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# NEW LAWS THAT GIVE GREATER RIGHTS TO THE WORKFORCE

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# OVERVIEW

- Over the last two years, California has passed a number of laws that provide employees with greater rights.
- Many of these laws coincide with "hot button" issues.
- Failure to comply with these laws could subject employers to significant liability.
- This presentation's goals:
  - Identify these new laws and the new rights they provide.
  - Provide guidance about how to manage these new rights.

# SALARY HISTORY & EQUAL PAY UPDATE

# 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.

# EQUAL PAY, SALARY HISTORY, AND PAY AUDITS

**California Fair Pay Act ("FPA")**

- Currently prohibits employers from paying less for substantially similar work on the basis of sex/gender, race, or ethnicity
- Unlawful to prohibit employees from discussing or inquiring about their co-workers wages
- FPA prohibits employers from justifying any disparity in compensation based **solely** on prior salary, but can justify wage differential if due to:
  - Seniority system
  - Merit system
  - Compensation system that measures earnings by production; or
  - Bona fide factor other than sex/gender, race, or ethnicity

# EQUAL PAY, SALARY HISTORY, AND PAY AUDITS

- Salary history about a job applicant may not be sought, either orally or in writing, or personally or through an agent
- Prior salary not a permissible consideration in deciding whether to extend job offer or to justify a pay differential
- Must provide applicants, upon reasonable request, with the pay scale for an applied position
- Does not prohibit employers from considering or relying upon salary history which the applicant provides voluntarily and without prompting

# AB 2282 AMENDS AND CLARIFIES SALARY HISTORY BAN

- Clarification on key terms
  - **Applicant** – individual who is seeking employment with the employer and is not currently employed with that employer in any capacity or position
  - **Pay scale** – a salary or hourly range
  - **Reasonable request** – a request made only after an applicant has completed an initial interview with the employer
- Clarifies that employers can ask an applicant about their salary expectation for the position
- Authorizes employers to consider a current employee's existing salary if any resulting disparity can be justified by an FPA exception (e.g., seniority, merit, production, bona fide factor)

# *RIZO V. YOVINO*, 889 F.3D 453 (9TH CIR. 2018)

- *Rizo* held that consideration of an applicant's prior salary, **even in part**, cannot justify difference in wages between genders in Equal Pay Act claims
- Unlike the California ban on salary history inquiries, which states that reliance on prior salary cannot by itself justify a disparity in compensation based on gender, race, or ethnicity, the Ninth Circuit just held that prior salary by itself or in combination with other factors cannot ever justify a wage differential

# SALARY HISTORY/EQUAL PAY PRACTICAL ADVICE

- Remove inquiries regarding salary history from job applications
- Advise third-party vendors to remove such information from referrals
- Train all hiring personnel and recruiters on how to negotiate salary without inquiring about salary history
- Have a protocol in place to handle voluntary disclosures
- Conduct annual review of market/industry compensation, and adjust if applicable
- Perform a pay audit

# IMMIGRANT WORKERS

# THE IMMIGRANT WORKER PROTECTION ACT (AB 450)

- Passed on October 5, 2017
- Selected provisions blocked from enforcement on July 5, 2018, pending the outcome of litigation between the federal government and the State of California

- …so now what?

# THE IMMIGRANT WORKER PROTECTION ACT (AB 450)

- Applies to public and private employers
- Originally Imposed 3 Main Obligations, "*except as otherwise required by federal law*"
  1. Limitations on reverifying current employees
  2. Deny immigration enforcement agents access to non-public areas of a workplace without a judicial warrant
     - *Federal law requires otherwise with respect to I-9 Employment Eligibility Forms*
     - Employers may provide access to I-9 Employment Eligibility Verification forms and other documents for which a Notice of Inspection was provided to the employer
  3. Provide current employees notice of any upcoming inspections

# THE UNITED STATES OF AMERICA V. CALIFORNIA

- US Dept. of Justice filed an action in the Eastern District of California, seeking to invalidate the Act as preempted by federal law and unconstitutional

- On July 5, 2018, District Judge John Mendez granted a preliminary injunction, prohibiting California from enforcing some provision against private employers

# WHAT IS LEFT OF THE ACT?

- Public employers are still bound by the Act in all respects
- Obligations for private employers, "*except as otherwise required by federal law*"
  1. Limitations on reverifying current employees
  2. Deny immigration enforcement agents access to non-public areas of a workplace without a judicial warrant
  3. Provide current employees notice of any upcoming inspections

# 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"

# 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)

- 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.

# INDIVIDUALIZED ASSESSMENT

- Things employers may/must consider:
  - The nature and gravity of the criminal history (*i.e.* the harm caused by the criminal conduct).
  - The time that has passed since the conviction(s).
  - The nature of the job the employer is seeking.

- Employers **must** consider any information contained in an employee's response to the determination.

# 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.

# CALIFORNIA CONSUMER PRIVACY ACT OF 2018

- Enacted June 28, 2018
- Effective January 1, 2020
- Hunting season opens for the Attorney General July 1, 2020

# SCOPE OF THE CAL. CPA 2018

- Covers a "business" which is any entity who
  - Has an annual gross revenue that exceeds $25 million
  - Buys, sells, or shares personal information for commercial purposes from more than 50,000 consumers, households, or devices
  - Derives more than 50% of annual revenue from the sales of personal information

    OR
  - Is a controlled subsidiary of any of the above

# SCOPE OF THE CALIFORNIA CPA 2018

- Protects "consumers"
  - A natural person who is a California resident
- Protects "personal information"
  - Any non-public information that "identifies, relates to, describes, is capable of being associated with, or could reasonable be linked, directly or indirectly with a particular consumer or household."
  - *Does not supersede any Federal laws that may apply in specific circumstances (e.g., HIPAA, FCRA)*

# PERSONAL INFORMATION UNDER THE CA CONSUMER PRIVACY ACT

# CALIFORNIA CONSUMER PROTECTION ACT 2018

## Individuals' Rights

- The Right to Know . . .
  - What personal information is being collected
  - Whether it is being sold or disclosed and to whom
- The Right to Say No
- The Right of Access
- The Right to Equal Service
- The Right to be Forgotten

## Business' Obligations

- Disclose Employees' Rights to Them
- Respond to Employees' Requests about Their Personal Information
- Implement and Maintain Reasonable Security
- Protect, Encrypt, or Redact Personal Information
- Erase Personal Information at Employees' Requests

# THE RIGHT TO BE FORGOTTEN

***UNLESS . . .***

- It is necessary for the business to maintain the personal information to:
  - Complete a transaction or perform a contract between the employer and employee
  - Detect and protect against security incidents
  - Comply with a warrant from law enforcement (CalECPA)
  - Engage in statistical research and deletion would "seriously impair the achievement of such research"
    - Individual must give informed consent
  - For solely internal uses that are reasonable in light of the employee's expectation of privacy
  - Comply with a legal obligation
  - Otherwise use the personal information internally, "in a lawful manner that is compatible with the context in which" the information was collected

# WHAT CAL. CPA MEANS FOR EMPLOYERS

- At an employee's request, employers will have to disclose the personal information they collect, the purpose for collecting it, and the categories of third parties it is disclosed to
- Employers cannot sell employees' personal information
- Rethink any marketing to employees or sharing employees' information with sponsors or other third-party organizations
- Implement reasonable security measures
  - *The scariest parts of CalCPA are the penalties for personal data breaches*

# #METOO

## THE CHANGING LANDSCAPE ON INVESTIGATIONS, NON-DISCLOSURES, AND ARBITRATION AGREEMENTS

# #METOO AND EMPLOYMENT ARBITRATION

**#MeToo**

- A recent analysis by the Economic Policy Institute found more than 60 million U.S. workers are subject to mandatory employment arbitration
- Use of mandatory arbitration has come under fire since the advent of #MeToo, due to the confidential nature of arbitration proceedings
- Some employers, including Microsoft, have announced they are discontinuing the use of mandatory arbitration

# WHAT ABOUT #METOO & NON-DISCLOSURE AGREEMENTS?

- Blanket NDA provisions may contravene other statutory rights to participate in law enforcement, union activity, securities enforcement, and equal opportunity agency actions, etc.
- Also, NDAs, even if enforceable, might not always be effective in keeping a company "out of the news"
- Enforcement of NDAs might also lead to accusations of facilitating a cover-up or trying to keep victims silent

# #METOO, NDAS AND FEDERAL LAWS

- As part of the *Tax Cuts and Jobs Act of 2017, 29 U.S.C. § 162(q)*, federal lawmakers repealed business expense deductions for any settlement or payment to settle sexual harassment claims **if** made subject to a non-disclosure agreement
- Effective January 1, 2018, this also prohibited deductions for attorney's fees related to a qualifying settlement

# #METOO, NDAS AND CALIFORNIA LAW

- SB 820 adds Section 1001 to the Code of Civil Procedure
- Prohibits a provision in a settlement agreement that prevents the disclosure of "factual information related to" certain claims of sexual assault, sexual harassment, or harassment or discrimination based on sex, filed in a civil action or with an administrative agency.
- After January 1, 2019, agreement is void as a matter of law and against public policy.

# SB 1343 – EXPANDED SEXUAL HARASSMENT TRAINING REQUIREMENTS

- Employers who employ 5 or more employees, including temporary or seasonal employees
- Must provide at least 2 hours of sexual harassment training to all supervisory employees and at least one hour of sexual harassment training to all nonsupervisory employees
- By January 1, 2020, and once every 2 years thereafter.
  - Temporary/seasonal employees need not be trained until January 1, 2020

# SB 1300 – UNLAWFUL EMPLOYMENT PRACTICES: DISCRIMINATION AND HARASSMENT

- SB 1300 makes it unlawful "for an employer, in exchange for a raise or bonus, or as a condition of employment or continued employment" to "require an employee to sign a release of claim or right."
- Prohibits non-disparagements or other agreements that would "deny the employee the right to disclose information about unlawful acts in the workplace, including, but not limited to, sexual harassment."
- Restrictions do not apply to "a negotiated settlement agreement to resolve an underlying claim. . . that has been filed by an employee in court, before an administrative agency, alternative dispute resolution forum, or through an employer's internal complaint process," so long as such agreement is voluntary and involves valuable consideration.

# WHAT ELSE DOES SB 1300 DO?

- Extends employer liability for sexual harassment committed by nonemployees to all forms of harassment prohibited by FEHA, so long as the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action.
- Lowers the standard for what types of conduct are sufficiently "severe or pervasive" to constitute actionable harassment under FEHA. Specifically, the bill clarifies that "[a] single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment."
- Makes it harder for employers to win summary judgment on harassment claims by expressly codifying that "[h]arassment cases are rarely appropriate for disposition on summary judgment."

# SB 826 – FEMALE MEMBERS OF BOARDS OF DIRECTORS

- SB 826 adds Section 301.3 to the Corporations Code, which will require that "[n]o later than the close of the 2019 calendar year,
  - a publicly held domestic or foreign corporation whose principal executive offices, according to the corporation's SEC 10-K form, are located in California
  - shall have a minimum of one female director on its board."
  - Brown: "Recent events in Washington D.C. – and beyond – make it crystal clear that many are not getting the message."

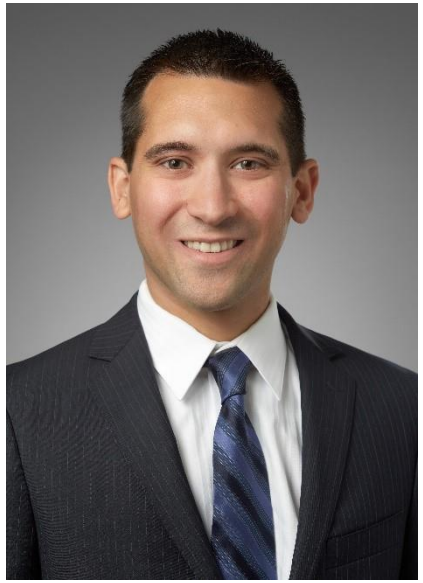
# #METOO

**Takeaways**

- Update handbooks, policies and protocols regarding harassment in workplace
- Update NDAs and other confidentiality agreements
- Update settlement, separation and severance agreement templates
- Take a critical look at internal investigation policies and internal investigators
- Look at your board of director composition for gender diversity

# QUESTIONS?

# THANK YOU FOR ATTENDING!



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