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Employers, Take Notice: New Employment Laws May Affect Your Business

By Paul L. Bressan and Ronald J. Arias

Year after year, the California Legislature and the Governor implement new employment laws that place additional requirements on employers throughout the state. The employment laws that become effective on January 1, 2018 burden small to large businesses engaged in various industries, and failure to comply with these new laws could have severe consequences. This client alert is intended to place employers on notice of the new laws that we believe are the most likely to affect their businesses.

Prohibition Against Inquiries Regarding the Salary History of Job Applicants – AB 168

AB 168 expands the prohibitions regarding what employers may ask job applicants prior to an offer of employment. This new bill adds Section 432.3 to the Labor Code and provides that employers of all sizes are now prohibited from directly or indirectly relying on the salary history information of an applicant for employment as a factor in determining whether to offer an applicant employment or what salary to offer an applicant. This "salary history information" includes prior salary, compensation and benefits. The bill also prohibits an employer from seeking salary history information about an applicant for employment and requires an employer, upon reasonable request, to provide the pay scale for a position to an applicant for employment.

A job applicant may voluntarily and without prompting disclose salary history information. In such case, an employer is not prohibited from considering or relying on that voluntarily disclosed salary history information in determining salary. Nevertheless, even if salary history is disclosed, it cannot by itself be the basis for disparity in compensation under the California Fair Pay Act, which prohibits discrimination in pay on the basis of gender and race. The bill does not apply to salary history information available to the public under state and federal law, such as the California Public Records Act.

Parental Leave Act: Small Businesses – SB 63

The California Family Rights Act currently prohibits employers with 50 or more employees from refusing to grant a request by an eligible employee to take up to 12 workweeks of unpaid protected leave during any 12-month period (1) for reason of a child born to, adopted by, or placed for foster care with, the employee (the "baby-bonding" provision), (2) to care for the employee's parent or spouse who has a serious health condition, as defined, or (3) because the employee is suffering from a serious health condition rendering him or her unable to perform the functions of the job. SB 63 adds Section 12945.6 to the Government Code, which expands the "baby bonding" provision to employers with 20 or more employees, requiring them to allow an employee with more than 12 months of service with the employer, who has at least 1,250 hours of service with the employer during the previous 12-month period, and who works at a worksite in which the employer employs at least 20 employees within 75 miles, to take up to 12 weeks of parental leave to bond with a new child within one year of the child's birth, adoption, or foster care placement. This bill does not expand the provisions for 12 workweeks of unpaid leave in connection with an employee's or a family member's serious health condition.

An employer must provide a guarantee of employment in the same or a comparable position upon the termination of the leave and will be deemed to have refused to allow the leave if the guarantee is not provided on or before commencement of the leave.

An employer must also maintain and continue to pay for coverage under a group health plan, which means a plan (including a self-insured plan) of, or contributed to by, an employer (including a self-employed person) or employee organization to provide health care (directly or otherwise) to the employees, former employees, the employer, others associated or formerly associated with the employer in a business relationship, or their families. This coverage must be maintained and paid for the duration of the leave, not to exceed 12 weeks over the course of a 12-month period, commencing on the date that the parental leave commences, at the level and under the conditions that coverage would have been provided if the employee had continued to work in his or her position.

Employers are eligible to recover coverage costs under the health plan for employees that do not return to work after leave for reasons other than a serious health condition or in other circumstances beyond an employee's control. If an employer employs both parents and they are entitled to leave pursuant to this bill for the same birth, adoption, or foster care placement, the total parents' mandated parental leave will be capped at 12 weeks. The bill authorizes the employer to grant simultaneous leave to these parents.

"Ban-the-Box" Prohibition Against Job Applicant Criminal History Inquiries – AB 1008

AB 1008 repeals Section 432.9 of the Labor Code and adds Section 12952 to the California Fair Employment and

Housing Act. This bill provides that it is an unlawful employment practice under the Fair Employment and Housing Act for an employer with 5 or more employees to include on any application for employment any question that seeks the disclosure of an applicant's conviction history, to inquire into or consider the conviction history of an applicant until that applicant has received a conditional job offer, and, when conducting a conviction history background check, to consider, distribute, or disseminate information related to specified prior arrests, diversions and convictions. If an offer of employment is made conditional to a background check, an individualized assessment of whether the applicant's conviction history has a direct and adverse relationship to the specific duties of the job must be made in order for an employer to deny an applicant a position of employment solely or in part because of the applicant's conviction history.

An employer who makes a preliminary decision to deny employment based on that individualized assessment must provide the applicant written notification of this decision. The notification must contain: (1) a notice of the disqualifying conviction or convictions that are the basis for the preliminary decision to rescind the offer; (2) a copy of the conviction history report, if any; and (3) an explanation of the applicant's right to respond to the notice of the employer's preliminary decision before that decision becomes final and the deadline by which to respond. The explanation must inform the applicant of the right to respond, and that the response may include submission of evidence challenging the accuracy of the conviction history report, evidence of rehabilitation or mitigating circumstances, or both. The applicant must be given at least five business days to respond to the notice before the employer may make a final decision. If the applicant timely notifies the employer in writing that the applicant disputes the accuracy of the conviction history report that was the basis for the preliminary decision to rescind the offer and that the applicant is taking specific steps to obtain evidence supporting that dispute, then the applicant must be given at least five additional business days to respond to the notice. The employer must consider the information submitted by the applicant before making a final decision.

If the employer makes a final decision to deny employment based solely or in part due to the applicant's conviction history, the employer must notify the applicant of this final decision, any existing procedure 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.

This law does not apply to public agencies otherwise required by law to conduct a conviction history background check, a farm labor contractor or an employer required by law to conduct criminal background checks.

Immigrant Worker Protection Act – AB 450

AB 450 adds Sections 7285.1, 7285.2, and 7285.3 to the Government Code, and adds Sections 90.2 and 1019.2 to the Labor Code. This bill prohibits an employer or other person acting on the employer's behalf from providing voluntary consent to an immigration enforcement agent to enter nonpublic areas of a place of labor unless the agent provides a judicial warrant. Except as required by federal law, the bill prohibits an employer or other person acting on the employer's behalf from providing voluntary consent to an immigration enforcement agent to access, review or obtain employee records from the employer without a subpoena or court order.

Employers will be required to provide current employees with notice of an inspection of I-9 Employment Eligibility Verification forms or other employment records conducted by an immigration agency, by posting this information in the language the employer normally uses to communicate employment information within 72 hours of receiving the federal notice of inspection. Further, upon reasonable request, an employer will be required to provide an affected employee with a copy of the notice of inspection of I-9 Employment Eligibility Verification forms. The bill requires an employer to provide to an affected employee, and to the employee's authorized representative, if any, a copy of the written immigration agency notice that provides the inspection results and the obligations of the employer and the affected employee arising from the action.

The Labor Commissioner and the Attorney General will have exclusive authority to enforce these provisions and any penalty recovered by either of them will be deposited in the Labor Enforcement and Compliance Fund. The bill prescribes civil penalties for violations of $2,000 up to $5,000 for a first violation and $5,000 up to $10,000 for each subsequent violation. If a court finds that an immigration enforcement agent was permitted to access, review or obtain the employer's employee records without the consent of the employer or other person in control of the place of labor, the civil penalty shall not apply.

Minimum Wage and Related Matters

In 2017, SB 3 amended Section 1182.12 of the Labor Code and provided a six-step annual statewide increase of the minimum wage. Beginning January 1, 2018, the California state minimum wage for employers with 25 or fewer employees will be $10.50, and will increase each year until it reaches $15.00 in 2023. Beginning January 1, 2018, the minimum wage for employers with 26 or more

employees will be $11.00, and will increase each year until it reaches $15.00 in 2022.

In the cities of Los Angeles, Santa Monica and Pasadena, starting on July 1, 2018 the minimum wage will increase to $13.25 per hour for employers with 26 or more employees and $12.00 per hour for employers with 25 or fewer employees. In San Francisco, on July 1, 2018 the minimum wage will increase to $15.00 per hour. Certain other California cities also have minimum wage increase requirements.

The increases in the state minimum wage are important not only to companies that employ lower-wage workers, but they also affect the standard for exempt status under California law. Specifically, in order to be exempt from being paid overtime under the executive, administrative and professional exemptions, an employee must be paid at least twice the state minimum wage per month. Thus, in 2018, the minimum annualized salary for an employee to be considered for one of these exemptions in California will rise to $45,760 for employers with 26 or more employees, and to $43,680 for employers with 25 or fewer employees.

With respect to computer software employees, the overtime exemption in Labor Code Section 515.5 will require them to receive a minimum hourly pay of $43.58 or a minimum annual salary of $90,790.07 for full-time employment, and to be paid not less than $7,565.85 per month. For licensed physicians and surgeons, the California overtime exemption will require them to receive the minimum annual salary or a minimum hourly pay of $79.39.

Harassment Prevention Training Expansion: Gender Identity, Gender Expression and Sexual Orientation – SB 396

Back in 2004, the California Fair Employment and Housing Act began requiring employers with 50 or more employees to provide at least two hours of classroom or other effective interactive training regarding sexual harassment to all supervisory employees in California within six months of their assumption of a supervisory position. This training must be provided once every two years. In 2015, the Act was amended to include bullying and abusive conduct as part of the training.

Now, in 2018, SB 396 amends Sections 12950 and 12950.1 of the Fair Employment and Housing Act, and amends Sections 14005 and 14012 of the Unemployment Insurance Code. This bill expands the training to include harassment based on gender identity, gender expression and sexual orientation. The training must include practical examples of these forms of harassment, and must be presented by trainers with knowledge and expertise in those areas. Employers must also display a poster created by the Department of Fair Employment and Housing concerning the rights of transgender persons, which must be posted in a prominent and accessible location in the workplace.

Harassment Training Prevention Expansion: Farm Labor Contractors – SB 295

Current law pertaining to farm labor contractors prohibits the issuance of a farm labor contractor license unless the applicant attests in writing that certain employees have received sexual harassment training in accordance with prescribed requirements relating to the substance, administration and record of the training. SB 295 amends Section 1684 of, and adds Section 1697.5 to, the Labor Code. This bill expands the law to require that the training for each agricultural employee be in the language understood by that employee.

The bill also requires a licensee, as part of the application for license renewal, to provide the commissioner with (i) a complete list of all materials or resources utilized to provide sexual harassment prevention training to the licensee's agricultural employees in the calendar year prior to the month in which the renewal application is submitted, and (ii) the total number of agricultural employees trained in sexual harassment in the calendar year prior to the month in which the renewal application is submitted. The bill authorizes the commissioner to issue citations and assess civil penalties of $100 for each violation.

Employee Retaliation/Whistleblower Claim Expansion for Labor Commissioner – SB 306

SB 306 amends Section 98.7 of, and adds Sections 98.74, 1102.61, and 1102.62 to, the Labor Code. This new bill authorizes the Labor Commissioner to commence an investigation of an employer, with or without a complaint being filed by an employee, when specified retaliation or discrimination is suspected during the course of adjudicating a wage claim, during a field inspection concerning labor standards or in instances of suspected immigration-related threats. The Labor Commissioner, upon finding "reasonable cause" to believe that any person has engaged in or is engaging in a violation, will be able to petition a superior court for prescribed injunctive relief. However, temporary injunctive relief under these provisions does not prohibit an employer from disciplining or terminating an employee for conduct that is unrelated to the claim of the retaliation.

The bill also would authorize the Labor Commissioner to issue citations to persons determined to be responsible for violations, directing specific relief. This specific relief

includes, but is not limited to, directing the respondent to cease and desist from any violation and take any action deemed necessary to remedy the violation, including, where appropriate, rehiring or reinstatement, reimbursement of lost wages and interest thereon, payment of penalties, payment of reasonable attorneys' fees associated with any hearing held by the Labor Commissioner in investigating the complaint, and the posting of notices to employees. The bill establishes review procedures, including procedures for requesting a hearing before a hearing officer for the Labor Commissioner and for a petition for a writ of mandate. An employer who willfully refuses to comply with a final order will be subject to prescribed civil penalties payable to the affected employee.

Construction Contractor Liability for Debt Owed By Subcontractors to Wage Claimants – AB 1701

AB 1701 adds Section 218.7 to the Labor Code. For all contracts entered into on or after January 1, 2018, a direct contractor that makes or takes a contract in California for the erection, construction, alteration, or repair of a building, structure, or other work, will now assume and be liable for any debt owed by a subcontractor to a wage claimant, or third party on the wage claimant's behalf, if the wage claimant acted under, by, or for the direct contractor in performing labor that is the subject of the original contract. In other words, a general contractor will now be liable for a subcontractor's employee's wages if the employee worked for the benefit of the general contractor pursuant to the original contract with the subcontractor. This liability extends to any unpaid wage, fringe or other benefit payment or contribution, including interest. The bill also authorizes the Labor Commissioner to enforce it and requires a subcontractor to provide payroll records to the general contractor upon request.

Vetoed Bills

In addition to the above bills that were signed into law, there were a number of bills that were vetoed by Governor Brown, the most notable of which are as follows:

Reproductive Health Rights – AB 569: This bill would have prohibited an employer from taking any adverse action against an employee or the employee's dependent or family member for their reproductive health decisions, including, but not limited to, the timing thereof, or the use of any drug, device or medical service. It also would have made this benefit unwaivable and would have required employers to include in employee handbooks a notice of an employee's rights and remedies. The Governor believes that claims of adverse employment action due to reproduction health decisions are, and should remain, under the jurisdiction of the Department of Fair Employment and Housing under the California Fair Employment and Housing Act.

Gender Pay Gap Transparency Act – AB 1209: This bill would have required employers with 500 or more employees in California, on or after July 1, 2019, to file a statement of information with the Secretary of State as a means for the state to collect information concerning gender wage differentials for exempt employees and board members. It also would have required the Secretary of State to publish the information described above on an Internet Web site available to the public upon receiving necessary funding and upon the establishment of adequate mechanisms and procedures. The Governor noted that the ambiguous wording of the bill likely would lead to increased litigation rather than a meaningful decrease in the gender wage gap.

Employers should audit their current policies and practices, and make any necessary changes to ensure that they are in compliance with these new laws.

Paul L. Bressan is a Shareholder in the Firm's Orange County office and Chair of the Labor & Employment practice. He can be reached at 949.224.6232 or pbressan@buchalter.com.

Ronald J. Arias is an Attorney in the Firm's Los Angeles office. He can be reached at 213.891.5209 or rarias@buchalter.com.