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EMPLOYMENT LAW UPDATE

Relationship-Driven Results *October 2017*

11th Annual Employment Law Symposium

November 16, 2017
8:00 a.m. – 4:30 p.m.
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LEGISLATIVE

California

California "Bans the Box"

"Ban the box" laws seek to restrict when an employer may consider criminal conviction history information concerning applicants for employment. Nationally, 29 states and over 150 cities and counties have enacted some type of "ban the box" law. Some of these laws only apply to government sector employers when they hire their own employees. However, nine states and 15 cities have gone further and adopted "ban the box" laws that apply to private sector employers. In California, this includes San Francisco and Los Angeles, which have already adopted their own local ordinances to "ban the box."

However, with the enactment of Assembly Bill 1008 (McCarty), California joins the list of states that have adopted law that apply to both public and private employers. Largely based on the City of Los Angeles "ban the box" ordinance, AB 1008 applies to public and private employers with five or more employees. The new law prohibits an employer from including on any application, before the employer makes a conditional offer of employment, any question that seeks the disclosure of the applicant's conviction history. For many California employers, this will necessitate revising initial employment applications to remove "boxes" or questions that ask applicants to disclose criminal convictions.

AB 1008 also prohibits an employer from "inquiring into or considering" the conviction history of the applicant until after a conditional offer of employment has been made. This means employers cannot ask questions of the applicant about conviction history during the hiring and interview process, until an offer of employment is made. This also means an employer may not utilize background checks that reveal criminal conviction history until after an offer is made.

Under AB 1008, if an employer decides to deny employment to the applicant solely or in part because if the applicant's conviction history, the employer must embark on a specified process. First, employers 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 that justify denying the applicant the position. In making this assessment, the employer is required to consider (1) the nature and gravity of the offense or conduct, (2) the time that has passed since the offense or conduct and completion of the sentence, and (3) the nature of the job held or sought.

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Second, if the employer makes a preliminary decision that the applicant's conviction history disqualifies the applicant for employment, the employer must notify the applicant in writing. The notification must contain (1) notice of the disqualifying conviction that is a basis for the preliminary decision, (2) a copy of the conviction history, if any, and (3) an explanation of the applicant's right to respond before the decision becomes final and the deadline by which to respond.

Third, after the employer provides the written notification, the applicant shall have at least five business days to respond before the employer may make a final decision. The applicant's response may include submission of evidence challenging the accuracy of the conviction history, evidence of rehabilitation or mitigating circumstances, or both. If the applicant notifies the employer that they dispute the accuracy of the conviction history and are obtaining evidence to support that assertion, the applicant shall have five additional business days to respond to the notice.

Finally, if (after receiving the response from the applicant), the employer makes a final decision to deny employment, it must notify the applicant in writing. This notice must notify the applicant of (1) the final denial or disqualification, (2) any existing procedure the employer has for the applicant to challenge the decision or request reconsideration, and (3) the right to file a complaint with the Department of Fair Employment and Housing.

Prior to the effective date of this new law, employers should carefully analyze employment applications and hiring processes to ensure compliance with the law's requirements – specifically not seeking or relying on criminal history information until after a conditional offer of employment has been made. If an employer desires to rely on criminal history information, the employer will need to understand and follow the specific individualized assessment and employee notice requirements contained in the new law.

California Bans Salary History Inquiries

California has joined the ranks of a growing number of jurisdictions to prevent employers from asking about salary history information. Governor Jerry Brown signed Assembly Bill 168 (Eggman), a bill that prohibits public and private employers from seeking or relying upon the salary history of applicants for employment. AB 168 makes it unlawful for an employer to seek salary history information, orally or in writing, personally or through an agent, about an applicant for employment. "Salary history information" includes compensation and benefits. In addition, the new law prohibits an employer from relying on the salary history information of an applicant as a factor in determining whether to offer employment to an applicant or what salary to offer an applicant. However, AB 168 specifies that it does not prohibit an applicant from "voluntarily and without prompting" disclosing salary history information to a prospective employer. If the applicant does so, the employer may consider or rely on that information in determining the salary for that applicant. In addition, the new law provides that it does not apply to salary history information disclosable to the public pursuant to federal or state law, such as the California Public Records Act or the federal Freedom of Information Act. Salary information for public employees is largely a matter of public record.

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AB 168 also requires an employer, upon reasonable request, to provide the pay scale information to an applicant applying for employment. Therefore, if an applicant inquires as to how much a specific position pays, the employer is required to provide the pay scale for that position.

As a result of this new law, employers should carefully review employment applications and hiring processes to ensure that they do not impermissibly inquire into, or rely upon, salary history information. In particular, job applications and new hire packets should be amended to remove any inquiries into prior salary history. In addition, all employees involved in the hiring process should be trained about the law's new requirements and how it impacts the types of inquiries and questions that are permissible and not permissible.

California Enacts Job-Protected Parental Leave for Smaller Employers

Both the federal Family and Medical Leave Act ("FMLA") and the California Family Rights Act ("CFRA") apply to employers with 50 or more employees. Governor Jerry Brown signed Senate Bill 63 (Jackson) – entitled the "New Parent Leave Act" – into law to provide up to 12 weeks of job-protected parental leave for employers with 20 or more employees.

The new law applies to employers that employ at least 20 employees within 75 miles. It does not apply to an employee who is covered under both the CFRA and the FMLA, which apply to employers with 50 or more employees. Therefore, the practical effect is that this bill applies to employers with between 20 and 49 employees within 75 miles of each other. The new law applies to employees with more than 12 months of service with the employer and who have at least 1,250 hours of service with the employer during the previous 12-month period.

SB 63 makes it unlawful for a covered employer to refuse to allow a covered employee to take up to 12 weeks of parental leave to bond with a new child within one year of the child's birth, adoption, or foster care placement. It is important to note that this leave is not for the entire universe of employee and family member "serious health conditions" for which leave is available under the CFRA and the FMLA. Rather, leave under this new law is limited to the "parental leave" purposes as described above.

In addition, if before the start of the leave the employer does not provide the employee with a guarantee of employment in the same or a comparable position following the leave, the employer will be deemed to have refused to allow the leave. In other words, a covered employer is required to provide up to 12 weeks of "job-protected" unpaid leave to covered employees for new parental responsibilities.

The leave under this new law is unpaid. However, the employee shall be entitled to utilize accrued vacation pay, paid sick time, other accrued paid time off, or other paid or unpaid time off negotiated with the employer, during the period of parental leave. In addition, similar to the CFRA, it is unlawful for an employer to refuse to maintain and pay for continued group health coverage for employees during the duration of the parental leave at the same level and under the same conditions that would have been provided had the employee continued to work.

Just as under the CFRA, where both parents are employed by the same employer, SB 63 specifies that the employer is not required to grant leave allowing the parents leave totaling more than 12 weeks. An employer may, but is not required to, grant leave to both employees simultaneously. Finally, the new law prohibits an employer from discriminating against an employee for exercising their rights, or from restraining or denying any rights provided under this law.

Employers with between 20 and 49 employees within 75 miles, should carefully review and revise leave policies to comply with the new requirements of the law prior to January 1, 2018.

California employers need to be aware of a number of new workplace restrictions have been passed by the state legislature and signed into law by Governor Jerry Brown. State lawmakers were quite active this year, with almost 2,500 bills introduced and over 1,000 making it to the Governor's desk. Of those approved by the October 15th deadline, a substantial number relate to the workplace. Unless otherwise noted, these new laws go into effect on January 1, 2018.

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Mandated Sexual Harassment Training Must Now Include Gender Identity, Gender Expression, And Sexual Orientation

Under current law, employers with 50 or more employees are required to provide at least two hours of training regarding sexual harassment to all supervisory employees every two years. This is often referred to as "AB 1825 training," named after 2005 the legislation that mandated this requirement. Senate Bill 396 (Lara) now provides that, as a component of AB 1825 training, a covered employer shall also provide training on harassment based on gender identity, gender expression, and sexual orientation.

The new law does not expand the total number of hours that must be devoted to the training overall, but the two hours of mandated training must include a component regarding these additional topics. The new law specifies that the training and education "shall include practical examples inclusive of harassment based on gender identity, gender expression, and sexual orientation, and shall be presented by trainers or educators with knowledge and expertise in those areas." In addition, SB 396 requires employers to display a poster (developed by the Department of Fair Employment and Housing) regarding transgender rights in a prominent and accessible location in the workplace.

Governor Signs Bill Expanding Labor Commissioner's Authority in Connection with Retaliation Claims

Governor Brown has signed into law Senate Bill 306 (Hertzberg), which expands the Labor Commissioner's authority in connection with retaliation claims. Existing law prohibits a person from discharging or otherwise discriminating, retaliating, or taking any adverse action against any employee or applicant for employment because the employee or applicant engaged in conduct specified by the Labor Code. Under existing law, an aggrieved employee or applicant is entitled to reinstatement or employment and reimbursement for lost wages and work benefits caused by acts of the employer in violation of this prohibition, and may file

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a complaint with the Division of Labor Standards Enforcement ("DLSE"). Existing law also requires a discrimination complaint investigator to investigate, and submit a report on, each complaint to the Labor Commissioner; authorizes the Commissioner to designate specified officers to review the report; and authorizes the Commissioner to hold an investigative hearing on the report if, after reviewing the report, the Commissioner determines that a hearing is necessary.

This new law authorizes the DLSE to commence an investigation of an employer, *with or without a complaint being filed*, when specified retaliation or discrimination is suspected during the course of a wage claim or other specified investigation being conducted by the Labor Commissioner. The law also authorizes the Labor Commissioner, upon finding reasonable cause to believe that any person has engaged in or is engaging in a violation, to petition a superior court for prescribed injunctive relief. The law requires a court, if an employee has been discharged or faced adverse action for raising a claim of retaliation for asserting rights under any law under the jurisdiction of the Labor Commissioner, to order appropriate injunctive relief on a showing that reasonable cause exists to believe a violation has occurred. The law provides, however, that temporary injunctive relief under these provisions would not prohibit an employer from disciplining or terminating an employee for conduct that is unrelated to the claim of the retaliation.

In addition to the foregoing, this law authorizes the Commissioner to issue citations directing specific relief to persons determined to be responsible for violations, and also authorizes employees bringing a civil action for retaliation to seek injunctive relief in court.

California Enacts Joint Liability For General Contractors On Construction Projects

Assembly Bill 1701 (Thurmond) makes a general contractor on a private construction project liable for wage and fringe benefit liabilities incurred by subcontractors at any tier of the project. Although California law generally provides for joint liability for general contractors and subcontractors on public works projects, AB 1701 extends this liability to private construction projects. This liability would apply to contracts entered into on or after January 1, 2018.

Under AB 1701, the general contractor is liable for unpaid wages, fringe or other benefit payments or contributions, including interest, but not penalties and liquidated damages. Enforcement may be pursued through a civil action by the Labor Commissioner, a third party which is owed fringe or benefit payments (such as a union trust fund), or a joint labor-management cooperation committee. AB 1701 also authorizes the general contractor to request payroll records and information about the project and subcontractors, from the subcontractor and lower tier subcontractors.

Governor Signs Immigration Bill

Governor Brown signed Assembly Bill 450 (Chiu) which, among other things, prohibits employers from voluntary consenting to Immigration and Customs Enforcement (ICE) access to the worksite without a judicial warrant, requires

employers to provide their workers with notice of certain immigration enforcement actions, and imposes new statutory penalties for violations of the law.

Under current federal immigration law, when federal immigration authorities appear at a worksite to engage in enforcement activity, an employer may allow authorities to access nonpublic portions of the worksite by either requiring a judicial warrant or voluntarily consenting to access. AB 450 essentially removes the ability of employers to "voluntarily consent" to ICE access in this manner. Employers (or persons acting on behalf of employers) would be prohibited from providing voluntary consent for access, and instead would have to insist on a judicial warrant. However, the new law does not prohibit the employer from taking the immigration enforcement agent to a nonpublic area, where employees are not present, for the purposes of verifying the warrant.

An employer that violates this requirement is subject to a $2,000 to $5,000 civil penalty for a first violation, and $5,000 to $10,000 for each subsequent violation. However, the new law provides that enforcement of these penalties will be under the exclusive authority of the Labor Commissioner or the Attorney General, and any penalties recovered will be deposited in the Labor Enforcement and Compliance Fund. Therefore, (and since this provision is in the Government Code rather than the Labor Code), there will be no private enforcement under the Private Attorneys General Act.

Similarly, AB 450 prohibits an employer (or person acting on behalf of the employer) from granting voluntary access to the employer's employee records without a subpoena or judicial warrant. This does not apply to I-9 forms and other documents for which a Notice of Inspection has been provided to the employer. An employer that violates this requirement is subject to a $2,000 to $5,000 civil penalty for a first violation, and $5,000 to $10,000 for each subsequent violation.

The new law also imposes a number of new notification requirements on California employers. First, employers must provide current employees with a notice of any inspection of I-9 forms or other employment records within 72 hours of receiving notice of the inspection. Written notice must also be provided to any collective bargaining representative within this same time frame. The Labor Commissioner is tasked with developing a template that employers may use by July 1, 2018. Second, upon reasonable request, an employer must provide an affected employee with a copy of a Notice of Inspection of I-9 forms. Third, employers must provide affected employees (and their representatives) a copy of the notice that provides the inspection results within 72 hours of receiving it, as well as written notice of the obligations of the employer and the affected employee arising from the results of the inspection. This notice shall be delivered by hand at the workplace if possible, or by mail and email if hand delivery is not possible. An employer who fails to provide these required notices is subject to a $2,000 to $5,000 civil penalty for a first violation, and $5,000 to $10,000 for each subsequent violation, recoverable by the Labor Commissioner.

AB 450 also prohibits an employer from re-verifying the employment eligibility of a current employee at a time or in a manner not required by federal law. The Labor Commissioner is authorized to recover civil penalties of up to $10,000 for violations.

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Governor Signs Bill Creating New Requirements for Sexual Harassment Prevention Training Provided to Employees of Farm Labor Contractors

Governor Brown has signed into law Senate Bill 295 (Monning), which creates new requirements for sexual harassment prevention training provided to employees of farm labor contractors. Existing law prohibits the issuance of a farm labor contractor license unless the applicant attests in writing that certain employees have received sexual harassment prevention and reporting training in accordance with prescribed requirements relating to the substance, administration, and record of the training. This new law additionally requires that training for each agricultural employee be in the language understood by that employee, and further requires a licensee, as part of his or her application for license renewal, to provide the Labor Commissioner with a complete list of all materials or resources utilized to provide sexual harassment prevention training to his or her agricultural employees in the calendar year prior to the month the renewal application is submitted, as well as other specific information. The Labor Commissioner is authorized to issue citations and assess civil penalties of $100 for each violation of these new requirements.

JUDICIAL

Federal

Ninth Circuit Affirms Motion for Summary Judgment in Favor of Employer In Disability Discrimination Case

In *Alamillo v. BNSF Railway Co.,* the Ninth Circuit Court of Appeals (“Ninth Circuit”) affirmed summary judgment granted in favor of the employer. Plaintiff Antonio Alamillo (“Alamillo”) worked as a locomotive engineer for BNSF Railway Co. (“BNSF”). Because of his seniority, he was able to choose between two scheduling options: 1) a five-day-per-week schedule with regular hours, or 2) on the “extra board,” which requires employees to come to work only when called. Alamillo choose option 2), meaning he was required to respond to one of a series of three phone calls within a fifteen-minute span, most often at 5:00 a.m. If he missed all three calls, he was deemed absent for the day. If he missed all three calls (was absent) five or more times during a twelve-month period, he was subject to termination.

During 2012, Alamillo missed seven calls. Following multiple trainings and two suspensions, Alamillo’s supervisor recommended he get a landline and/or a pager, instead of just relying on his cell phone, and provided him additional recommendations for avoiding further missed calls. Alamillo refused to get a landline phone because he was having an affair at the time—he did not want BNSF calling a landline because he often told his wife he was going to work when he was visiting his girlfriend. Alamillo also did not get a pager; seek transfer to a five-day-per-week schedule; set an alarm for 5:00 a.m. to monitor for calls (as he had done in the past); ask his wife to wake him up if his cell phone rang while he was sleeping; or check the electronic job board to see if a call the next day was likely. Alamillo then missed three more calls, for a total of 10 in 2012.

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Alamillo was subsequently diagnosed with obstructive sleep apnea ("OSA"), and he provided his diagnosis to BNSF, with a medical opinion that not being awakened by a ringing phone is "well within the array of symptoms" of OSA. However, his doctor did not specifically opine that OSA actually caused the most recent absences. Despite the new evidence of a medical issue, BNSF discharged Alamillo. He filed suit for wrongful termination, disability discrimination, failure to accommodate his disability, and failure to engage in the interactive process. The district court granted summary judgment, reasoning that BNSF could not have violated the FEHA because Alamillo's attendance violations took place before he was diagnosed with a disability and before any accommodation was requested.

The Ninth Circuit affirmed the district court's judgment, finding no evidence that Alamillo's OSA was "a substantial motivating reason for" BNSF's decision to terminate him. In fact, the parties seemingly agreed that Alamillo's OSA made no difference to the decision to terminate him. BNSF did not know that Alamillo was disabled when it initiated disciplinary proceedings, and Alamillo conceded that BNSF "disregarded" his disability when it decided to terminate him. Further, Alamillo produced no evidence to show that OSA actually caused his absences, but merely showed it was "within the array of symptoms." Finally, Alamillo's failure to take steps to remedy his absences, as suggested by his supervisor, were damaging. The court determined that Alamillo's "OSA may have been a contributing factor to his attendance violations, but only due to his own non-OSA-related carelessness and inattention."

Alamillo argued that BNSF violated its reasonable accommodation duty because it chose the non-mandatory termination option in light of the circumstances and did not offer leniency, despite finding out about Alamillo's disability. The court disagreed, stating a "second chance" to control the disability in the future is not a reasonable accommodation. It also found that the interactive process claims similarly failed. The key reason: "no reasonable accommodation could have cured his prior absenteeism."

This summary judgment win for employers illustrates the importance of timing. An employer who takes disciplinary action based on performance problems prior to learning about a disability may be shielded from disability claims, especially where an employee had the opportunity to take simple steps to remedy the conduct leading to the termination but chose not to do so.

California

Court of Appeal Holds Employer Waived Right to Compel Arbitration of Class Members' Claims by Waiting More than Four Years Before Seeking to Arbitrate

In *Sprunk v. Prisma LLC,* a California Court of Appeal held that it does not pay to delay. Four years after plaintiff Maria Elena Sprunk ("Plaintiff") filed her class action lawsuit, and more than a year after the California Supreme Court issued its decision in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59

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Cal.4th 348,[1] defendant Prisma LLC ("Defendant") finally moved to compel arbitration of class members' claims. Unsurprisingly, the trial court denied the motion on the ground that Defendant unreasonably delayed in seeking to enforce its right to arbitrate. The Court of Appeal agreed.

Plaintiff filed her lawsuit in October 2011. Although Defendant filed a motion to compel arbitration of Plaintiff's individual claims in January 2012, it withdrew the motion later that year. In April 2015, the trial court granted Plaintiff's motion to certify the class. Four months later, in August 2015, Defendant finally filed a motion to compel arbitration of class members' claims.

The Court of Appeal court held that Defendant delayed too long in seeking to compel arbitration of Plaintiff's claims, thereby effecting a waiver of the right to arbitrate the class members' claims. The court explained that, had Defendant forced Plaintiff to arbitrate her individual claims, the class litigation would have effectively ended—though another plaintiff could theoretically come forward to file a new class action, it was unlikely anyone would actually do so, given that all class members had signed arbitration agreements. The court determined that Defendant simply made a strategic decision to delay moving to compel arbitration until it had another chance to win the entire case—at the class certification stage. According to the Court of Appeal, "an attempt to gain a strategic advantage through litigation in court before seeking to compel arbitration is a paradigm of conduct that is inconsistent with the right to arbitrate."

The appellate court also rejected Defendant's contention that, because the law of class arbitration was unsettled until after *Iskanian* was decided, any earlier attempt to compel class arbitration would have been futile. Defendant presented no convincing explanation for why it waited more than a year after *Iskanian* was decided before moving to compel arbitration, dooming its futility argument.

Sprunk underscores the importance of (1) determining, at the outset of litigation, whether the matter is governed by an enforceable arbitration agreement, and (2) filing a motion to enforce that right at the earliest opportunity. Courts will not tolerate tactical decisions to delay enforcement of arbitration agreements, especially when such delays follow drawn-out efforts to pursue the litigation through the judicial system.

Court of Appeal Clarifies the Meaning of "Marital Status Discrimination" Under FEHA

In *Orlando Nakai v. Friendship House Association of American Indians, Inc.*, a California Court of Appeal affirmed summary judgment in the employer's favor in connection with a Fair Employment and Housing Ac t ("FEHA") marital discrimination claim.

Plaintiff Orlando Nakai ("Orlando") worked for the Friendship House Association of American Indians, Inc. ("Friendship House") for over 20 years. Friendship House is a drug and alcohol rehabilitation program providing treatment services to Native Americans. Orlando worked in the Friendship

[1] In *Iskanian*, the Court held that arbitration agreements containing class action waivers are enforceable under California law.

House's San Francisco office, as did Helen Waukazoo ("Helen"), the program's CEO and Orlando's mother-in-law.

In 2000, Orlando married Karen Nakai ("Karen"), Helen's daughter. In March 2014, Orlando and Karen began experiencing marital difficulties. Late one evening in May 2016, Karen called Helen at home. Karen reported that Orlando had a gun, was angry with the employees of Friendship House, was dangerous, and had relapsed on drugs. The following day, Helen placed Orlando on paid administrative leave. Karen, in turn, obtained a temporary restraining order ("TRO") against him and provided Helen with a copy. Based on the information Karen provided, Helen subsequently terminated Orlando's employment.

Orlando sued for wrongful termination, claiming (1) his employment was wrongfully terminated in violation of FEHA; (2) his employment was wrongfully terminated in violation of the implied covenant of good faith and fair dealing; and (3) his employment was wrongfully terminated in violation of a duty under FEHA to conduct a reasonable investigation upon receiving Karen's report of an alleged threat. Friendship House eventually moved for and was granted summary judgment. Orlando appealed.

A California Court of Appeal affirmed the trial court's decision. Orlando claimed Helen terminated his employment "solely because of his status as the spouse of the complaining employee and [her] son-in-law." Thus, Orlando contended that the motivation for his discharge was his marital status, which is prohibited by FEHA. However, the Court noted that laws prohibiting marital status discrimination are "to prevent discrimination against classes of people," they *do not* extend to "the status of being married to a *particular* person."

Orlando's claim was predicated not on alleged animus towards his married state, itself, but on supposed particulars *about* his spouse. Indeed, as the trial court observed, Orlando was married to the CEO's daughter for 14 years. Thus, "if his marital status were an issue, Orlando would have been terminated earlier. It was the identity of Helen – not the marital status – that led to his discharge."

In short, while Orlando may have alleged that he was unfairly discharged on the basis of groundless or overblown accusations by his wife, he failed to allege a prima face case of marital status discrimination. As such, Friendship House was not required to conduct an investigation under FEHA. This is, without establishing a prima facie case of marital status discrimination, Orlando was not afforded all the protections under FEHA.

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