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2018 Brings New Restrictions on Public Employers' Inquiries Into Salary History and Conviction History

Planning to hire in 2018? California employers need to prepare for new restrictions on lawful consideration of applicants' conviction history and prior salary as of January 1, 2018.

Last month, Governor Brown signed two pieces of legislation, which involve changes to the types of information employers may seek from applicants in the hiring process, and when certain information may be considered in the hiring decision. We offer a brief overview of both bills and identify recommended steps for public employers to consider now in preparation for hiring after January 1, 2018.

APPLICANTS' CONVICTION HISTORY (AB 1008)

As of January 1, 2018, employers (both public and private) with 5 or more employees must comply with the following restrictions when hiring for any positions (except those identified below as expressly excluded):

- Until an applicant for hire or promotion receives a **conditional offer of employment**, the employer cannot:
 - Include on any application a question that seeks disclosure of the applicant's **conviction history**;
 - Inquire orally or in writing about the applicant's conviction history; or
 - Consider any information obtained in any manner about an applicant's conviction history.

If the employer obtains conviction history for an applicant following issuance of a conditional offer of employment, the employer cannot deny employment because of the conviction history unless it performs an **individualized assessment**. The employer must make a **preliminary determination** based on the results of the individualized assessment. If that preliminary determination is to disqualify the applicant based on conviction history, the employer must notify the applicant in **writing** of its **intent to disqualify** and advise that the applicant has a right to respond within **five business days (or more)** to present evidence to challenge the accuracy of the conviction history information or report, and/or provide evidence of

mitigating circumstances. The employer must consider any information provided by the applicant before making a **final decision** on disqualification. If the final decision is to disqualify the applicant **solely or in part** based on conviction history, the employer must provide written notice, including an explanation that the applicant has a **right to file a complaint with the California Department of Fair Employment and Housing**.

The following positions are **excluded** from the above requirements:

- Positions in criminal justice agencies;
- Positions as **farm labor contractors**;
- Any position for which an **employer, or agent of an employer, is required by any state, federal, or local law** to conduct criminal background checks for employment purposes or to restrict employment based on conviction history.

Recommended Steps Prior to January 1, 2018

- Employers should review all positions to determine which qualify for exclusion from the new law.
- Employers should review all application, interview, or other hiring materials to remove any questions for non-excluded positions that require information regarding conviction history.
- Employers should ensure that recruitment practices for non-excluded positions no longer include requests for conviction history information after screening for minimum qualifications.
- Employers should ensure that any requests for conviction history for non-excluded positions are delayed until after issuance of a conditional offer of employment.
- Employers should consider implementing or revising procedures for conducting individualized assessments and issuing initial and final determinations, as well as determining timeframes for applicants' response to initial determinations.
- Employers should monitor FEHC revisions to existing regulations regarding conviction history to determine the extent to which those provisions will remain in effect after January 1, 2018.
- In taking some or all of these steps, employers should determine whether additional obligations may apply under applicable labor relations laws.

APPLICANTS' PRIOR COMPENSATION AND BENEFITS (AB 168)

AB 168 reflects a continuation of the recent efforts by California to address statistics showing gender-, race-, and ethnicity-based pay disparities among employees. Since January 1, 2017, Labor Section 1197.5 has expressly prevented private employers from justifying sex-

, race-, or ethnicity-based pay disparities based solely on prior salary. As of January 1, 2018, these provisions will apply to public employers. California now goes a step further by adding Section 432.3 to the Labor Code, which significantly limits the circumstances under which an applicant's salary history information (including compensation and benefits) can even be **considered** lawfully by employers. These requirements will apply regardless of an employer's size.

The new law does recognize that some salary history for applicants is available through information **disclosable to the public** under laws such as the **California Public Records Act** and the federal **Freedom of Information Act** and permits that information to be considered. In addition, the law permits applicants to choose on their own to provide prior salary history information to prospective employers, as long as that choice is truly **voluntary** and not **prompted**.

Outside of these limited exceptions, starting January 1, 2018, employers will be subject to the following express restrictions:

- Employers **cannot rely** on an applicant's salary history in determining whether to offer a position to that applicant.
- Employers **cannot rely** on an applicant's salary history in determining what salary to offer to an applicant, unless the applicant has provided that information **voluntarily** and **without prompting**.
- Employers **cannot request** salary history information from an applicant in **any written or oral form**.
- Employers **cannot use third parties** to seek or request salary history information that they are prohibited from seeking or requesting directly from applicants.

Further, employers must provide the "**pay scale**" for a position to an applicant "**upon reasonable request**."

Recommended Steps Prior to January 1, 2018

- Employers should review all application, interview, and other hiring materials to remove any questions requiring an applicant to disclose salary history, whether orally or in writing.
 - Employers may wish to revise these materials to advise that salary history information may be obtained where it is publicly disclosable under state and federal law such as the California Public Records Act and the federal Freedom of Information Act.
- Employers should determine how they will comply with the requirement of providing the pay scale for a position to an

applicant “upon reasonable request.” Some possible issues for consideration include:

- Whether an established pay scale exists for each open position, and if not whether to establish one prior to an applicant’s request.
- Whether to provide established pay scales as part of a job announcement or only upon an applicant’s request.
- In taking some or all of these steps, employers should determine whether additional obligations may apply under applicable labor relations laws.