EPSTEIN BECKER GREEN | Employment, Labor & Workforce Management

ACT NOW ADVISORY

Another Tidal Wave of New California Laws Will Impact Employers in 2018 and Beyond

December 21, 2017

By Adam C. Abrahms, Jonathan M. Brenner, Andrea K. Douglas, Matthew A. Goodin, Amy B. Messigian, and Katrina J. Walasik

---

Earlier this month, the American Tort Reform Foundation released the 2017–18 "Judicial Hellholes" list. California came in second, surpassed only by Florida as the nation's top "Hellhole." This inauspicious recognition comes, in part, as the result of *859 new California statutes added to the books in 2017*. Many of these new laws impact California employers, including those laws that prohibit inquiries into a job applicant's salary or criminal history and that extend job-protected leave to new parents working for smaller employers.

Below are the key new laws impacting employers that will take effect in California during 2018 or later. Unless otherwise noted, each of these laws takes effect on January 1, 2018.

FAIR EMPLOYMENT

Gender Identity, Gender Expression, and Sexual Orientation Training of Supervisors: Currently, the California Fair Employment and Housing Act ("FEHA") requires employers with 50 or more employees to provide at least two hours of training and education regarding sexual harassment to all supervisory employees within six months of their assumption of a supervisory position and once every two years. SB 396 has expanded this requirement to include training on harassment based on gender identity, gender expression, and sexual orientation. The new law also requires employers to display in a prominent and accessible location in the workplace a poster developed by the Department of Fair Employment and Housing ("DFEH") regarding transgender rights. A copy of the required poster can be found here.

References to "Nonbinary" Gender: Effective September 1, 2018, SB 179 (the "Gender Recognition Act") will allow individuals to update state-issued identification documents (including birth certificates, state identification cards, and driver's licenses) to select "nonbinary" as their gender. In light of this new law, employers should consider updating their own forms that ask employees to identify as male or female to include "nonbinary" as a gender choice. An employer should also allow both nonbinary and transgender employees to indicate their preferred name and choice of pronoun, ensure that an employee's preferred name/pronoun is used, and review employment policies to

make sure that they explicitly prohibit discrimination based upon gender identity or gender expression.

Enhanced Health Care Whistleblower Protections: Existing law prohibits a health facility from discriminating or retaliating against a patient, an employee, a member of the medical staff, or any other health care worker of a health facility because that person has presented a grievance, complaint, or report to the facility, or has initiated, participated in, or cooperated in an investigation or administrative proceeding related to the quality of care, services, or conditions at the facility.

On September 25, 2017, Governor Jerry Brown signed AB 1102, which increases the maximum penalty for an employer's willful violation of these provisions, from $20,000 to $75,000.

Human Trafficking Notices: Two new laws that affect employer notice requirements regarding human trafficking will take effect on January 1, 2019. Under California's human trafficking law (Civil Code section 52.6), employers in certain industries (primarily airports and other travel-related locations, hospitals, massage businesses, and adult-oriented businesses) must post a notice near the entrance of the establishment with telephone contact information for the National Human Trafficking Hotline and the California Coalition to Abolish Slavery and Trafficking.

SB 225 amends this notice requirement to include language in the notice indicating that victims and witnesses to human trafficking can text a special hotline to access help and services.

AB 260 expands the scope of employers subject to the notice requirement of Civil Code section 52.6 to include hotels, motels, and bed and breakfast inns.

Sexual Harassment Training Requirements—Liability Expanded for Farm Labor Contractors: Existing law prohibits the issuance of a farm labor contractor license unless the applicant attests in writing that certain employees (in addition to supervisors) have received sexual harassment prevention and reporting training in accordance with prescribed requirements. SB 295 requires that training for each agricultural employee be in the language understood by that employee. Licensees will be required—as part of the renewal application process—to supply the California Labor Commissioner ("Labor Commissioner") with a complete list of all materials or resources utilized to provide sexual harassment prevention training and the total number of employees trained in the calendar year prior to the month that the renewal application is submitted. The Labor Commissioner will aggregate the data and publish the information on the Division of Labor Standards Enforcement ("DLSE") website. The Labor Commissioner is authorized by the new law to issue citations and assess civil penalties of $100 per violation for failing to comply with these provisions or the existing training requirements.

HIRING & WORKFORCE MANAGEMENT

Ban on Salary History Inquiries: As we discussed in an earlier *Act Now* Advisory, AB 168 bans all employers, regardless of size, from asking about a job applicant's prior salary, compensation, or benefits. Employers will not be able to rely on an applicant's

prior salary or benefits in determining whether to hire someone or in setting the applicant's compensation or benefits (except in limited circumstances). The new law also requires an employer to provide applicants with the pay scale for a position upon a reasonable request.

"Ban the Box" Law Prohibiting Pre-Offer Criminal Conviction Inquiries: AB 1008 repeals the prohibition on a state or local agency from asking a job applicant to disclose information regarding a criminal conviction. The bill also makes it an unlawful employment practice under FEHA for an employer with five or more employees to include on an application for employment any question that seeks the disclosure of an applicant's conviction history, or to inquire into or consider the conviction history of an applicant, until that applicant has received a conditional offer of employment. Additionally, the bill requires employers to (i) make individualized assessments as to whether the conviction history has a direct adverse relationship with the specific duties of the job and (ii) provide notice under a specific procedure to employees if they intend to deny employment based on the conviction history.

Expedited Teacher Credentialing: Under AB 226, the Commission on Teacher Credentialing ("Commission") must grant or deny a completed application for a teaching credential within seven days of the date that the Commission received the application if (i) the applicant is married to, or in a domestic partnership or other legal union with, an active duty member of the U.S. Armed Forces who is assigned to duty in California under official active duty military orders, and (ii) holds a valid teaching credential in another state, district, or territory of the United States.

Immigration Enforcement Raids: Public and private employers are prohibited by AB 450 from providing voluntary consent to an immigration enforcement agent to enter nonpublic areas of the worksite without a judicial warrant. The law also prohibits employers from providing voluntary consent to an immigration enforcement agent to access, review, or obtain the employer's employee records without a subpoena or court order. Beginning July 1, 2018, employers will have to post a notice to current employees of Form I-9 (and any other employment records) inspections by an immigration agency within 72 hours of receiving the federal notice of inspection. Employers, upon reasonable request, must also provide an affected employee with a copy of the notice of inspection. The Labor Commissioner will create a template for employee notification purposes by July 1, 2018. Please see our *Retail Labor and Employment Law Blog* for our prior discussion of this new law.

Required Alcohol Training for Servers: AB 1221 requires that businesses licensed to serve alcohol ensure that each alcohol server receives mandatory training on alcohol responsibility and obtains an alcohol server certification. These requirements go into effect in 2021, after the course is developed by the Department of Alcoholic Beverage Control.

Training on Abuse Required for Salon Professionals: AB 326 authorizes the State Board of Barbering and Cosmetology ("Board") to promote physical and sexual abuse awareness among salon professionals. The law directs the Board to adopt courses to raise awareness on how to spot the signs of physical and sexual abuse from their clients and to promote abuse prevention awareness as part of the salon professional

licensing process. Such courses must be added as part of preexisting health and safety training that is required for beauticians, barbers, and stylists by July 1, 2019.

LEAVES OF ABSENCE

New Parent Leave Act Benefits: Under the California Family Rights Act ("CFRA"), an eligible employee is entitled to take up to 12 workweeks of unpaid protected leave during any 12-month period for specified reasons, including the birth, adoption, or foster care placement of a child with the employee. Currently, an employee must have more than 12 months of service with the employer, at least 1,250 hours of service during the previous 12-month period, and work at a worksite in which the employer employs at least 50 employees within 75 miles to be eligible. The New Parent Leave Act, or SB 63, extends this right to employees who work at a worksite that employs *20* or more employees within 75 miles of the employee's worksite. Employers will be required to maintain and pay any coverage under a group health plan for an employee who takes leave under the New Parent Leave Act, but they will be permitted to recover premiums if the employee fails to return to work after leave in specified circumstances. Employees who are eligible for leave under CFRA and the federal Family and Medical Leave Act of 1993 ("FMLA") will not be eligible for additional time off under the New Parent Leave Act. The new law prohibits employers from interfering with, or retaliating against, an employee who exercises his or her rights or attempts to exercise his or her rights under the law and creates a mediation pilot program administered by the DFEH for resolving disputes prior to litigation.

PUBLIC EMPLOYEES

Public Employee Union Campaigns: SB 285 prohibits public employers from deterring or discouraging public employees from becoming or remaining members of a union. This bill is intended to close the "loophole" in Government Code section 16645.6, which previously prohibited public employers from only influencing union organization. Now, public employers (including local school boards and districts) are expressly prohibited from discouraging individual employees from joining an existing union.

Expansion of Public-Sector Unionization: AB 83 (aka the "Judicial Counsel Employer-Employee Relations Act") extends the Ralph C. Dills Act (which governs collective bargaining between state and public employee organizations) to include Judicial Council employees. Judicial Council employees may now form, join, and participate in the activities of employee organizations for the purpose of representation on all matters of employer-employee relations. However, the following employees are still excluded from coverage under the Dills Act: managerial, confidential, or supervisory employees; judicial officers; employees of the Supreme Court, the courts of appeal, or the Habeas Corpus Resource Center; and employees in positions designated by the Judicial Council in its sole authority and discretion.

Equal Pay Act Provisions Extended to Public-Sector Employees: AB 46 includes public-sector employers in California's Equal Pay Act, which was previously applicable only to private employers. Under the Equal Pay Act, as amended, public-sector employers are prohibited from providing unequal pay to co-workers of a different race, ethnicity, or sex who are performing similar work. As with private-sector employers,

public-sector employers may avail themselves of the exceptions to the Equal Pay Act, including:

- a seniority system;
- a merit system;
- a system that measures earnings by quantity or quality of production; or
- a bona fide factor other than race, ethnicity, or sex, such as education, training, or experience.

Prohibition on Religious or Ethnic Registries: SB 31 (the "California Religious Freedom Act") prohibits California state and local governments from participating in any government program that is aimed at creating a registry of individuals based on their religion, national origin, or ethnicity. State employers may not disclose personally identifiable information regarding their employees when the information is intended to be used in any government effort to create a list, registry, or database of identifying individuals by their religious affiliation, national origin, or ethnicity.

WAGE & HOUR

Contractors Liable for Subcontractor Debt, Including Unpaid Wages: As previously discussed on our *Wage and Hour Defense Blog*, per AB 1701, all construction contracts entered into in California on or after January 1, 2018, must identify a "direct contractor." The direct contractor can be liable for debts owed by a subcontractor to its employees if the employees were performing work under, by, or for the direct contractor, as specified in the contract. The law may only be enforced by the Labor Commissioner, labor-management cooperation committees, and unions; there is no private right of action.

DLSE Authorized to Conduct Independent Investigations: Approved by Governor Brown on October 3, 2017, SB 306 now allows the DLSE to investigate an employer, regardless if a complaint has been filed, where retaliation or discrimination is suspected during the course of the investigation of an employee's wage claim. Further, the bill allows the Labor Commissioner, upon a determination of reasonable cause, to petition a superior court for prescribed injunctive relief. Additionally, the Labor Commissioner may issue citations directing specific relief to persons determined to be responsible for violations within the employer's organization. The bill also establishes new review procedures, including procedures for requesting a hearing before a hearing officer and for a petition for a writ of mandate.

Prevailing Wage Assessments: Under current law, the Labor Commissioner may issue civil wage and penalty assessments on public works projects against contractors that fail to comply with prevailing wage requirements. Affected contractors can obtain administrative or judicial review of such penalty assessments, and can avoid paying liquidated damages, if they deposit an amount equal to the assessment with the Department of Industrial Relations ("DIR") pending the administrative or judicial review. AB 326 requires the DIR to release the funds deposited, plus interest earned, to the person or entity found to be entitled to those funds, within 30 days following either the conclusion of all administrative and judicial review or the DIR's receipt of written notice

from the Labor Commissioner of a settlement or other final disposition of an assessment.

Commissions for Licensed Cosmetologists: SB 490 revises the Labor Code to add section 204.11, which authorizes licensed barbers, cosmetologists, estheticians, manicurists, electrologists, and apprentices to enter into an agreement with their employer to receive "commission wages" in addition to their base hourly rate. Under this new law, "commission wages" are defined as wages paid as a percentage or a flat sum portion of the sums payable to the employee by the client receiving the service. Licensed cosmetologists may also be compensated for rest and recovery periods at a rate of pay that is at least equal to their hourly rate of pay.

WORKPLACE SAFETY

Cleaning Product Right to Know Act: Pursuant to the Hazardous Substances Information and Training Act, employers are required to notify employees of designated hazardous substances within the workplace, including automotive products, cleaning products, and polish or floor maintenance products, and to provide information regarding potential hazards of using those substances. Currently, employers must make safety data sheets on substances in the workplace available to employees, collective bargaining representatives, and employee physicians. Under SB 258, employers will now also be required to make available certain online disclosures prepared by the product manufacturers.

Electronic Wireless Communication Devices: AB 1222 removes specialized mobile radio devices and two-way messaging devices from the list of devices that are illegal to operate while driving. While this new, relaxed standard permits brief two-way messaging and communications through mobile radios, employers should still regulate and limit the use of electronic communication devices while driving in order to ensure the safety of employees and third parties while on the road.

What Employers Should Do Now

California's new laws impact a wide range of policies and procedures throughout the employment relationship. Accordingly, employers with a California workforce should do the following:

- Review your hiring processes to eliminate questions about criminal or compensation history, and properly train supervisors on these new prohibitions.
- Ensure that modules used for required anti-harassment training include content on gender identity and expression.
- Review and revise, if necessary, your employee handbooks to ensure that they are otherwise up to date.
- If you have 20-49 employees within a 75-mile radius in California, establish a new parent leave policy.

In addition, construction contractors in California will need to identify a "direct contractor" in all contracts.

****

For more information about this Advisory, please contact:

Adam C. Abrahms
Los Angeles
310-557-9559
aabrahms@ebglaw.com

Jonathan M. Brenner
Los Angeles
310-557-9504
jbrenner@ebglaw.com

Andrea K. Douglas
Los Angeles
310-557-9527
adouglas@ebglaw.com

Matthew A. Goodin
San Francisco
415-399-6021
mgoodin@ebglaw.com

Amy B. Messigian
Los Angeles
310-557-9540
amessigian@ebglaw.com

Katrina J. Walasik
Los Angeles
310-557-9577
kwalasik@ebglaw.com

About Epstein Becker Green
Epstein Becker & Green, P.C., is a national law firm with a primary focus on health care and life sciences; employment, labor, and workforce management; and litigation and business disputes. Founded in 1973 as an industry-focused firm, Epstein Becker Green has decades of experience serving clients in health care, financial services, retail, hospitality, and technology, among other industries, representing entities from startups to Fortune 100 companies. Operating in offices throughout the U.S. and supporting clients in the U.S. and abroad, the firm's attorneys are committed to uncompromising client service and legal excellence. For more information, visit www.ebglaw.com.