

California Employers: Time to Gear Up for 2017

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Now is the time of year for California employers to review the numerous employment laws that will be going into effect in 2017 to ensure that their policies and practices are in compliance and properly address new requirements. In this Advisory, we summarize some of the more significant new employment laws that create or expand employee rights and benefits.

All the new laws discussed below are effective on January 1, 2017, unless otherwise indicated.

ARBITRATION AND DISPUTE RESOLUTION

Choice of Law: On September 25, 2016, Governor Jerry Brown signed into law [SB 1241](#), which prohibits employers from requiring employees who primarily reside and work in California to agree to contract provisions that require them to adjudicate claims arising in California in any locale outside the state. Further, employees who primarily reside and work in California cannot be forced to sign agreements that deprive them of the substantive protections of California law. SB 1241 makes any provision of a contract that violates these prohibitions voidable upon request of the employee. If so requested, the dispute over a voided provision would then be adjudicated in California under California law. This new law applies to employment agreements entered into, modified, or extended after January 1, 2017, so long as an employee's employment is conditioned on the agreement, the underlying claims arise in California, and the agreement was not negotiated on behalf of the employee by counsel.

DISCRIMINATION

Equal Pay – Race or Ethnicity: On September 30, 2016, Governor Brown signed into law [SB 1063](#), the Wage and Equality Act of 2016. This new law prohibits employers from paying employees of one race or ethnicity less than employees of another race or ethnicity who perform substantially similar work. SB 1063 requires employers to demonstrate that a reasonably applied factor justifies differences of pay between employees of different races or ethnicities. The factor (i) may not derive from a race or

ethnicity-based differential in compensation, (ii) must be job-related, and (iii) must be consistent with a business necessity.

Wage Discrimination: On September 30, 2016, Governor Brown also signed [AB 1676](#), amending the California Fair Pay Act's prohibitions against unequal pay to co-workers of the opposite sex who perform similar work. Under AB 1676, prior salary history alone is no longer sufficient to justify pay disparity between men and women who perform substantially similar work. However, the Fair Pay Act's exceptions are still available to employers, 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 sex, such as education, training, or experience.

Single-User Restrooms: Governor Brown signed [AB 1732](#), requiring that single-user occupancy restrooms in businesses, government buildings, and places of public accommodation be made available to everyone and include restroom signage to designate single-occupancy restrooms as "all gender." AB 1732 adds Section 118600 to the Health and Safety Code, effective March 1, 2017. Section 118600 mandates that all single-user toilet facilities in any business establishment, place of public accommodation, or state or local government agency, including public educational entities, be identified as an all-gender toilet facility. A "single-user toilet facility" means a toilet facility with a locking mechanism controlled by the user that contains no more than one toilet and one urinal. The new law does not require employers to add single-occupancy restrooms but merely changes signage and usage permissions for any already-existing facilities.

Employment Discrimination: The California Fair Employment and Housing Act ("FEHA") prohibits employment discrimination and harassment on the basis of numerous protected characteristics, including physical and mental disability, as well as provides a right to reasonable accommodation. [AB 488](#) extends FEHA's protections to workers with disabilities by allowing individuals employed under a special license in a nonprofit sheltered workshop or rehabilitation facility to bring an action under the FEHA if they suffer prohibited harassment or discrimination.

Immigration-Related Unfair Practice: [SB 1001](#) prohibits employers from:

- requesting more or different documents than required under federal law to verify that an individual is authorized to work in the United States;
- refusing to honor documents that, on their face, reasonably appear to be genuine; or

- attempting to reinvestigate or re-verify an incumbent employee’s authorization to work unless required to do so by federal law.

SB 1001 also creates a private right of action. Employers may be subject to a \$10,000 penalty per violation, payable to the employee or applicant who suffered the violation.

Employment Services – Verification: [AB 2532](#) repeals existing law that requires each state and local government agency, or any private organization contracting with a state or local government agency, to post in a prominent location in the workplace a notice stating that only citizens or those persons legally authorized to work in the United States will be permitted to use the agency’s or organization’s employment services that are funded by the federal or state government.

Deaf or Hard-of-Hearing Individuals: [AB 1709](#) replaced existing references to “hearing impaired” with “hard of hearing.”

Juvenile Records: [AB 1843](#) prohibits employers from inquiring about and/or considering for employment purposes information concerning or related to “an arrest, detention, process, diversion, supervision, adjudication, or court disposition” that occurred while the applicant or employee was subject to the process and jurisdiction of a juvenile court.

No Discrimination Certification for Public Contracts: [AB 2844](#) requires a person who bids on or proposes to enter into or renew a contract with a state agency in the amount of \$100,000 or more to certify, under penalty of perjury, at the time the bid or proposal is submitted or the contract is renewed that the person is in compliance with the anti-discrimination requirements of the Unruh Civil Rights Act and FEHA. The bidder must also certify that he or she has not adopted any policy that can be used to discriminate against any sovereign nation or peoples recognized by the government of the United States, including Israel, in violation of the Unruh Civil Rights Act or FEHA.

Legalization of Marijuana: California voters approved a measure on the November ballot to legalize the recreational use of marijuana in California. The new law does not prohibit (or require) a drug-free workplace. Employers remain able to make hiring and termination decisions based on a positive drug test for marijuana. Handbooks and other materials describing policies against drug use should clearly specify whether the use of marijuana and other Schedule 1 drugs under federal law is prohibited.

Los Angeles’ “Ban the Box” Ordinance: Effective January 22, 2017, the “Fair Chance Initiative” will prohibit employers and city contractors/subcontractors in the city of Los Angeles from inquiring about job seekers’ criminal convictions until after a conditional offer of employment has been made. After a conditional offer of employment is made, employers and city contractors may request information regarding the applicant’s criminal history. However, the conditional offer can only be withdrawn because of the applicant’s criminal history after the employer or city contractor engages in the “Fair Chance Process.” This process requires employers to prepare a written assessment illustrating how the applicant’s criminal history poses a risk to the duties of

the position sought by the application. The applicant must be provided with notice of this assessment and given an opportunity to respond; the employer cannot terminate the conditional offer or fill the position until five business days after the applicant is given the written assessment.

A violation of the Fair Chance Initiative carries a maximum penalty of \$2,000 per occurrence, up to \$500 of which may be given to the applicant by the city. Exceptions to these ordinances include:

- employers required by law to review an applicant's criminal history;
- positions for which an applicant would be required to possess or use a firearm;
- positions which, by law, cannot be held by an individual with a criminal history; and
- employers that are prohibited, by law, from hiring persons with criminal convictions.

EMPLOYEE BENEFITS

Retirement Program: [SB 1234](#) requires that private employers (with five or more employees) that do not offer a 401(k) plan or similar retirement savings plan must enroll their employees in the new California Secure Choice Retirement Savings Program, unless employees elect to opt out of the program. The program may also be offered by employers with fewer than five employees at their option.

Paid Family Leave: On April 11, 2016, Governor Brown signed into law [AB 908](#), which increases the wage replacement rate under the Paid Family Leave program for California workers. Starting on January 1, 2018, AB 908 will also eliminate the seven-day waiting period for receiving temporary disability benefits.

Under AB 908, workers experiencing periods of disability commencing after January 1, 2018, but before January 1, 2022, will be entitled to weekly benefit amounts, as follows:

- Individuals whose wages over the highest-income quarter during the base period are less than \$929 will be entitled to a minimum of \$50 per week.
- Individuals whose wages are \$929 or greater *but* less than one-third of the state average quarterly wage will be entitled to 70 percent of the amount of wages paid during the individual's highest-income quarter during the base period, divided by 13.
- Individuals whose wages during the highest quarter were at least one-third of the amount of the state average quarterly wage will be entitled to the greater of the following sums:
 - 23.3 percent of the state average weekly wage, or

- 60 percent of the worker's wages during the highest quarter, divided by 13.

San Francisco Paid Parental Leave: Earlier this year, the city of San Francisco passed an ordinance requiring employers to provide supplemental compensation to employees who are receiving California Paid Family Leave for purposes of bonding with a new child. Employers with 50 or more employees (wherever located) are required to comply as of January 1, 2017. Employers with 35 or more employees (wherever located) are required to comply as of July 1, 2017, and employers with 20 or more employees (wherever located) are required to comply as of January 1, 2018.

The ordinance requires that covered employers pay the difference between the amount of Paid Family Leave benefits paid by the state and an employee's regular hourly rate (subject to the caps imposed by the state for high-earning employees) for up to six weeks. Employees are covered by the ordinance if they have worked for the employer for at least 180 days, perform at least eight hours of work per week for the employer within the geographical boundaries of San Francisco, spend at least 40 percent of their total weekly hours working for the employer within the geographical boundaries of San Francisco, and are eligible to receive Paid Family Leave for purposes of bonding with a new child from the state of California.

Domestic Violence, Sexual Assault, and Stalking Leave: [AB 2337](#) sets forth notice requirements for employers with 25 or more employees regarding the right to time off for victims of domestic violence, sexual assault, or stalking. Current law permits such employees to take time off to seek medical attention or a restraining order, obtain relocation assistance or counseling, and engage in other protected activities. AB 2337 requires covered employers to provide written notice to new employees upon hire and to current employees upon request. Employers will not be required to comply with the notice requirement until the Labor Commissioner creates a form notice for use, which it is required to do on or before July 1, 2017.

Paid Sick Leave: While the California paid sick leave statute remains unchanged in 2017 (new provisions passed this year affecting in-home supportive service workers will become effective in 2018), several cities passed or amended their own paid sick leave laws. For example, San Francisco amended its paid sick leave ordinance to better coordinate with the California paid sick leave requirements. The amended San Francisco ordinance is effective January 1, 2017. Santa Monica and Berkeley will also have paid sick leave ordinances taking effect in 2017.

WAGE AND HOUR

Minimum Hourly Wage / Minimum Exempt Salary: California has approved statewide increases to the minimum wage on an incremental basis to \$15 per hour. The first increase to \$10.50 per hour will occur on January 1, 2017, for employers with 26 or more employees (employers with 25 or less employees are exempt until January 1, 2018). The increase in the minimum wage also raises the minimum salary for exempt

“white collar” employees (i.e., those employees subject to the administrative, professional, and executive exemptions) to \$43,680, or two times the minimum wage.¹ The salary threshold for exempt physicians and surgeons increases to \$77.15 per hour, effective January 1, 2017, and the wage threshold for exempt computer professionals increases to \$42.35 per hour or \$88,231.36 per year. Please note that the following cities and counties will have minimum wage requirements exceeding the California minimum wage next year:

- Berkeley: \$12.53 (\$13.75 on 10/1/17)
- Cupertino: \$12.00
- El Cerrito: \$12.25
- Emeryville: 0-55 employees: \$12.25 (\$14.00 on 7/1/17); 56+ employees: \$14.44
- Los Altos: \$12.00
- Los Angeles (city/county): 0-25 employees: \$10.00 (\$10.50 on 7/1/17); 26+ employees: \$10.50 (\$12.00 on 7/1/17)
- Malibu: same as LA
- Mountain View: \$11.00
- Oakland: \$12.25
- Palo Alto: \$12.00
- Pasadena: same as LA
- Richmond: \$12.30
- San Diego: \$11.50
- San Francisco: \$13.00 (\$14.00 on 7/1/17)
- San Jose: \$10.50 (all employers)
- San Mateo: \$12.00
- Santa Clara: \$11.10
- Santa Monica: same as LA
- Sunnyvale: \$13.00

Employment Wages and Itemized Statements: On July 31, 2016, Governor Brown signed [AB 2535](#). The law amends Labor Code Section 226 to clarify that the itemized wage statements or pay stubs for employees who are exempt from overtime do not need to include the employees’ hours worked.

Temporary Services Employees (Security Officers): [AB 1311](#) requires temporary services employers to pay an employee who is a registered security officer his or her wages at least once a week, regardless of when the employee’s assignment ends. The new law took effect July 22, 2016, as an urgency statute.

Minimum Wage Challenges Initiated by the California Division of Labor Standards Enforcement: Section 1197.1 of the California Labor Code authorizes an employee to file a wage claim with the Labor Commissioner for unpaid wages. If the Labor Commissioner rules in favor of the employee, the employer may appeal to the Superior Court but must first post a wage bond for the amount of unpaid wages owed plus liquidated damages and less penalties, preserving the ability of the employee to collect the wages owed to him or her. [AB 2899](#) extends this bond requirement to actions that started following an investigation by the Labor Commissioner.

¹ Note that a federal increase of the salary exemption test under the Fair Labor Standards Act was set to increase the minimum salary threshold for exempt white-collar employees to \$47,476. But, as of the time of this publication, implementation of that increase is enjoined. Employers should be mindful that California’s requirements are separate and continue to be in effect.

Wage Investigation: [SB 1342](#) allows California cities and counties to work with the California Division of Labor Standards Enforcement to enforce wage payment laws. This new law gives local enforcement programs the tools required to conduct wage claim investigations in order to recover unpaid wages, including the ability to issue subpoenas.

Domestic Worker Bill: [SB 1015](#) removes the 2017 sunset date from the Domestic Worker Bill of Rights passed in 2013 (AB 241), which, among other things, establishes overtime compensation rates for domestic work employees who are engaged as personal attendants.

WORKING CONDITIONS

Smoking in the Workplace: Governor Brown signed [ABX2-7](#), which expands workplace prohibitions on smoking in all enclosed places of employment to all employers of any size, including a place of employment where the owner-operator is the only worker. Private residences—other than those used as daycare facilities—remain exempt. ABX2-7 also eliminates most of the specified exemptions that permit smoking in certain work environments, such as hotel lobbies, bars and taverns, banquet rooms, warehouse facilities, and employee break rooms.

What Employers Should Do Now

Employers are strongly urged to:

- review and update their policies and procedures in anticipation of the aforementioned new laws;
- focus on ensuring that they are in compliance with all of the new legislation that requires immediate action, such as increases in minimum wage; changes to sick, parental, and paid family leave policies; and the elimination of inquiries regarding a job applicant's criminal history (there may be significant repercussions for failing to comply with these new regulations, such as fines, penalties, or even exposure to civil liability); and
- consult with legal counsel to ensure that their policies are compliant and up to date, based on local, state, and federal laws.

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