Summary of Select New Laws Impacting California Employers

The new year will bring many changes to California's employment laws in various areas, including hiring practices (such as a statewide "ban the box" law); leaves and benefits (including expansion of parental leave to small businesses); discrimination, harassment and retaliation; required notices; and wage and hour issues (including an increase in state and local minimum wage rates and liability of certain contractors for wages and benefits of subcontractors' employees). We have outlined some of the more significant changes below (note that these are summaries, not complete analyses of the referenced statutes). Most of these laws become effective on Jan. 1, 2018 (exceptions are noted below).

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HIRING PRACTICES

"Ban the Box" Law. Several years ago, California passed a "ban the box" law that was limited to state agencies, cities and counties. Thereafter, other states and several major cities, including Los Angeles, adopted similar laws that cover both public and private sector employers. Now, California has extended the "ban the box" law to private employers with five or more employees. (Govt. Code § 12952.) The new law also mandates a multi-step process for requesting and considering an applicant's criminal conviction history. (Certain positions, such as those that require an employer to conduct a background check, are excluded from the requirements of the new law.) Key components of the new law are outlined below.

What Can Be Considered, and When: Employment applications cannot include any questions that would disclose an applicant's conviction history prior to a conditional offer of employment. Similarly, employers cannot inquire into or consider the conviction history of an applicant before making a conditional offer of employment. Certain information, such as specified arrests not resulting in conviction, referral to diversion programs, and sealed convictions, cannot be considered, distributed or disseminated at all.

Individualized Assessment: If the employer intends to deny an applicant a position based solely or in part on the applicant's conviction history, the employer must make an individualized assessment, based on factors set forth in Government Code Section 12952, of whether the applicant's conviction history has a direct and adverse relationship with specific duties of the position that justify denying the applicant the position. The factors to be considered include the nature and gravity of the offense, the time that has passed and the nature of the position sought, which are similar to the EEOC's long-standing Enforcement Guidance (No. 915.002, 4/25/2012). The employer may, but is not required to, commit the results of this individualized assessment to writing.

Preliminary Decision Notification to Applicant: The employer must then notify the applicant in writing of its preliminary decision, including attaching a copy of the conviction history report, identifying the

conviction(s) being used as the basis of the preliminary decision to rescind the offer, and providing the applicant with a detailed explanation of his or her right to respond to the notice before it becomes final and the deadline to do so, which must be at least five business days out. The notification may, but is not required to, outline the employer's justification.

The Applicant's Response: If the applicant timely informs the employer that he or she disputes the accuracy of the conviction history report and is taking specific steps to obtain evidence to support this assertion, the applicant will have an additional five business days to respond to the notice.

Consideration of Evidence Submitted by the Applicant: The employer must consider the information submitted by the applicant disputing the accuracy of the conviction history report before making a final decision.

Notification of Final Decision: If the employer makes a final determination to deny the applicant the position, the employer must notify the applicant in writing of the final denial, any procedures the employer has for the applicant to challenge the decision or request reconsideration, and the applicant's right to file a complaint with the Department of Fair Employment and Housing. The employer may, but is not required to, explain its reasoning for the denial.

Salary History Inquiry Ban. California law now prohibits employers from requesting or relying on an applicant's salary history, which includes both compensation and benefits, as a factor in determining whether to offer an applicant employment or what salary to offer. (Lab. Code § 432.3.) Section 432.3 does not prohibit an applicant from voluntarily and without prompting providing salary history information, and the employer may consider or rely on the voluntary disclosure in determining the salary for that applicant. (Note, though, the difficulty of proving that the disclosure was "voluntary and without prompting.") Employers must also, upon reasonable request, provide the pay scale for the position to an applicant. Section 432.3 further provides that nothing in that section will be construed to allow prior salary, by itself, to justify any disparity in compensation, consistent with Labor Code section 1197.5, the Equal Pay Act.

Employer Takeaways. Employers should promptly update hard copy and online employment applications, policies and hiring procedures to ensure compliance with these new laws, including omitting inquiries regarding salary history and following the specific individualized assessment and notice requirements if criminal history information is considered. Employers should be certain that all individuals who participate in the recruitment and interviewing process, including third-party recruiters, are aware of these requirements and avoid asking improper questions of applicants. Employers should consider developing written pay scales for positions based on market data, and should be prepared to provide this information if requested. Finally, if an applicant's criminal history is considered as a basis for refusing employment, the employer should prepare a written analysis of the decision-making process, working in conjunction with legal counsel, to document the file, whether or not it is provided to the applicant.

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LEAVES AND BENEFITS

Parental Leave for Small Employers. The New Parent Leave Act (Govt. Code § 12945.6) will require businesses with 20 or more employees to provide eligible employees up to 12 weeks of unpaid, job-protected leave to bond with a new child within one year of the child's birth, adoption or foster care placement. This has the biggest impact on employers with 20–49 employees within a 75-mile radius. Larger employers already were covered by the California Family Rights Act (CFRA) and the federal Family and

Medical Leave Act (FMLA), but this new law may expand the number of employees now eligible for leave (i.e., employees working at smaller locations may now be eligible).

Eligibility requirements are similar to the CFRA and FMLA. Specifically, an employee is eligible under the New Parent Leave Act if he or she (i) was employed by the employer for more than 12 months; (ii) has at least 1,250 hours of service for the employer during the prior 12-month period; and (iii) works at a worksite where there are at least 20 employees within a 75-mile radius. (The CFRA and FMLA require at least 50 employees within a 75-mile radius.)

The New Parent Leave Act does not apply to employees who are subject to both the CFRA and the FMLA. However, employees are entitled to combine the leave provided by the New Parent Leave Act with leave provided under the California Pregnancy Disability Leave (PDL) law (Govt. Code § 12945) if the employee qualifies for PDL.

If both parents work for the same employer, and both are entitled to leave under the New Parent Leave Act, the amount of total leave for both parents is capped at 12 weeks. There is no similar cap if one parent-employee is entitled to leave under the New Parent Leave Act and the other is entitled to leave under the CFRA/FMLA (for instance, if one parent-employee works at a larger location); in that case, the employer might be required to provide each employee with 12 weeks of leave.

Employees may elect to use accrued vacation, paid sick time, or other paid or unpaid time off during the leave, but the statute does not include a provision permitting employers to require the use of paid time off during the leave. Employers are required to maintain and pay for group health plan coverage for employees on leave for up to 12 weeks at the same level and conditions that coverage would have been provided if the employee had continued to work (subject to the right to recover premiums under certain limited circumstances). In addition, employers must provide the employee with a guarantee of reinstatement to the same or comparable position on or before the date the employee's leave starts; failure to do so is deemed to be a refusal to provide leave in violation of the law.

Employer liability under the New Parent Leave Act can arise in a number of ways, including failure to provide leave; failure to guarantee reinstatement to the same or a comparable position on or before the date the employee takes leave; failure to return the employee to the same or a comparable position upon his or her return; failure to maintain benefits while the employee is on leave; taking any adverse action against applicants or employees for exercising rights under the Act; or interfering with their attempt to exercise rights thereunder. Until Jan. 1, 2020, if an employer requests mediation under the statutorily contemplated construct, employees will not be permitted to pursue a civil action until the mediation is complete or the employee affirmatively elects not to participate (this provision expires Jan. 1, 2020).

Employer Takeaways. Employers should bring their leave policies into compliance with the New Parent Leave Act. While the act will have the greatest impact on small businesses with 20 to 49 employees, who are not required to provide baby bonding leave under the CFRA or FMLA, it will also affect larger employers, potentially making more employees eligible for leave (i.e., employees at smaller locations, where there are 20 or more employees within a 75-mile radius).

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DISCRIMINATION, HARASSMENT AND RETALIATION

Worksite Immigration Enforcement Law ("Sanctuary State" Law). This law, which adds various new sections to the Government and Labor Codes, imposes significant restrictions and requirements upon employers in connection with federal immigration law enforcement. Employers may be liable for prescribed civil penalties, up to $10,000 per violation.

Restrictions:

- Unless federal law ***requires*** otherwise, Government Code sections 7285.1 and 7285.2 prohibit an employer or other person acting on the employer's behalf from providing voluntary consent to an immigration enforcement agent to either (i) enter a nonpublic area of business, unless the agent provides a judicial warrant, or (ii) access or review of the employer's employee records without a subpoena (which may be issued by a court or administrative agency officials) or judicial warrant. The prohibition does not apply to I-9 Employment Eligibility Verification forms and other documents for which a notice of inspection has been provided to the employer. The law specifies that nothing in these provisions is intended to restrict or limit an employer's compliance with E-Verify requirements. The term "immigration enforcement agent" is not defined, but potentially is broader than just agents of U.S. Immigration and Customs Enforcement (ICE) and Homeland Security Investigations (HSI), which may cause confusion in implementation.
- Labor Code section 1019.2 prohibits an employer from reverifying the employment eligibility of a current employee at a time or in a manner not ***required*** by specified federal law. This could impact when and how companies perform immigration law compliance audits, respond to reports or suspicions of unauthorized workers, and correct individual employee forms.

Notice Requirements:

- Labor Code section 90.2 requires employers to post a notice informing employees (and provide a copy of the notice to their exclusive collective bargaining representative, if any) of an inspection of employment records conducted by an immigration agency within 72 hours of receiving the federal notice of inspection. The notice must be in the language the employer normally uses to communicate with employees, and must include the name of the immigration agency conducting the inspection; the date the employer received the notice of inspection; the nature of the inspection, to the extent known; and a copy of the notice of inspection. (The Labor Commissioner will develop a template notice by July 1, 2018.) Upon reasonable request, the employer must provide affected employees with a copy of the notice of inspection.
- In addition, Labor Code section 90.2 requires that, except as otherwise required by federal law, within 72 hours of receiving the immigration agency's results from the inspection, employers provide each affected employee (and their exclusive collective bargaining representative, if any) a copy of those results, as well as written notice of the obligations of the employer and the affected employee arising from the results of the inspection. Notably, the written notice must relate to the affected employee only, and must include a description of the deficiencies identified in the written immigration inspection results related to the affected employee; the time period for correcting any potential deficiencies; the time and date of any meeting with the employer to correct the deficiencies; and notice that the employee has a right to representation during any meeting scheduled with the employer. The notice must be delivered by hand at the workplace, if possible, or by mail and email if hand delivery is not possible.

Employer Takeaways. Employers should revise their policies and procedures (or implement written procedures if none exist) to ensure compliance, addressing timely notification to employees (including a translation, as appropriate), appropriate redacting of documentation provided and other aspects of these new laws. Supervisors with responsibility for these issues should be thoroughly trained, including appropriate responses to federal agents (for instance, when access to non-public work areas is requested), and legal counsel should be consulted immediately to ensure that, among other things, immigration agents have appropriate authority to take the requested action, and the company responds in accordance with the new laws.

Legal counsel also should be consulted before undertaking immigration law compliance audits, correcting noncompliant paperwork, or addressing authorization issues with particular employees to avoid triggering penalties under Labor Code section 1019.2. Employers will need to walk a very fine line in order to comply with both federal and state law, and likely will need to balance risks in attempting to comply with both. Employers would be well-advised to ensure that their immigration law compliance procedures—verification of authorization to work and accurate completion of I-9 Forms—are fully compliant up front, which can help avoid these issues on the back end.

Fair Employment and Housing Act (FEHA) Updates and Transgender Regulations. Existing law requires employers with 50 or more employees to provide at least two hours of sexual harassment awareness training every two years to supervisors. Under the new law, employers must augment their training to include harassment based on gender identity, gender expression and sexual orientation, including practical examples. (Govt. Code § 12950.1.) In addition, the **FEHA transgender regulations** that became effective July 1, 2017, require employers to honor employees' requests to be identified by a preferred gender, name or pronoun (including gender-neutral pronouns).

Employer Takeaways. Employers should promptly update their training materials to include discussions and practical examples of harassment based on gender identity, gender expression and sexual orientation. This would also be a good time to confirm that all affected employees have undertaken the required training, and to establish a schedule to ensure compliance going forward.

Military Service Discrimination. California law has been expanded to protect service members by prohibiting discrimination in all "terms, conditions or privileges" of employment. (Mil. & Vets. Code § 394.) This amendment brings California law more into conformity with the federal Uniform Services Employment and Reemployment Rights Act (USERRA).

Employer Takeaways. While no changes should be necessary for employers who already were covered by USERRA, employers are encouraged to review their policies to ensure compliance and best practices.

Health Facility Whistleblower Fine. Section 1278.5 of the Health and Safety Code has been amended to increase the maximum penalty for willful discrimination or retaliation against an employee who raises a concern about conditions at a health facility from $20,000 to $75,000.

Employer Takeaways. This is a significant increase. Employers would be well-served to ensure that their policies and practices will not run afoul of this law, including providing appropriate training for supervisors and human resources personnel in responding to whistleblowers.

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NOTICES

Transgender Rights Notice. Employers will now be required to display a poster on transgender rights. (Govt. Code § 12950.) A **poster** has been developed by the Department of Fair Employment and Housing.

Updated Domestic Violence Notice. Effective July 2017, all employers with at least 25 employees were required to give written notice to new employees (and to current employees upon request) explaining the rights of victims of domestic violence, sexual assault and stalking. (Lab. Code § 230.1.) In mid-2017, the California Labor Commissioner posted a **template form** that employers may use to comply with the notice requirement. If the sample form is not used, the employer's notice must be substantially similar to the content contained in the Labor Commissioner's sample form. Specifically, it must include information about the employee's rights to take time off, receive reasonable accommodations, be free from discrimination and retaliation, and file a complaint.

Updated Human Trafficking Notice. Existing law requires specific business establishments to post a notice that contains information relating to slavery and human trafficking. The law has been amended to extend these notice requirements to hotels, motels and bed and breakfast inns (not including personal residences). (Civ. Code § 52.6.) The notice must be printed in English, Spanish and one other language that is the most widely spoken language in the county where the establishment is located if translation is mandated by the federal Voting Rights Act. A link to the model notice prepared by the Department of Justice can be found **here**. In addition, effective Jan. 1, 2019, the notice must be updated in certain respects, including providing a number that can be texted for services and support. Monetary penalties for failure to comply range from $500 to $1,000 per offense.

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WAGE AND HOUR ISSUES

Minimum Wage Increase

State Minimum Wage Increase: On Jan. 1, 2018, California's minimum wage will increase from $10 to $10.50 per hour for employers with 25 or fewer employees, and from $10.50 to $11 per hour for employers with 26 or more employees. The state minimum wage will continue to rise each year until it reaches $15 per hour, which will occur in the year 2022 for large employers, and 2023 for smaller employers.

Local Wage Ordinances: Employers should also note that numerous localities within California dictate higher minimum wages, as well as different effective dates for wage hikes. By way of example, Los Angeles, Malibu, Santa Monica, San Francisco, San Diego, Oakland and many other cities and counties have their own ordinances. Generally, applicability of these ordinances is governed by where the employee performs the work.

Impact on Exempt Employee Status: Notably, when the state minimum wage increases, so does the exempt employee salary threshold (local minimum wage ordinances do not impact the salary threshold). Thus, the

exempt salary threshold for most exemptions will increase to $45,760 annually in 2018 for businesses with 26 or more employees (i.e., double the minimum wage), and $43,680 for businesses with 25 or fewer employees.

Employer Takeaways. Employers should audit their wage scales to ensure they are up-to-date for minimum wage purposes in all locations where non-exempt employees perform work. In addition, they should ensure that exempt employees meet the updated salary threshold as a result of the increase in the minimum wage.

Liability for Wages and Benefits of Construction Subcontractors. Amendments to Section 218.7 of the Labor Code will make direct contractors (as defined in the statute) liable for the failure of their subcontractors (at any tier) to pay wages and fringe or other benefit payments and contributions, plus accrued interest, under certain construction contracts. Covered contracts include those entered into on or after Jan. 1, 2018, in California for the erection, construction, alteration or repair of a building, structure or other work. Liability of the direct contractor is limited to the wage claimant's performance of labor included in the original contract, and does not include liability for penalties or liquidated damages.

Section 218.7 allows actions to be brought against the direct contractor by the Labor Commissioner on behalf of the wage claimant, third parties who are owed fringe or other benefits on the claimant's behalf, and joint labor-management cooperation committees (defined in Section 218.7, and subject to certain notice requirements). Actions must be filed within one year of the earlier of (i) the recording of a Notice of Completion of the direct contract; (ii) the recording of a Notice of Cessation of the direct contract; or (iii) the date the work covered by the direct contract is actually completed. The statute provides for recovery of attorneys' fees to prevailing claimants; however, there is no reciprocal right to recovery if the contractor prevails.

Subcontractors at all tiers are required to provide specified payroll and other information regarding the work of the subcontractor and the claimant on the project to the direct contractor upon request. Failure to comply does not relieve the direct contractor of the obligation to pay wages and benefits due to claimants. However, the direct contractor is permitted to withhold as "disputed" all sums owed to a subcontractor if that subcontractor does not timely provide the required information, until that information is provided.

The statute does not permit a direct contractor to evade the liability created by Section 218.7, but it does permit it to include contractual provisions that would create a remedy against subcontractors at any tier for failure to pay wages owed, and permits direct contractors to pursue other legal remedies against subcontractors.

Contractor Takeaways. General contractors should select financially secure subcontractors, and would be wise to research the subcontractors' history on wage and fringe benefit payments and claims to identify any potential red flags. General contractors may elect to require payment bonds from subcontractors. Agreements with subcontractors should include broad indemnity rights that cover the potential liability outlined above, express offset provisions with respect to claims for wages and benefits, and specified response deadlines designed to ensure prompt compliance with the information-sharing provisions in the statute (where failure to timely comply results in the subcontractor's breach of the contract and/or cause for termination of the contract). Contracts also should include audit rights, a cooperation requirement in the defense of any claims, and possibly a certified payroll record requirement (similar to prevailing wage projects). The general contractor should monitor subcontractors' payroll records throughout the project to ensure wage and benefit compliance.

Subcontractors at every tier should maintain accurate payroll records and ensure compliance with wage and benefit requirements. Subcontractors should be prepared to promptly provide these records upon request to the general contractor, at risk of having contractual payments withheld as disputed sums, and assist in the defense of any claims that do arise to minimize potential future liability.

Expansion of Anti-Retaliation Enforcement in Wage Claims. The amendment of Labor Code section 98.7 expands the Labor Commissioner's authority to enforce wage and hour laws. Among other things, if the Labor Commissioner suspects that an employee was subject to retaliation or discrimination in connection with a wage claim or other specified investigation being conducted by the Labor Commissioner, it can investigate even where the affected employee does not file a complaint. Upon finding reasonable cause to believe that any person has engaged in or is engaging in a violation, the Labor Commissioner can seek an injunction in superior court prohibiting the employer from firing an employee, or if the employee has been terminated, ordering the employee's reinstatement pending the outcome of the retaliation claim. Employees also may seek injunctive relief, and any relief granted would not be stayed pending appeal of the decision. The statute provides that the granting of such temporary injunctive relief does not prohibit an employer from disciplining or terminating an employee for conduct that is unrelated to the claim of retaliation. Employers are subject to penalties of up to $100 per day (to a maximum of $20,000) for willful refusal to comply with an order to reinstate an employee or cease the alleged conduct.

Employer Takeaways. The Labor Commissioner's burden to prevail on the injunction is significantly lowered to a mere showing of "reasonable cause" to believe that a violation of the law occurred. This means that an employee can be put back to work during the pendency of a lawsuit—which could be years. In addition, although the statute provides that such temporary injunctive relief does not prohibit an employer from disciplining or terminating an employee for conduct that is unrelated to the claim of retaliation, this will be difficult to prove, and employers should tread very cautiously in implementing adverse action with respect to such employees.

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