NEW CALIFORNIA EMPLOYMENT LAWS FOR 2018

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OVERVIEW OF NEW LAWS
OVERVIEW OF NEW EMPLOYMENT LAWS FOR 2018:

• Ban the Box: Restrictions on asking candidates and employees about criminal history

• Ban on Salary Questions: Restrictions on asking candidates about salary history

• Anti-discrimination for Military Personnel

• Expansion of Transgender Rights- Addition of “Nonbinary” Identity

• Marijuana Legalization in California

• Paid Sick Leave in California
“Ban the Box”
Restrictions on asking for an applicant’s criminal history
THE “CALIFORNIA FAIR CHANCE ACT” aka “Ban the Box”

- Effective January 1, 2018
- California is the 10th state to require private and public sector employers to delay background checks until a later stage in the hiring process
WHY DOES BAN THE BOX MATTER?

- Nearly 1 in every 3 adults in California (approximately 7 million Californians) have a conviction or arrest record which can show up on an employment background check.
- The purpose of “Ban the Box” is to increase the likelihood that those with criminal histories are considered for jobs that would have otherwise immediately disqualified them.
THE “CALIFORNIA FAIR CHANCE ACT” aka “Ban the Box”

DOES THIS MEAN THAT EMPLOYERS CAN NEVER ASK ABOUT CRIMINAL HISTORY?

• NO.
• California employers can still consider an candidate’s criminal history, but cannot do so until after the employee is made a conditional job offer
WHEN CAN AN EMPLOYER DISCOVER AN EMPLOYEE’S CRIMINAL HISTORY?

- Only after a candidate has been selected and a conditional offer made
- Then an employer can ask a candidate verbally or in writing for information or a criminal background check can be run
THE “CALIFORNIA FAIR CHANCE ACT” aka “Ban the Box”

WHO DOES THIS LAW APPLY TO?

• There are only a few exceptions to this law:
  • Employers with less than 5 employees
  • Positions where the law requires that a background check be run
    • For example, applicants for law enforcement positions are required to undergo background checks
THE “CALIFORNIA FAIR CHANCE ACT” aka “Ban the Box”

WHAT CAN A PROSPECTIVE EMPLOYER ASK?

• The permissible scope of the inquiry is limited to “conviction history”
THE “CALIFORNIA FAIR CHANCE ACT” aka “Ban the Box”

This law makes it an “unlawful employment practice” to “consider, distribute, or disseminate information about any of the following while conducting a conviction history background check in connection with any application for employment:

• Any arrest not followed by a conviction (unless an exception applies)
• Referral to a pretrial or post-trial diversion program
• Convictions that have been sealed, dismissed, expunged or statutorily eradicated pursuant to law
THE “CALIFORNIA FAIR CHANCE ACT” aka “Ban the Box”

An employer may ask a candidate about an arrest where the candidate is out on bail or trial is pending. California law considers this to be part of the candidate’s “criminal history.”
THE “CALIFORNIA FAIR CHANCE ACT” aka “Ban the Box”

WHAT IF YOU INTEND TO DENY A CANDIDATE EMPLOYMENT BASED SOLELY OR IN PART ON THEIR CONVICTION HISTORY? WHAT IS THE PROCESS?
THE “CALIFORNIA FAIR CHANCE ACT” aka “Ban the Box”- Denying a Candidate

• An individualized assessment is required to determine if the applicant’s criminal history has a direct and adverse relationship with the specific duties of the job to justify denying the candidate a position.
THE “CALIFORNIA FAIR CHANCE ACT” aka “Ban the Box”- Denying an Candidate

• The individualized assessment must consider the following:

  • The nature and gravity of the offense or conduct
  • The time that has passed since the offense or conduct and completion of the sentence
  • The nature of the job held or sought
THE “CALIFORNIA FAIR CHANCE ACT” aka “Ban the Box”- Denying a Candidate

• When the individualized assessment is completed, the results may, but are not required to be in writing if the candidate is still granted the position.
THE “CALIFORNIA FAIR CHANCE ACT” aka “Ban the Box”- Denying a Candidate

• If however, the employer makes a “preliminary decision” that the candidate’s conviction history disqualifies the candidate from employment, the employer shall notify the employee in writing.

• The writing “may, but is not required to, justify or explain the employer’s writing for making the preliminary decision.”
THE “CALIFORNIA FAIR CHANCE ACT” aka “Ban the Box”- Denying a Candidate

- The written notification must do as follows:
  - Provide notice that the disqualifying conviction(s) that form the basis for the preliminary decision to rescind the offer
  - Provide a copy of the conviction history report, if any.
  - Provide an explanation of the candidate’s right to respond to the notice before the decision becomes final and the deadline by which to respond. The explanation shall inform the candidate that the response may include submission of evidence challenging the accuracy of the conviction history report that is the basis for rescinding the offer, evidence of rehabilitation or mitigating circumstances.
THE “CALIFORNIA FAIR CHANCE ACT” aka “Ban the Box” - Denying a Candidate

• The candidate must be provided at least 5 business days to respond to the notice before the employer may make the final decision

• If the candidate timely notifies the employer in writing that it disputes the accuracy of the conviction history report and that he/she is taking specific steps to obtain the necessary evidence to dispute the report, then the candidate has an additional 5 business days to respond to the notice
THE “CALIFORNIA FAIR CHANCE ACT” aka “Ban the Box”- Denying a Candidate

• An employer is required to consider the information submitted by the candidate in response to the notice before it can make a final decision
THE “CALIFORNIA FAIR CHANCE ACT” aka “Ban the Box”- Denying a Candidate

• If the employer makes the final decision to deny the candidate solely or in part due to the conviction history the employer shall notify the applicant in writing.
THE “CALIFORNIA FAIR CHANCE ACT” aka “Ban the Box”- Denying a Candidate

• The writing reflecting the final decision to disqualify must state the following:

  • The final denial or disqualification. (This need not, but may, justify or explain the reasoning for the final decision)
  • Any existing procedure the employer has for the employee to challenge the decision
  • The right to file a complaint with the Department of Fair Employment and Housing
THE “CALIFORNIA FAIR CHANCE ACT” aka “Ban the Box”

WHAT IF AN EMPLOYER VIOLATES THIS LAW?

• Violations of this law are considered violations of the Fair Employment and Housing Act which could result in a lawsuit and may require the employer to pay damages to the candidate
Ban the Box- Review Questions

John is looking for a machinist for his company. He interviews Frank and makes him a conditional offer of employment. After the offer is made, John does a criminal background check and finds that Frank was convicted of a misdemeanor for theft 17 years ago. John’s company makes parts for airlines.

Can John deny Frank employment based on this conviction?
A- Frank cannot be denied the position because the crime is a misdemeanor.

B- Frank cannot be denied the position because theft does not have a direct and adverse relationship to the position.

C- Frank may be denied the position based solely on his conviction.
What if in the prior example, John asked Frank if he was ever convicted of a crime and Frank told him he was convicted of forgery when he was 17 and that the conviction was in the juvenile court system? John’s business makes airline parts for defense contractors and their products are considered highly confidential. In this example, Frank is 21 years old.
Ban the Box - Review Questions - Possible Answers

A- Frank can be denied the job due to the high level of security.

B- Frank cannot be denied the position, as four years have lapsed his conviction.

C- Frank cannot be denied the position, as his conviction occurred in the juvenile court system.
BAN ON ASKING APPLICANTS FOR PAST SALARY INFORMATION
Ban on Salary Inquiries

Employers can no longer rely on salary history information of a candidate as a factor when determining whether to offer an candidate employment or what salary to offer the candidate.
Ban on Salary Inquiries

THE LAW APPLIES TO ALL EMPLOYERS, REGARDLESS OF SIZE, EFFECTIVE JANUARY 1, 2018.
Ban on Salary Inquiries

Employers are prohibited from asking for any “salary history information” which includes questions about passed compensation *and* benefits.
Ban on Salary Inquiries

The employer cannot request this information orally, in writing, personally or through an agent.
Ban on Salary Inquiries

Upon a reasonable request, an employer must provide the “pay scale” information for the position to the candidate.
Ban on Salary Inquiries

Nothing in the law prohibits employees from voluntarily disclosing salary history to a prospective employer.
Ban on Salary Inquiries

Where a candidate voluntarily discloses salary history, nothing prohibits the employer from considering and relying on that information.
Ban on Asking Candidates about Salary- Questions

Jane is hiring two candidates for marketing positions. Both candidates have worked in this field for the last 5 years. When she placed the ad, she anticipated that she would need to hire someone with a salary of approximately $50,000. Jane interviews Joe first and offers him a salary of $50,000 which he accepts. Next, Sara interviews for the position. During the interview, Sara voluntarily tells Jane that she is currently earning $35,000 and she wants to earn at least $40,000. Jane offers Sara the position for $40,000 and she gladly accepts.

Is there anything wrong with Jane offering Sara a salary of $40,000?
Ban on Asking Candidates about Salary - Question-Answers

A- Jane cannot rely on the salary history information because of the ban on asking for salary history information.

B- Jane cannot pay Sara less money because she is paying Joe more.

C- Jane can rely on the information provided by Sara because it was voluntarily provided and she can pay Sara less money.
MILITARY STATUS
Amendment to California Laws Related to Military Status

Existing law provided that it was unlawful to discriminate against an officer, warrant officer or enlisted member of the military.

The new laws in California have expanded the definitions and penalties.
Amendment to California Laws Related to Military Status

The Military and Veterans Code was amended to add that no employer can discriminate in the “terms, conditions, or privileges of employment, position, status, trade, or business” because that individual is enlisted or was enlisted in the military.

Persons violating these sections are guilty of a misdemeanor and are liable for damages and reasonable attorney’s fees to the injured party.
“THE GENDER RECOGNITION ACT”

California adds “nonbinary” as an official gender identification
“Nonbinary” Gender

California passed the Gender Recognition Act

Under this act, California now recognizes a “nonbinary” gender identification.
Gender Recognition Act

The binary gender designations of female and male fail to adequately represent the diversity of human experience. Nonbinary is an umbrella term for people with gender identities that fall somewhere outside of the traditional conceptions of strictly either female or male.
Gender Recognition Act – Nonbinary vs. Transgender

People with nonbinary gender identities may or may not identify as transgender, may or may not have been born with intersex traits, may or may not use gender-neutral pronouns, and may or may not use more specific terms to describe their genders, such as a gender, genderqueer, gender fluid, two spirit, bigender, pangender, gender nonconforming, or gender variant.
Gender Recognition Act – Nonbinary vs. Transgender

Transgender is an umbrella term used to describe people whose gender identity or gender expression do not match the gender they were assigned at birth. Some transgender people have medically transitioned, undergoing gender affirming surgeries and hormonal treatments, while other transgender people do not choose any form of medical transition.
Gender Recognition Act – Nonbinary vs. Transgender

Transgender people may identify as female, male, or nonbinary, may or may not have been born with intersex traits, may or may not use gender-neutral pronouns, and may or may not use more specific terms to describe their genders, such as agender, genderqueer, gender fluid, two spirit, bigender, pangender, gender nonconforming, or gender variant.
Gender Recognition Act

Following this law, individuals in California can now identify as “nonbinary” on their drivers’ licenses and they can apply for that designation on their birth certificates.
LEGALIZATION OF MARIJUANA
Legalization of Marijuana

On November 8, 2016, Californians voted to pass proposition 64, also known as the adult use of marijuana act, which legalized the recreational use of marijuana for adults 21 years old and older. Although marijuana became legal to smoke on November 9, 2016 (the day after the election), licensed recreational marijuana sales were not allowed until January 1, 2018.
Legalization of Marijuana

How does the legalization of marijuana in California impact the workplace?

• Employer’s policies against drug possession, use and impairment remain enforceable
• Drug testing policies continue to be enforceable
Legalization of Marijuana

Proposition 64 explicitly states that it is intended to “allow public and private employers to enact and enforce workplace policies pertaining to marijuana.” The initiative also provides that it will not be construed or interpreted to amend, repeal, affect, restrict or pre-empt:

*The rights and obligations of public and private employers to maintain a drug and alcohol free workplace or require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growth of marijuana in the workplace, or affect the ability of employers to have policies prohibiting the use of marijuana by employees and prospective employees, or prevent employers from complying with state or federal law (section 11362.45 (f)).*
Legalization of Marijuana

Despite the language in Proposition 64, there are some restrictions on employers.

As part of new legalization process, California amended the California Code of Regulations (2 CCR § 11017.1), effective July 1, 2017. In doing so, the regulations provided that employers can not consider any “non-felony conviction for possession of marijuana that is two or more years old.”
RECENT CASE LAW- MARITAL STATUS
Plaintiff was fired after his wife complained to her mother (Plaintiff’s supervisor) that Plaintiff was on drugs and armed. Plaintiff sued his employer, alleging marital discrimination in violation of the Fair Employment and Housing Act. He argues that he was fired because of his marriage to his supervisor’s daughter.
GENERAL PROTECTIONS BASED ON “MARITAL STATUS”

“MARITAL STATUS” is a protected category under the Fair Employment and Housing Act.

The Nakai court concluded marital discrimination law is designed to prevent discrimination against classes of people and does not extend to the status of being married to a particular person.
PAID SICK LEAVE LAWS
California and City Laws
California Paid Sick Leave

Paid sick leave laws continue to change and several cities’ requirements have increased over this last year.
California Paid Sick Leave

As a reminder, California law requires employers to provide paid sick leave, which accrues in one of the following ways:

1. 1 hour per 30 hours worked
2. Frontload 24 hours or 3 days

Employers can limit an employees use of sick days to 3 days per year, but employees can accrue up to 48 hours or 6 days per year.
Los Angeles Paid Sick Leave

Effective July 1, 2017, all employees working in Los Angeles are entitled to a higher number of sick days than the state requires. The days can be accrued as follows:

1. One hour for every 30 hours worked or
2. Frontload 48 hours at the start of the year (6 days)

Employers can limit the number of hours taken to 48 hours (6 days), but employees can accrue up to 72 hours.
Santa Monica Paid Sick Leave

Effective January 1, 2018, Santa Monica now requires that employees accrue paid sick leave as follows:

(1) One hour for every 30 hours worked or
(2) Front load either 40 hours (5 days) (for 25 or fewer employees) or 72 hours (9 days) (26 or more employees)

In Santa Monica, employers cannot limit the number of paid sick days taken to a number less than to that accrued.
Other Cities Paid Sick Leave

Multiple other California cities have enacted similar paid sick leave laws, including Berkeley, Emeryville, San Diego, and San Francisco.
California Paid Sick Leave

In each of the California Paid Sick Leave jurisdictions, an employer can satisfy these requirements by providing other Paid Time Off policies, so long as they meet the minimum requirements listed under the laws.
CALIFORNIA REST BREAKS
California Rest Breaks

As a reminder, California requires that employers provide all non-exempt employees with rest breaks as follows:

<table>
<thead>
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<th>Hours worked</th>
<th>1st Rest Break</th>
<th>1st Meal Break</th>
<th>2nd Rest Break</th>
<th>2nd Meal Break</th>
<th>3rd Rest Break</th>
</tr>
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<tbody>
<tr>
<td>0 – 3:29 hours</td>
<td></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>3:30 – 5:00 hours</td>
<td>10 minute rest break</td>
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<td></td>
<td></td>
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<td>5:01 – 6:00 hours</td>
<td>10 minute rest break</td>
<td>30 minute meal break (can be waived by mutual agreement)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>6:01 – 10:00 hours</td>
<td>10 minute rest break</td>
<td>30 minute meal break (must begin no later than 5 hours after shift begins)</td>
<td>10 minute rest break</td>
<td></td>
<td></td>
</tr>
<tr>
<td>10:01 – 14:00 hours</td>
<td>10 minute rest break</td>
<td>30 minute meal break (must begin no later than 5 hours after shift begins)</td>
<td>10 minute rest break</td>
<td>30 minute meal break (must begin no later than 10 hours after the shift begins)</td>
<td>10 minute rest break</td>
</tr>
</tbody>
</table>
TAKE-AWAYS REGARDING NEW LAWS
RECOMMENDATIONS IN LIGHT OF THE NEW CALIFORNIA LAWS FOR 2018

During interviews:
• Avoid any questions about criminal history
• Never ask a candidate how much money they were earning at a past job or the type of benefits they received
• Avoid asking individuals if they served in the military or if they are currently enlisted unless the skills obtained during service are relevant to the job
• Do not ask for a candidate’s gender identity, unless it is a bona-fied job qualification
CONCLUSION
THANK YOU

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This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.