Are you finally caught up on all of the new California laws taking effect in 2017? Then begin preparing for 2018 because the California legislature has been busy drafting another set of employment related laws. Here is a sneak peak of some of the more notable proposals that may be coming down the pike. For now, these are only proposed laws that have neither passed the legislature nor been signed into law. If they do become laws, their substance may ultimately change substantially.

Opportunity to Work Act (AB 5)—Mandates Offering Additional Hours to Existing Employees Before Hiring New Employees

AB 5, the “Opportunity to Work Act,” would require employers with more than 10 employees in California to offer additional hours of work to existing non-exempt employees before hiring additional employees or subcontractors. Employees would be allowed to either file a complaint with the Labor Commissioner or file their own civil action for which they would be entitled to attorneys’ fees. The bill also imposes notice posting and document retention requirements on employers.

The proposed law is similar to San Jose’s recent Opportunity to Work Ordinance, which we previously blogged about here. However, AB 5 would apply to many more employers and is more burdensome. For example, the San Jose Ordinance only applies to employers with 35 or more employees, but AB 5 would apply to employers with as few as 11 employees. Similarly, while the San Jose Ordinance allows for a hardship exemption due to impracticability, impossibility, or futility, there is no such exemption currently contemplated in AB 5.

Ban the Box (AB 1008)—Prohibits Asking Applicants About Criminal History

Similar to Los Angeles’ recent “Fair Chance” Ordinance, AB 1008 would ban employers from asking a job applicant about his or her criminal history. Employers would also be prohibited from considering, distributing or disseminating a background check with certain information, including an arrest without a conviction, an infraction, or a misdemeanor older than three years or felony older than seven years. An employer may inquire about or consider conviction history, but only after the applicant has received a conditional offer of employment. Similar to current EEOC guidance, if an employer intends to take adverse employment action due to a prior conviction, the employer must make an “individualized assessment” to determine if the criminal history has a “direct and adverse relationship with the specific duties of the job.” Applicants who are denied employment must be given the reason(s) in writing and the applicant must be provided an opportunity to challenge that decision. If the decision is challenged, the employer must consider the information submitted with the challenge and, only then, provide written notice of a “final decision” on the applicant’s employment.

Expansion of CFRA Eligibility and Rights (SB 62)

SB 62 seeks to expand employee leave rights under the California Family Rights Act (CFRA). The bill would change the definition of “child” to include independent, adult children, as well as children of a domestic partner. The bill would also expand the categories of people for whom leave can be taken, including grandparents, grandchildren, siblings, domestic partners, or parents in-law. Notably, the bill creates leave rights that are distinct from those available under the federal Family and Medical Leave Act (FMLA). This means CFRA and FMLA leaves may not run concurrently, and employees could be entitled to a total of 24 weeks of leave instead of only 12 weeks.
Parental Leave Expansion (SB 63)—Parental Leave for Employers with 20-49 Employees

Currently, under both CFRA and FMLA, employers with 50 or more employees in a 75-mile radius are obligated to offer up to 12 weeks of parental leave for qualified employees to bond with a new child’s birth, adoption or foster care placement. **SB 63**, the “New Parental Leave Act,” seeks to extend such parental bonding rights to employees of small companies and will apply to employers with only 20 to 49 employees in a 75-mile radius.

Voluntary Veterans’ Preference Employment Policy Act (AB 353 and AB 1477)

The Voluntary Veterans’ Preference Employment Policy Act, **AB 353** and **AB 1477**, would allow employers to give preference for hiring or retaining veterans over other qualified applicants or employees. Any such employment decisions would be deemed to not violate local or state equal opportunity laws or regulations, including the anti-discrimination provisions of the California Fair Employment and Housing Act (FEHA). While FEHA currently allows employers to give preference to veterans, the preference is only allowed for Vietnam War-era veterans and with respect to decisions regarding the sex of an employee or applicant. This bill would expand an employer’s voluntary preference to all veterans and all categories of applicants and employees.

PAGA Reformation Attempts (AB 281, AB 1429, and AB 1430)

Since its inception, California’s Private Attorneys General Act (Labor Code §§ 2699, et seq.) (PAGA) has been the bane of many California employers who have been sued by an employee for Labor Code violations. PAGA allows aggrieved employees to seek civil penalties for certain Labor Code violations as a representative of the California Labor & Workforce Development Agency and other aggrieved employees. PAGA has been met with disfavor by both employers and legislators alike and, in response, three bills have been proposed in an effort to reform PAGA: AB 281, AB 1429, and AB 1430.

One such bill, **AB 281**, seeks to extend an employer’s 33-day cure to 65-days, as well as expand the scope of violations that are curable to all violations except health and safety violations. The bill would also limit recovery of civil penalties based only upon violations actually suffered by that employee, a reiteration of a standing requirement many California courts are imposing.

Currently under PAGA, a civil suit may be filed for violation of any Labor Code provision which does not specifically provide for a penalty. **AB 1429** would limit civil actions under PAGA only to violations of Labor Code §§ 226 (wage statements), 226.7 (meal/rest periods), 510 (overtime) and 512 (meal periods).

Finally, before filing a civil suit, an aggrieved employee must provide notice to the LWDA of the alleged violations. Under **AB 1430**, the LWDA would have an affirmative duty to investigate the allegations and then issue a citation or determine if there is a reasonable basis for the civil action within 120 days. Aggrieved employees can file a civil action only if they receive a determination from the LWDA that there is a reasonable basis for a civil action or the agency fails to provide timely notification of its determination.

Partial Defense For Reliance On DLSE Guidance (SB 524)

**SB 524** attempts to provide peace of mind to employers who seek and rely upon enforcement guidance from the Division of Labor Standards Enforcement (DLSE), at least partially. The bill would provide a partial affirmative defense to employers who rely in good faith upon the DLSE's opinion letters or enforcement policies. An employer would have to show that, at the time of the violation, it was acting in good faith and: (1) sought an opinion letter or enforcement policy from the DLSE; (2) relied upon a published DLSE opinion letter or enforcement policy; and (3) provided true and correct information to the DLSE in seeking the opinion letter or enforcement policy. If the affirmative defense is successfully established, the employer will not be liable for costs or “subject to punishment,” except for restitution of unpaid wages. Any employer asserting the defense would be required to post a bond in the amount of the reasonable estimate of alleged unpaid wages resulting from the reliance on the DLSE’s guidance.

Applicant Salary Information (AB 168)

**AB 168** would affect the application process in two major ways. First, it would prohibit employers from inquiring about an applicant’s salary history, including compensation and benefits. As currently drafted the law would prevent employers from contacting past employers as well as asking applicants about this information directly. Second, **AB 168** would require employers to provide the pay scale for the position upon reasonable request by the applicant.

Holiday Season Alternative Workweeks for Individual Retail Workers (AB 1173)
California permits non-exempt employees to work “alternative workweek” schedules which means they can work up to four 10-hour shifts in a workweek without being entitled to overtime pay. However, implementing an alternative workweek schedule can often be difficult as it requires, *inter alia*, approval of 2/3 of the employees in the affected work unit. **AB 1173** would establish an overtime exemption for an individual retail employee’s flexible work schedule during the holiday season. Under the bill, an individual non-exempt employee in the retail industry may request, and the employer may approve, a work schedule providing for workdays up to 10 hours a day within a 40 hour workweek, with overtime only being required after working 10 hours in a day or 40 hours in a week. The bill defines “holiday season” as the months of November to January. Furthermore, while the bill allows employers to inform employees that they are willing to consider requests for such flexible schedules, it prohibits inducing a request through any benefit or threat.

As evidenced by these proposed laws, California employers are required to constantly navigate the ever-changing legal landscape in this state. Accordingly, employers are encouraged to stay abreast of legislative updates and to consult experienced legal counsel with questions and concerns regarding the effect of and compliance with any new or existing laws. Sheppard Mullin will closely track proposed employment laws as they work their way through the legislative process, and will further report any developments.

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