revise their anti-discrimination policies to include reproductive health decision-making as a protected activity.

AB 2091—Employee Abortion Disclosure Prohibited

Effective September 27, 2022, employers and health care plans are prohibited from releasing medical information identifying or relating to a person seeking or obtaining an abortion except pursuant to a subpoena so long as the subpoena is not based on another state's laws that interfere with a person's abortion rights. Employers are likewise prohibited from releasing medical information to law enforcement that would identify an individual or is related to an individual seeking or obtaining an abortion for either of the following purposes:

(i) enforcement of another state's law that would interfere with a person's rights under California's Reproductive Privacy Act or (ii) enforcement of a "foreign penal civil action." A "foreign penal civil action" means a civil action authorized by the law of a state other than California in which the sole purpose is to punish an offense against the public justice of the other state.

Recommendation to Employers: Employers should be careful not to disclose any information pertaining to an employee's abortion, and it should be maintained in a confidential employee medical file. Employers should consult with counsel to ensure compliance with abortion laws that vary widely from state to state.

AB 1242—Out-of-State Warrants Regarding Abortions

AB 1242 prohibits California corporations or corporations whose principal executive offices are in California who provide electronic communication services from complying with out-of-state warrants or other legal processes regarding a lawful abortion in California.

Recommendation for Employers: Employers who receive a warrant for information regarding an abortion in California should consult counsel to navigate potentially conflicting legal liabilities across different jurisdictions.

OCCUPATIONAL HEALTH & SAFETY

AB 2243—Heat Illness & Wildfire Smoke Safety and Health Standards

AB 2243 requires Cal/OSHA to submit a regulation proposal regarding the heat illness and wildfire smoke standard within the next three years. Specifically, Cal/OSHA must consider the following: (i) requiring employers to distribute copies of the Heat Illness Prevention Plan to employees; (ii) mandating employers provide personal protective equipment to farmworkers when the air quality index reaches a certain threshold; and (iii) revising regulations related to rising global temperatures.

SB 1044—Workers' Rights in Emergencies

Effective January 1, 2023, SB 1044 prohibits certain employers from retaliating against employees who either leave work or refuse to report to work during an "emergency condition" because they reasonably believe that the workplace or worksite is unsafe. Additionally, employers cannot retaliate against employees for accessing a mobile device to seek emergency assistance, assess the safety of a situation, or communicate with a person to verify their safety.

An "emergency condition" is defined to include either (i) "conditions of disaster or extreme peril to the safety of persons or property at the workplace or worksite caused by natural forces or a criminal act;" or (ii) "an order to evacuate a workplace, a worksite, a worker's home, or the school of a worker's child due to natural disaster or a criminal act." A health pandemic is not a qualifying "emergency condition." Certain individuals—including, but not limited to, first responders, disaster service workers, law enforcement, military personnel, and emergency service professionals—are exempt from the law.

Employees must possess a "reasonable belief that the workplace or worksite is unsafe," which occurs when a "reasonable person, under the circumstance known to the employee at the time, would conclude there is a real danger of death or serious injury if that person enters or remains on the premise." Further, employees have an affirmative obligation, when feasible, to notify the employer of the emergency condition requiring them to leave or refuse to report to work.

Recommendation for Employers: During an emergency condition, employers should exercise care to put the health and safety of their workforce first and must not discriminate or retaliate against a worker who leaves or refuses to come into work or access their mobile device during an emergency condition.

AB 2068—Safety and Health Violations Notices in Specified Languages

Effective January 1, 2023, AB 2068 requires that when employers are required to post an employee notification prepared by the California Division of Occupation Safety and Health, the Division must also make the notification available in the top

seven non-English languages used by limited-English proficient adults in California, as determined by the most recent American Community Survey by the U.S. Census Bureau. This includes Spanish, Cantonese, Mandarin, Vietnamese, Tagalog, Korean, and Armenian as well as Punjabi. Employers must post the notice in all of the required languages.

Recommendation for Employers: Employers should ensure that any required employee notification is posted in English and all required languages when they receive a posting notice from Cal/OSHA.

INDUSTRY SPECIFIC

AB 1601—Cal/Warn Requirements for Call Center Employees

The California Worker Adjustment and Retraining Act ("Cal/WARN") requires California employers with any industrial or commercial facility that employs 75 or more employees to provide notice to employees before certain mass layoffs, relocations, or terminations. AB 1601 extends the notice requirements under Cal/WARN to call centers.

Beginning January 1, 2023, a call center employer with 75 or more employees must provide Cal/WARN compliant notice to its employees whenever it relocates a call center. A "relocation" for purposes of Cal/WARN occurs when the employer intends to move any of the following to a foreign country: (i) a call center; (ii) one or more facilities or operating units within a call center that comprise at least 30% of the call center's or operating unit's total volume when measured against the average call volume for the previous 12 months; or (iii) substantially similar operations. Employers who fail to provide the required notice will be ineligible for state grants, state-guaranteed loans, and tax credits.

Recommendation for Employers: Employers with plans to relocate call centers abroad in 2023 and beyond must provide the required notice under Cal/WARN and should consult knowledgeable legal counsel regarding compliance.

AB 257—Fast Food Accountability and Standards Recovery Act

AB 257, the Fast Food Accountability and Standards Recovery Act ("FAST"), is a first-of-its-kind legislative effort to regulate the working conditions and wages of California's fast-food workers. The law creates state and local "Fast Food Councils" which have the authority, among other things, to establish minimum standards on wages, working hours, and working conditions.

The state-level Fast Food Council is permitted to set a minimum wage of up to $22.00 per hour in 2023 and may increase the minimum wage by the lesser of 3.5% or the increase in the Consumer Price Index in 2024 and beyond. Additionally, the law provides for anti-discrimination and anti-retaliation provisions related to employee disclosure of public health or safety violations, participation in state or local Fast Food Councils, or refusal to work due to perceived public health, safety, or other legal violations.

Recommendation for Employers: On December 5, 2022, FAST Act opponents gained enough signatures to put a recall of the law on the 2024 ballot. The law will be suspended pending the outcome of the recall next year. Employers in the fast-food industry, which the law defines very broadly, should expect a hotly contested election cycle on this law.

AB 1788—Liability for Hotel Operators Regarding Sex Trafficking

Taking effect January 1, 2023, AB 1788 imposes civil penalties when a supervisory employee of a hotel either knew or acted in reckless disregard of sex trafficking activity that occurred at the hotel and failed to report the activity to the appropriate authorities. Hotels will also be liable when a supervisory employee, acting within the scope of employment, knowingly benefits from sex trafficking within the hotel. The law authorizes a city or county attorney to bring a civil action against the hotel operator, and civil penalties range from $1,000 (first violation) up to $10,000 (imposed at the court's discretion).

Recommendation for Employers: Hotel operators should consider bolstering and/or reinforcing their required training regarding human trafficking to all employees. Hotel employers

should also promote a workplace culture where all employees know the signs of and feel comfortable reporting suspected human trafficking.

OTHER

SB 731—Criminal Records Relief

Beginning on July 1, 2023, SB 731 seals the records of certain defendants convicted of most felonies on or after January 1, 2005. Records will be sealed when all of the following criteria are met: (i) the defendant completed any term of probation; (ii) the defendant completed their sentence and one year has passed since the date of judgment; and (iii) the defendant was not convicted of a new felony offense within the last four years. The law does not apply to certain violent felonies or registered sex offenders.

Recommendation for Employers: Employers should note that criminal records of potential applicants may be sealed and should not appear on background checks beginning on July 1, 2023.

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