

Areas of Practice

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I.

Legislative Update

California

Pending California Legislation

There are a number of bills in the legislature that, if signed into law, would impact California employers and employees.

These bills include:

AB 2617 (Weber): This bill seeks to prohibit the enforcement of arbitration agreements or pre-litigation settlement agreements that require an individual to waive his or her right to pursue a civil action for the alleged violation of civil rights under the civil code provisions relating to violence or threats of violence based on specific protected classes. This bill is currently in the Assembly Judiciary Committee.

SB 935 (Leno): This bill would increase California's minimum wage to \$11 per hour in 2015, \$12 per hour in 2016, and \$13 per hour in 2017, with annual inflation adjustments starting in 2018. This bill has been placed in the Appropriations Committee Suspense file.

SB 404 (Jackson): SB 404 would create a new protected class under California's Fair Employment and Housing Act. The new class would protect any individual, or anyone who is perceived to be, or is associated with an individual, who provides medical or supervisory care to a listed family member, including a child, parent, spouse, sibling, grandparent or grandchild. This bill is in the Assembly Appropriations Committee.

San Francisco Employers Must Limit Criminal History Inquiries

San Francisco recently enacted the Fair Change Ordinance (the "Ordinance"), which restricts an employer's ability to ask applicants about their criminal history. Employers in San Francisco may no longer use job applications that require an applicant to check a box acknowledging his or her criminal history.

We are dedicated to providing the highest quality legal services and obtaining superior results in partnership with those who entrust us with their needs for counsel.

We enjoy a dynamic and empowering work environment that promotes teamwork, respect, growth, diversity, and a high quality of life.

We act with unparalleled integrity and professionalism at all times to earn the respect and confidence of all with whom we deal.

In addition, the Ordinance prohibits employers from using a background check or other means to investigate criminal history, until after conducting an initial interview.

Any employer in San Francisco conducting a background check must give written notice that the employer is inquiring into an applicant or employee's criminal history.

A criminal offense may only be considered by an employer where the offense has a "direct and specific negative bearing on that person's ability to perform the duties or responsibilities necessarily related to the employment position." Employers may consider whether the position "offers the opportunity for the same or a similar offense to occur" and/or whether circumstances leading to the conduct for which the person was convicted will reoccur. Any employer relying on criminal history information to take an adverse employment action (*i.e.*, refusing to hire or promote), must notify the applicant or employee of its decision in writing and provide a copy of the criminal investigation report. The affected applicant or employee must then be given an opportunity to respond. If the employer nonetheless proceeds with the adverse employment action, then it must notify the employee that its decision was based on the criminal history information.

The Ordinance adds to the other obligations of employers in San Francisco to comply with the Fair Credit Reporting Act and EEOC guidance regarding the use of criminal background checks. When the Ordinance goes into effect on August 13, 2014, it will apply to employers in San Francisco with twenty or more employees. While the Ordinance is limited in geographic scope, all California employers should be aware of its provisions as there is a strong possibility that other cities or counties in California may adopt similar ordinances prohibiting blanket exclusions of applicants with a criminal past.

II.

JUDICIAL

California

Employer May Request Medical Reevaluation After FMLA Leave

In *White v. County of Los Angeles*, Susan White ("White") was an investigator for the Los Angeles County District Attorney (the "DA's Office"). Before requesting a medical leave of absence, she made numerous errors and acted erratically over the course of several months. In 2011, White sought leave for mental health problems. White provided medical certification and the DA's Office approved her leave under the federal Family and Medical Leave Act ("FMLA").

After exhausting her FMLA leave, White's doctor certified that she could return to work in September 2011. In September, the DA's Office "reinstated" White. However, she was assigned to paid leave at home, because the DA's Office was investigating White's pre-leave misconduct.

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The DA's Office requested that White attend a fitness for duty examination before returning to her regular job duties. White refused, claiming that the FMLA required her to be reinstated based solely on her doctor's certification. White sought an injunction, which the trial court granted. The DA's Office appealed.

On appeal, White argued that requiring her to undergo a fitness for duty examination after reinstatement was tantamount to interference with her FMLA rights. The Court of Appeal disagreed, holding that the DA's Office was justified under the Americans with Disabilities Act ("ADA"). Before White returned to work, the DA's Office had to accept White's doctor's certification and return her to work. After she returned to work, the FMLA protections no longer applied, and the DA's Office could require a fitness for -duty examination consistent with the ADA (which requires the examination be job-related and consistent with business necessities). In this case, White had engaged in odd behavior in a job requiring good judgment to avoid serious injuries or death, and her employer's request for a fitness for duty examination was proper. Employers should be cautious about requiring fitness for duty examinations for current employees, and should approach each situation on a case-by-case basis to determine whether such examination is job-related and necessary.

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