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"TABOO" TOPICS IN THE WORKPLACE

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OVERVIEW

- Discussing "taboo" topics could expose you or your company to liability.
- The list of taboo topics in California is enormous.
- They are not always "shocking" subjects.
- Taboo topics may be "off limits" in some contexts, but essential to discuss in other contexts.
- This presentation's goals:
  - Identify a handful of current "hot button" issues.
  - Provide guidance about how to manage taboo topics.

DISPARITIES IN PAY

CALIFORNIA'S EQUAL PAY ACT

- Employers may not pay "similarly situated employees" differently based on sex.
- The old rule defined "similarly situated" as employees who work in the same job, and usually in the same facility.
- The new rule lists tasks performed, skills, effort, levels of responsibility, working conditions, job difficulty, and minimum qualifications as factors in determining whether employees are similarly situated.

CALIFORNIA'S FAIR PAY ACT

- Expands equal pay protections to race and ethnicity.
- Prior salary alone cannot justify any disparity in compensation.
- Creates a new cause of action.
- Eases burden on employees to establish a prima facie case of discrimination.
- More difficult for an employer to demonstrate that wage differences are justified.

SALARY HISTORY

ISSUES WITH SALARY HISTORY INQUIRIES

- Benefits of salary history questions:
  - Provides useful insight about "market" rates.
  - Ability to manage applicants' salary expectations.
- Problems with salary history questions:
  - "Anchors" applicants to lower salaries not necessarily reflective of merit.
  - May adversely impact applicants returning to the workforce after significant time off.
  - May perpetuate prior salary discrimination.

CALIFORNIA BANS SALARY HISTORY INQUIRIES (AB 168)

- Starting January 1, 2018, employers generally may not:
  - Seek or inquire into an applicant's prior salary, compensation, or benefits.
  - Use an applicant's salary history as a factor in determining whether to extend a job offer.
  - Use an applicant's salary history information as a factor in determining what salary to offer an applicant.
- Upon reasonable request, employers must provide applicants with a position's pay scale.

CALIFORNIA BANS SALARY HISTORY INQUIRIES (AB 168)

- Exceptions:
  - AB 168 does not apply to salary history information disclosable to the public under federal or state law.
  - If an applicant discloses their salary history "voluntarily and without prompting," an employer may consider that information as **one** factor in determining a proposed salary.
- Prior salary cannot, by itself, justify disparities in compensation.
- Local laws may be stricter.

DISABILITIES

DISABILITY DISCRIMINATION LAWS

- Americans with Disabilities Act (ADA)
- Fair Employment and Housing Act (FEHA)
- Family and Medical Leave Act (FMLA)
- California Family Rights Act (CFRA)

ASSOCIATIONAL DISABILITY DISCRIMINATION

- FEHA requires employers to reasonably accommodate disabled employees (e.g. time off to attend dialysis treatment).
- Must employers accommodate a non-disabled employee to care for a disabled person they "associate" with?
  - Undecided under FEHA.
  - Generally: employers should reasonably accommodate employees associated with disabled individuals (e.g., time off to administer dialysis treatment to a child).

CRIMINAL HISTORY

RESTRICTIONS ON USING CRIMINAL HISTORY

- Labor Code § 432.7 generally prohibits employers from seeking, and/or utilizing in employment decisions, information about:
  - Arrests that do not result in a conviction.
  - Dismissed, expunged, or sealed convictions.
  - Referral to, or participation in, a "diversion program."
  - Juvenile criminal history (including adjudications).
- Limited exceptions for employers at health facilities.
  - Certain sex offenses, if there will be "regular access to patients."
  - Certain drug offenses, if there will be access to drugs/medication.

RESTRICTIONS ON USING CRIMINAL HISTORY

- The health facility exception does not apply to juvenile criminal history information, unless:
  - A juvenile court found that the applicant committed a felony or misdemeanor offense; AND
  - The offense occurred within five years prior to the application for employment.
- Specific state or federal laws may nevertheless require inquiry into some types of criminal history (e.g., the Federal Credit Union Act).

"BAN THE BOX" LAWS

- Nine states and 15 major cities, have adopted "Ban the Box" laws covering both public and private sector employers.
- The laws typically:
  - Prohibit employers from asking applicants about prior convictions on a job application;
  - Forbid employers from seeking out or relying upon an applicant's conviction history until a particular point in the hiring process;
  - Impose a "fair chance" process regulating the conditions for employers using prior convictions as a basis for denying employment.
- "Ban the Box" ordinances currently exist in San Francisco and Los Angeles.
- On October 14, Governor Brown signed a Statewide "Ban the Box" Law (AB 1008).

CALIFORNIA "BANS THE BOX" (AB 1008)

- Becomes effective January 1, 2018.
- Part of the Fair Employment and Housing Act.
- Governs employers with five or more employees.
- Restricts circumstances under which employers may:
  - Seek or inquire into an applicants' conviction history.
  - Utilize an applicants' conviction history as a basis for denying employment.

CALIFORNIA "BANS THE BOX" (AB 1008)

- Covered employers may not:
  - Inquire into, seek, or consider conviction history before extending a conditional offer of employment.
  - Consider, distribute, or disseminate information protected by Labor Code § 432.7 while conducting a conviction history background check.
- AB 1008 does not apply:
  - To positions with a criminal justice agency or as a farm labor contractor.
  - If another law requires criminal history checks or restricts employment based on criminal history.

CALIFORNIA "BANS THE BOX" (AB 1008)

- Imposes a fair chance process for denying employment based on conviction history.
- Covered employers must:
  - Individually assess whether a conviction has a "direct and adverse relationship" with a job's "specific duties."
  - Notify applicants of a preliminary decision to deny employment and provide 5 business days to respond.
  - Consider any information timely submitted.
  - Notify an applicant of any final adverse decision, of any procedures to challenge the decision, and of the right to file a complaint with the DFEH.

SUMMARY OF CRIMINAL HISTORY RULES

- Except in limited circumstances, employment decisions may not be based on:
  - Arrests that do not result in a conviction.
  - Dismissed, expunged, or sealed convictions.
  - Referral to, or participation in, a "diversion program."
  - Juvenile criminal history (including adjudications).
- Employers generally may not ask about, seek, or utilize conviction history in employment decisions until after extending a conditional offer of employment.
- Decisions based on conviction history usually must follow a "fair chance process."
- Local ordinances (e.g., LA or SF) may impose stricter rules.

DOMESTIC VIOLENCE, SEXUAL ASSAULT & STALKING

PROTECTIONS FOR VICTIMS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT, AND STALKING

- Labor Code sections 230 and 230.1 protect victims of domestic violence, sexual assault, and stalking from discrimination.
- Employers have a duty to provide reasonable accommodations for the safety of the victim at work.
- Employers must provide victims with time off to seek relief to help ensure the health, safety, or welfare of the victim or their child.

PROTECTIONS FOR VICTIMS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT, AND STALKING

- Employers with 25 or more employees must permit victims to take leave to:
  - Seek medical attention for injuries;
  - Obtain services from a domestic violence shelter, program, or rape crisis center;
  - Obtain psychological counseling related to an experience of domestic violence, sexual assault, or stalking;
  - Participate in safety planning and other actions to increase safety from future domestic violence, sexual assault, or stalking.
- State and local sick leave laws require some of this leave to be paid.

PROTECTIONS FOR VICTIMS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT, AND STALKING

- Employers must inform employees of the rights available to victims of domestic violence, sexual assault, and stalking in writing.
- Notice must be provided upon hire and upon request.
- A Labor Commissioner approved notice is available on the Labor Commissioner's website.

POLITICS

POLITICAL AFFILIATIONS OR PRACTICES

- Employers may not adopt a "rule, regulation, or policy" that prohibits "engaging or participating in politics" or running for public office.
- Employers may not make a rule that tends to control or direct the "political activities or affiliations of employees."
- Employers may not threaten to fire any employee who adopts or refuses to adopt "any particular course or line of political action or political activity."

NATIONAL LABOR RELATIONS ACT (NLRA)

- Employers may require employees to focus on work in the workplace during working hours.
- The NLRA restricts an employer's right to limit employees' communications about wages, hours and other terms or conditions of employment.
- Even neutral policies may be deemed unlawful.

IMMIGRATION

BALANCING DISCUSSIONS ABOUT IMMIGRATION STATUS

- It is unlawful to employ persons who lack legal authorization to work in the U.S.
- Employers have an obligation to verify work authorization.
- However, state and/or federal law prohibit:
  - Discriminating against individuals on the basis of race, ancestry, national origin, citizenship, or immigration status;
  - Requesting more or different documents than are required to verify employment eligibility;
  - Rejecting documents that reasonably appear to be genuine;
  - Specifying certain documents over others;
  - Engaging in "unfair immigration-related practices" in retaliation for an immigrant's engagement in protected activities (such as reporting unlawful conduct).

THE IMMIGRANT WORKER PROTECTION ACT (AB 450)

- Applies to public and private employers.
- Prohibits employers from:
  - Reverifying eligibility at a time or in a manner not required by law.
  - Providing immigration enforcement agents with access to non-public areas of a workplace without a judicial warrant, unless federal law requires otherwise.
  - Allowing immigration enforcement agents to access, review, or obtain employee records without a subpoena or court order, except for:
    - I-9 Employment Eligibility Verification forms and other documents for which a Notice of Inspection was provided to the employer.
    - Federal law requires employers to provide access.

THE IMMIGRANT WORKER PROTECTION ACT (AB 450)

- Within 72 hours of being notified of an immigration agency's intent to inspect records, employers must notify current employees of:
  - The date and nature of the inspection (if known);
  - The name of the agency conducting the inspection;
  - The date the employer received notice.
- Must also provide employees with a copy of the official "Notice of Inspection."
- Affected employees may obtain a copy of the Notice of Inspection upon "reasonable request."

THE IMMIGRANT WORKER PROTECTION ACT (AB 450)

- Within 72 hours of receiving the results of an inspection, employers must provide each affected employee and his or her authorized bargaining representative, with:
  - Written notice of the obligations of the employer and the employee arising from the inspection.
  - A description of any and all deficiencies identified in the inspection results relating to the affected employee.
  - The deadline for correcting any potential deficiencies.
  - The date and time of any meeting with the employer to correct the identified deficiencies.
  - Notice of the employee's right to legal representation.

MARIJUANA

MARIJUANA IN THE WORKPLACE

- Two significant laws legalize marijuana use under California law:
  - The Compassionate Use Act (1996) permits marijuana use for specified medical purposes if recommended by a licensed physician.
  - Proposition 64 (2016) allows persons who are 21 and older to grow, possess, and use marijuana for nonmedical purposes, within statutory limits.
- What must employers allow?
  - Is marijuana use a disability accommodation?
  - Is marijuana use a lawful off-duty activity?

MARIJUANA USE IN THE WORKPLACE

- Because marijuana use is still illegal under federal law:
  - Employers MAY prohibit marijuana in the workplace.
  - Employers do NOT have to permit marijuana use as an accommodation for a disability.
  - Employers MAY terminate or discipline employees for using marijuana, even if the use occurs outside of work.
- Policies should be clear and drafted in a way that allows for consistent enforcement.

GENDER & SEXUAL ORIENTATION

SENSITIVITY TRAININGS

- Employers with 50 or more employees must already provide 2-hour training sessions to supervisory employees within 6 months of their start date.
- Employers must provide this training every 2 years.
- Recent amendments have added abusive conduct (i.e. bullying) as a required training topic.
- SB 396 expands sensitivity training rules effective January 1, 2018.
  - Employers must include training inclusive of harassment based on gender identity, gender expression, and sexual orientation.
  - Employers must also post a required notice about transgender rights within the workplace.

TRANSGENDER RIGHTS

- "Gender identity" and "gender expression" are protected categories under the FEHA.
- The DFEH issued a guidance brochure on transgender rights last year (DFEH-163TGR).
  - Transgender persons do not need to complete any particular step in a gender transition to be protected.
  - Employees have the right to use restrooms and locker rooms that correspond to gender identity. Forced use of unisex bathroom may constitute a "hostile workplace environment."
  - Dress code policies may give rise to claims of discrimination based on gender identity.

TRANSGENDER RIGHTS

- Not clear if Title VII protects transgender identity.
  - The EEOC currently interprets and enforces Title VII's prohibition of sex discrimination as forbidding any "gender identity" discrimination.
  - May be cognizable as discrimination based on "gender stereotypes."
- State protections may increase in response to a perceived "roll back" of federal regulation and executive orders.

ALL-GENDER RESTROOMS

- The Equal Restroom Access Act (AB 1732) became effective March 1, 2017.
- Public accommodations, government agencies, and "business establishments" must identify "single-user toilet facilities" as all-gender toilet facilities.
- California's signage requirements provided in Chapter 11B of the Building Standards Code.
- Additional requirements may be imposed by the ADA.

EXAMPLES OF ALL GENDER RESTROOM SIGNS

QUESTIONS?

THANK YOU FOR ATTENDING!

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