

New California Statutes Will Impact Hiring Practices

Two new statutes may have significant impact on the hiring practices of California companies. Beginning January 1, 2018, there will be new limitations on an employer's ability to inquire into an applicant's (1) salary history and (2) prior criminal convictions. This client alert summarizes the two new statutes and provides practical guidance to prepare for compliance.

Limitations On Inquiries Into Criminal Convictions

On October 14, 2017, Governor Brown signed into law a statewide "Ban the Box" initiative. This statute follows several municipal "Ban the Box" ordinances, which require employers to delay questions about an applicant's prior criminal convictions until later in the hiring process.

AB 1008, which adds Section 12952 to the Government Code, provides that most public and private employers with at least five employees may not inquire into or consider an applicant's prior criminal convictions until ***after a conditional offer of employment has been made***. (Exceptions exist for criminal justice agencies, farm laborers, and positions where the law requires criminal background checks for employment purposes.)

Once a conditional offer is made, an employer may then inquire into criminal history and/or conduct a criminal background check. However, the employer may only rescind the conditional offer based on criminal history after engaging in an ***individualized assessment*** of the circumstances. This assessment includes consideration of the nature and gravity of the criminal offense, the time that has passed since the conviction and the type of job sought.

Following consideration of these factors, if an employer makes a "preliminary decision" not to move forward with the hire, the applicant must be ***informed*** of the criminal record and that the offer is to be rescinded and given an ***opportunity to respond***. The applicant must be given time to submit information challenging the accuracy of the criminal record or to provide evidence of rehabilitation or other mitigating circumstances. An employer must consider the submitted documentation before a final decision is made.

Employers should strongly consider documenting this process, especially because several municipal "Ban the Box" ordinances (including in Los Angeles and San Francisco) *require* written documentation of the "individualized assessment." And even where not technically required, such documentation will be valuable in the event of a legal claim under the new law.

Employers should take note that this law amends the Fair Employment and Housing Act ("FEHA"), so exposure for violation of these requirements can be significant, including compensatory and punitive damages as well as attorneys' fees and costs.

Bar On Salary Inquiries

AB 168 was signed into law on October 13, 2017, and follows a 2016 revision to California's Equal Pay Law that barred employers from relying on salary history to justify disparities in compensation. This legislation, which adds section 432.3 to the Labor Code, goes further and precludes all California employers from ***inquiring into the salary or benefit history*** of a job applicant—either directly or through an agent. It also prohibits employers from ***relying on an applicant's salary history*** in determining whether to offer employment or what salary to offer.

Under the new law, applicants may still **disclose their salary history “voluntarily and without prompting.”** If they do so, employers may consider that information in setting their new salary (although not in determining whether to offer a position). In addition, nothing in the law prevents an employer from asking prospective employees what salary they wish to be paid.

Finally, the statute requires that employers **provide any applicant with the pay scale** for a prospective position upon “reasonable request.” California is the first state to encourage wage transparency by imposing such an obligation.

Tips to Prepare For Compliance

Prior to January 1, 2018, employers should revisit their employment applications and hiring policies and practices to ensure compliance with these new statutes. Consider taking the following steps:

- Remove inquiries/boxes from job applications regarding criminal and salary history.
- Train recruiters, managers and other employees involved in the hiring process that they must not inquire into criminal or salary history during interviews.
- Train hiring parties that knowledge (or suspicion) regarding an employee’s salary history cannot be a factor in deciding whether to offer employment.
- Confirm that third-party recruiters and other agents are aware that they should not make such inquiries on the Company’s behalf when vetting candidates.
- Consider postponing all background checks until a conditional offer of employment is made.
- If pre-offer background checks are anticipated, confirm that investigators will *not* include conviction history in their report. Also, ensure background checks do not solicit salary history at any time.
- Review and revise any written company policies/procedures regarding inquiries into (or reliance upon) criminal and salary history in the hiring process.
- Revisit any “no-hire” policies based on criminal convictions.
- Develop procedures for the “individualized assessment” that is required in the event a criminal history is disclosed following a conditional offer of employment. Include appropriate documentation, especially in municipalities where this is required.
- Ensure that individuals conducting the hiring process are aware of company protocols for providing applicants with appropriate notices and opportunities to respond in the event an “individualized assessment” of criminal history is required.
- Train those making hiring decisions regarding what factors may be considered and the process that must be followed to determine if a prior conviction is disqualifying.
- Prepare to provide compensation scales for positions. Recognize that pay scales may become public and available to current employees and competitors.

- ☑ Consider confirming that current employee compensation is within the scale and decide whether any adjustments are necessary. While pay scales need not be shared with *existing* employees, if they become public, employers should be prepared to explain deviations in compensation based on objective and lawful criteria such as experience, length of service, education, etc.
- ☑ Develop protocols for responding to voluntary disclosures of salary history and/or requests for pay scale information. In particular, it may be wise to avoid relying on salary history even if voluntarily disclosed, because doing so could lead to disputes as to whether the disclosure was in fact voluntary.
- ☑ Familiarize yourselves with applicable municipal ordinances that may contain additional limitations as well as affirmative requirements regarding the use of salary and conviction histories.

Munger, Tolles & Olson LLP is available to provide further assistance and counsel as your HR personnel review your workplace policies and procedures.

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