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California Governor Approves Three More Employment Laws: “Ban The Box”; Expansion of Sexual Harassment Training; and Contractors Liable for Subcontractors’ Wage and Benefit Obligations

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The deadline for California Governor Jerry Brown to sign new bills into law officially expired October 15, 2017. In addition to signing five bills last week, the Governor signed three more employment-related bills into law over the weekend relating to the use of job applicants’ criminal history, the required components of sexual harassment training, and the liability of building contractors for their subcontractors’ failure to pay wages, fringe benefits, or other benefit payments. The three new laws all become effective on January 1, 2018.

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California

1. **Restrictions on the Use of, and Inquiry into, Applicants’ Conviction History (AB 1008)**

“Ban the Box” laws have been on the rise in recent years. As we explained in our general discussion of this trend earlier this year, “Ban the Box” laws typically prohibit employers from asking applicants about prior convictions on a job application and restrict an employer from seeking out or relying upon an applicant’s conviction history until later in the hiring process. Some laws, such as those adopted in Los Angeles, New York, and San Francisco, also impose a “fair chance” process that regulates the conditions and manner for employers to use prior convictions as a basis for denying employment.

Effective January 1, 2018, AB 1008 amends the Fair Employment and Housing Act to prohibit employers with five or more employers from directly or indirectly inquiring into, seeking the disclosure of, or considering an applicant’s conviction history (including questions on a job application) until **after** the applicant receives a conditional offer of employment. AB 1008 also prohibits employers from considering, distributing, or disseminating information about any of the following while conducting a background check in connection with an application for employment:

- Arrests not followed by a conviction (with some exceptions).
- Referral to, or participation in, a pretrial or post-trial diversion program.
- Convictions that have been sealed, dismissed, expunged, or statutorily eradicated.

AB 1008 expressly does not apply to positions: with a criminal justice agency; with a farm labor contractor; where a state or local agency is legally required to conduct a conviction history background check; or where state, federal, or local law either requires an employer to conduct criminal background checks or restricts employment based on criminal history.

Like the local ordinances adopted in Los Angeles, New York, and San Francisco, AB 1008 mandates that employers follow a “fair chance” process before denying employment based on an applicant’s conviction history. AB 1008’s process—which will apply to all employers with five or more employees beginning on January 1, 2018—operates as follows:

1. **Individualized Assessment.** Employers who intend to deny employment to an applicant based on his or her conviction history must first perform an “individualized assessment” of whether the conviction history has a “direct and adverse relationship with the specific duties of the job that justify denying the applicant the position.”
2. **Written Notice of Preliminary Decision.** If an employer makes a preliminary decision to deny

employment after performing an individualized assessment of the conviction history, the employer must provide the applicant with written notification of the preliminary decision and the conviction history that is the basis for decision. The employer must also provide the applicant with a copy of any conviction history report the employer obtained, and the employer must expressly inform the employee of the right to respond to the notice of the employer's preliminary decision before that decision becomes final and the deadline by which to respond.

3. **5 Day Waiting Period.** Applicants will have at least five business days to respond, in writing, to any notice of a preliminary decision to deny employment based in any way on the applicant's conviction history, and employers must consider any information submitted before finalizing an employment decision. If the applicant disputes the accuracy of a conviction history report and states that they are taking steps to obtain evidence supporting that assertion, they will receive five additional business days to respond to the notice.
4. **Final Written Notice.** Once an employer finalizes a decision to deny employment based on the applicant's conviction history, the employer must notify the applicant in writing of the final decision, of any employer-provided procedures for challenging the decision, and of the applicant's right to file a complaint with the Department of Fair Employment and Housing.

Employees who suffer a violation of the State's "Ban the Box" law will be able to file claims with the Department of Fair Employment and Housing in pursuit of any remedies available under the Fair Employment and Housing Act, which may include compensatory damages, punitive damages, and attorney's fees. Notably, AB 1008 explicitly states that these remedies are "in addition to and not in derogation of all other rights and remedies that an applicant may have under any other law, including any local ordinance."

2. **Expanded Categories of Harassment Training (SB 396)**

The Fair Employment and Housing Act currently requires employers with 50 or more employees to provide at least two hours of sexual harassment training to all supervisory employees within 6 months of the assumption of a supervisory position and once every two years thereafter. It also requires employers with five or more employees to post a copy of the Department of Fair Employment and Housing's poster discussing prohibitions against discrimination and harassment at a "prominent and accessible location in the workplace."

SB 396 amends the Fair Employment and Housing Act's posting requirements by mandating the posting of the Department's recently-created poster regarding transgender rights in the workplace. It also states that required sexual harassment training must now include training about harassment based on gender identity, gender expression, and sexual orientation. That mandated training must include practical examples of harassment based on gender identity, gender expression, and sexual orientation, and must be presented by trainers or educators with knowledge and expertise in those areas.

3. **Building Contractors Jointly Liable for Subcontractors' Wages and Benefit Obligations (AB 1701)**

Labor Code section 1743 holds contractors jointly and severally liable with their subcontractors for underpaid wages and penalties on public works projects subject to California's prevailing wage laws. AB 1701 extends this practice outside of the public works arena by making contractors who perform projects in California involving "the erection, construction, alteration, or repair of a building, structure, or other private work" **jointly and severally liable** with their subcontractors for any failure to pay wages, fringe benefits, or other benefit payments or contributions on any contract entered into on or after January 1, 2018. In contrast to the prevailing wage context, however, direct contractors are not jointly liable for penalties or liquidated damages. Additionally, the new law does not affect the right of contractors and subcontractors at any tier to enter into indemnification agreements regarding any failure to pay wages, fringe benefits, or other benefits or contributions.

AB 1701 authorizes enforcement of its provisions through a civil action by the Labor Commissioner, by any third party owed fringe or other benefit payments or contributions on a wage claimant's behalf, or by a joint labor-management cooperation committee established pursuant to the federal Labor Management Cooperation Act of 1978. Prevailing plaintiffs are entitled to recover their attorney's fees.

To assist general contractors' ability to ensure that subcontractors comply with applicable wage laws, AB 1701 also entitles general contractors to obtain payroll records and contract award information from a subcontractor and any lower tier subcontractors under contract to the subcontractor.

In connection with his approval of AB 1701, Governor Brown issued a signing statement encouraging AB 1701's sponsors to move forward with a proposed bill to strike an ambiguous provision of AB 1701 concerning the limitations of liability imposed by the new law. The language at issue states that the AB 1701's obligations and remedies are "in addition to any obligations and remedies otherwise provided by law, except that nothing in this section shall be construed to impose liability on a direct contractor for anything other than unpaid wages and

fringe or other benefit payments or contributions including interest owed."

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