California at

You may not have expected that the California Legislature in 2017 designated an official state dinosaur (Augustynolophus morrisi) and four state nuts (almond, pecan, walnut and pistachio), which are technically seeds, but that's a separate article.

Less surprising is that employer regulation and employee rights continue to expand in our state, the sixth-largest economy of the world. The rate of expansion, however, seems to have taken another pendulum swing: 304 bills introduced in 2017 mention "employer," compared to 569 bills in 2016 and 224 in 2015. Most of those bills did not pass, and of the ones that did, most were not signed into law by Gov. Brown. Essential elements of several bills that became law affecting private employers, effective Jan. 1, 2018, unless noted otherwise, follow.

Work

New Labor Laws for 2018

BY MARK E. TERMAN

State Minimum Wage On The Rise

As part of legislation enacted in 2015, the state minimum wage increased on Jan. 1, 2018, to $11 per hour for employers with 26 or more employees, and to $10.50 per hour for employers of 25 or fewer employees. It will continue to increase by 50 cents annually until $15 per hour is reached by Jan. 1, 2022, for the larger (26-plus employees) employers and by Jan. 1, 2023, for smaller employers.

Changes in state—*but not local*—minimum wage also affect classification of most exempt workers. In addition to strict "duties tests" for administrative, executive and professional wage and hour exemptions, a salary of at least twice the state minimum wage must be paid to meet the "salary basis test." By Jan. 1, the annualized salary rate that employers with 26 or more employees must pay to meet the exempt salary requirement will advance to $45,760, up from $43,680. For employers with smaller workforces, the exempt salary requirement will move to $43,680, up from $41,600. When the $15 per hour rate is reached, the exempt salary rate will be $62,400.

Each state increase also impacts retailers who rely on the inside-sales exemption, which requires that employees be paid at least 1.5 times the state minimum wage, and at least half of their other earnings be from commissions.

Municipalities continue to create and increase their own minimum wage for companies that have employees working in their jurisdiction. Employers must pay the higher of the state or local minimum wage. For example, by July 1, 2018, the city of Los Angeles will require employers with 26 or more employees to raise the local minimum wage to $13.25 per hour, up from $12, then comply with other scheduled annual increases up to $15 per hour by July 1, 2020. Los Angeles employers with fewer employees, or nonprofit corporations who obtain approval to pay a deferred rate, must pay at least $12 per hour by July 1, 2018. These same rates apply in Los Angeles County, unless a city ordinance requires a higher local minimum wage.

The minimum hourly wage for employees in San Francisco will increase to $15, up from $14, on July 1, 2018. Many other cities, including Berkeley, El Cerrito, Malibu, Oakland, Palo Alto, Pasadena, Richmond, San Diego, Santa Monica and Sunnyvale have enacted local minimum wage laws. Each jurisdiction has its own rate change dates. Most are Jan. 1 or July 1, but there are outliers such as Berkeley (Oct. 1). In addition, living wage laws may require higher minimum wages be paid as a condition of contracting with local, state or federal agencies.

Employers should monitor the requirements to assure compliance in each municipality they have employees working in. A good starting place is the UC Berkeley Labor Center Inventory of U.S. City and County Minimum Wage Ordinances, calcpa.org/laborcenter.

Minimum Pay For Computer Professional Overtime Exemption Increases

Labor Code Sec. 515.5 contains an overtime pay exemption for certain highly skilled computer professionals who spend more than 50 percent of their working time in top-level intellectual or creative work that requires the exercise of discretion and independent judgment, such as software engineers and programmers, and systems designers and analysts.

To qualify for exemption, the employee also be paid at least a certain amount per hour or, alternatively, a salary equal to that hourly rate. Each year, the California Department of Industrial Relations sets that pay rate based on the California CPI increase. For 2018, the rate is $43.58 per hour or $90,790.07 annual salary (i.e., $7,565.85 monthly).

Employers should review Sec. 515.5 and the actual job functions of their computer professionals to determine whether the duties qualify for exemption and assure that these employees are paid enough to comply with the exemption.

MUNICIPALITIES CONTINUE TO CREATE AND INCREASE THEIR OWN MINIMUM WAGE FOR COMPANIES THAT HAVE EMPLOYEES WORKING IN THEIR JURISDICTION.

Pay Equity Rules Prohibit Asking Job Applicant Salary History

In past years, California has expanded the Fair Pay Act to reduce pay inequity based on gender and race/ethnicity for equal work that require equal skill, effort and responsibility performed under similar working conditions.

As a next enabling step, AB 168 adds Labor Code Sec. 432.3 to prohibit employers from relying on salary history (i.e., compensation and benefits) information of an applicant for employment as a factor in determining whether to offer an applicant employment or what salary to offer. This bill also prohibits employers, themselves or through

an agent, from seeking salary history information about an applicant for employment, and requires employers, upon reasonable request, to provide the pay scale for a position to an applicant for employment. If an applicant "voluntarily and without prompting" discloses salary history information, employers are not prohibited from considering or relying on that voluntarily disclosed salary history information in determining salary.

Employers should review and update their hiring protocols to comply with this new law, from job applications to background checks to interviewer training to new hire materials.

State Limits How Employers Respond to Federal Immigration Enforcement Action

Except as otherwise required by federal law, AB 450 adds the Immigrant Worker Protection Act to prohibit employers from providing voluntary consent to immigration enforcement agents to:

- Enter nonpublic areas of a workplace, unless the agent provides a judicial warrant, and
- Access, review or obtain employee records without a subpoena or court order.

This restriction does not apply to I-9 Employment Eligibility Verification forms and other documents for which a federal Notice of Inspection has been provided to the employer.

This bill requires three kinds of notices by employers:

- An employer must post a notice to current employees within 72 hours of receiving a Notice of Inspection that the federal agency will be inspecting I-9 forms or other employer records. The notice content must comply with Gov. Code Sec. 90.2, though the Labor Commissioner is to make a sample form of complaint notice available on its website by July 1, 2018. The posting by the employer must be in the language the employer normally uses to communicate employment-related information to employees.
- Upon reasonable request, the employer must provide a copy of the Notice of Inspection to an affected employee.
- Within 72 hours of receiving a federal *Notice of Inspection* results and the employer's obligations, the employer must provide that notice to affected employees, by hand if possible or by email and regular U.S. mail if not.

For unionized workplaces, the latter two notices must also be provided to a union representative. An "affected employee" is one identified in the federal notice of potentially lacking authorization to work in the U.S. or having a defect in documentation.

In addition, employers are prohibited from re-verifying the employment eligibility of current employees at a time or in a manner not required by specified federal law.

This bill also provides the Labor Commissioner or the Attorney General the exclusive authority to enforce these provisions. Employers are subject to various per-violation monetary penalties to be deposited in the state Labor Enforcement and Compliance Fund.

This bill adds Gov. Code Secs. 7285.1 to .3, and Labor Code Secs. 90.2 and 1019.2.

Employers should consider implementing procedures for handling federal immigration authorities' efforts to inspect non-public workplace areas or employer records, and providing notices to employees and their union representative.

A manager designated to interact with the authorities, supervisors and those who work at points of entry to the employer's premises should be trained.

EMPLOYERS SHOULD MONITOR THE REQUIREMENTS TO ASSURE COMPLIANCE IN EACH MUNICIPALITY THEY HAVE EMPLOYEES WORKING IN.

'Ban The Box' Is Now Statewide Law

As part of a national trend to provide employment opportunity to more people, many states and cities have enacted laws that restrict, at some level, the use of job applicants' criminal conviction history in deciding whether to offer employment. These laws are commonly known as "Ban the Box" laws, named from job applications that used to ask, "have you ever been convicted …?" San Francisco has had its own Ban the Box Ordinance for years, and Los Angeles has had one in effect for the last year.

Now, AB 1008 adds Gov. Code Sec. 12952 to make it unlawful under the Fair Employment and Housing Act (FEHA) for employers with five or more employees to:

- Include on any application for employment, before a conditional offer of employment is made, any question that seeks the disclosure of an applicant's conviction history, and
- Inquire into or consider the conviction history of an applicant until that applicant has received a conditional offer.

When conducting a conviction history background check, AB 1008 also prohibits employers from considering, distributing or disseminating information related to specified prior arrests, diversions and convictions.

Any employer that intends to deny an applicant a position of employment "solely or in part" because of the applicant's conviction history must make an individualized assessment of whether the applicant's conviction history has a direct and adverse relationship with the specific duties of the job, and to consider the following in its assessment:

- Nature and gravity of the offense or conduct;
- Time that has passed since the offense or conduct and completion of the sentence; and
- Nature of the job held or sought.

An employer who makes a preliminary decision to deny employment based on that individualized assessment is required to provide the applicant written notification of the decision, which must contain all of the following:

- Notice of the disqualifying convictions upon which the preliminary decision to rescind the offer is based;
- A copy of the conviction history report, if any; and
- 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 that the response may include submission of evidence challenging the accuracy of the conviction history report that is the basis for rescinding the offer, evidence of rehabilitation or mitigating circumstances, or both.

Applicants must be provided five business days to respond to the employer's notification before the employer may make a final decision.

If the applicant notifies the employer in writing that he or she disputes the accuracy of the conviction history and is obtaining evidence to support that assertion, the applicant must be provided an additional five business days to respond to the employer's notice.

The bill also requires that the employer "shall consider information" submitted by the applicant … before making a final decision."

If the employer makes a final decision to deny employment, it must notify the applicant in writing of the final denial or disqualification in which the employer may–but is not required to–justify or explain its reasoning; any existing procedure the employer has for the applicant to challenge the decision or request reconsideration; and the right to file a complaint with the DFEH.

Regardless, and consistent with existing Labor Code Sec. 432.7, the bill prohibits employers from considering or disseminating *any* of the following about an applicant: arrests that did not result in a conviction (except in limited situations), involvement in a pre- or post-trial diversion program and convictions that we expunged or sealed.

This new law does not apply where federal, state or local laws require criminal background checks for employment purposes or restrict employment based on criminal history.

Employers should review and update their hiring protocols to comply with this new law, from job applications to background checks to interviewer training to individualized assessment processes. AB 1008 is similar to an existing Los Angeles ordinance, but employers should check to see if there is a local ordinance that must also be complied with.

Joint Employer Liability of General Contractors for Subcontractor Wages

For contracts entered into on or after Jan. 1 in the state for erection, construction, alteration or repair of a building, structure or other private work, AB 1701 adds Labor Code Sec. 218.7 to make the direct contractor jointly liable for its subcontractor's (regardless of tier) debts owed to wage claimants for their performance of labor included in the direct contractor and the owner.

The joint liability extends to unpaid wage, fringe or other benefit payment or contribution, including interest, but excluding penalties and liquidated damages.

The bill permits contractors to include and enforce lawful protective contractual provisions with their subcontractors. Examples might include indemnity, approval of lower tier contractors, monitoring and audit, and attorney fees provisions. The bill also requires subcontractors, upon request of the contractor, to provide payroll information for all employees on the job.

General contractors should work with counsel to improve contracts with subs and consider monitoring and verification of subcontractor payrolls.

Small Business Required to Provide Parental Leave

SB 63 adds the Parental Leave Act as Gov. Code Sec. 12945.6 to require that employers who have 20-49 employees provide up to 12 weeks unpaid parental leave of absence to eligible employees to bond with a new child within one year of the child's birth, adoption or foster care placement. Under this bill, employees who have more than 12 months of service with their employer, at least 1,250 hours of service with their employer during the previous 12-month period and who work at a site in which their employer employs at least 20 employees within a 75-mile radius, are entitled to take parental leave.

On or before the start of the leave, employers must provide a "guarantee of employment in the same or comparable position at the termination of the leave." Failure to do so is deemed a violation of the statute, as if the leave had never been granted.

While the leave is unpaid, employees are entitled use to accrued vacation, sick or other paid time off. SB 63 also requires employers to maintain and pay for coverage under a group health plan for an employee who takes this leave under the same terms and conditions that coverage would have been provided if the employee had continued to work in his or her position for the duration of the leave.

If both parents are employed by the same employer, and both request parental leave, the employer is not required to permit more than a combined total of 12 weeks between them, and need not permit both leave from work at the same.

SB 63 also blocks employers from refusing to hire, or from discharging, fining, suspending, expelling or discriminating against, any employee for exercising his or her right to parental leave, or giving information or testimony as to his or her own parental leave, or another person's parental leave, in an inquiry or proceeding related to rights under this bill.

SB 63 does not apply to employers of 50 or more employees. Those employers remain governed by the California Family Rights Act (CFRA) and federal Family and Medical Leave Act (FMLA), which require parental leave for CFRA/FMLA eligible employees to care for or bond with a new child.

Employers should update their employee handbooks and leave practices, as well as forms used for leave of absence requests and approvals. While the statute does not state in what form the employment return guarantee must take, doing it in writing as part of a standard grant of leave form is advisable. Supervisors and managers should be trained as to these rights and anti-retaliation provisions.

SB 396 NOW REQUIRES COVERED EMPLOYERS TO INCLUDE TRAINING AND EDUCATION OF HARASSMENT BASED ON GENDER IDENTITY, GENDER EXPRESSION AND SEXUAL ORIENTATION.

More Labor Commissioner Authority to Pursue Retaliation Actions

SB 306 authorizes the Division of Labor Standards Enforcement (DLSE) to commence an investigation of an employer, even without an employee complaint being filed, for alleged discharge or discrimination prohibited by, or in retaliation for an employee asserting rights provided in, the Labor Code (e.g., involving wage and hour, workplace health and safety, or making complaints to the DLSE).

This bill authorizes the Labor Commissioner, upon finding "reasonable cause" to believe a violation has or is occurring, to petition a superior court for injunctive relief (e.g., potentially, prohibiting discipline or requiring reinstatement) while a claim or investigation with the DLSE is pending. The standard to be used by the Superior Court is "reasonable cause" as well, seemingly a lower standard than normally applies, and the court is to take into account "the chilling effect on other

employees asserting their rights" in determining what relief, if any, to issue. SB 306 does not prohibit an employer from disciplining or terminating an employee for conduct that is unrelated to the claim of the retaliation.

This bill authorizes the Labor Commissioner to issue citations directing specific relief to persons determined to be responsible for violations and mandates relatively tight timelines for responding to and hearings upon a citation, court challenges to a DLSE decision and order on a citation, and when the order becomes final. Employers who willfully refuse to comply with a final order may be required to pay civil penalties to the affected employee.

If an employee begins civil action, this bill authorizes the employee to also seek injunctive relief from the superior court. Injunctive relief granted is not stayed pending appeal.

This bill amends Labor Code Sec. 98.7 and adds Labor Code Secs. 98.74, 1102.61 and 1102.62.

Employers should take all DLSE notices seriously and review them with their legal and HR teams to plan a course of action, especially to avoid unlawful retaliation and missing any deadlines.

Gender Identity, Gender Expression and Sexual Orientation Added to Anti-Sexual Harassment Training Content

Existing law requires all California employers with 50 or more employees to provide two hours of sexual harassment prevention and anti-bullying training to their supervisors and managers every two years. This training and education, known by some as "AB 1825 training" since the original legislation took effect years ago, must be provided to supervisors within six months of the time they become supervisors and then at least once every two years.

SB 396 now requires covered employers to include training and education of harassment based on gender identity, gender expression and sexual orientation. The training and education must include practical examples of harassment based on gender identity, gender expression and sexual orientation, and be presented by trainers or educators with knowledge and expertise in those areas. While this additional content is required, the duration of the training is unaffected.

The DFEH is required to issue a poster regarding transgender rights that employers are required to post in a prominent and accessible location in the workplace.

This bill amends Gov. Code Secs. 12950 and 12950.1, and Unemployment Ins. Code Secs. 14005 and 14012.

What's Next?

Employers should consider how these new laws impact their workplaces, then review and update their personnel policies and practices with the advice of experienced attorneys or human resource professionals.

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