

# No, You Really Cannot Ask That and Other Implications of New Laws Impacting Employers

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**By Wendy Lazerson and Alison Hong**

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## **AB 1008—New Ban-the-Box Law**

Employers of at least five employees are prohibited from inquiring into criminal record or conducting background checks until after extending a conditional offer of employment. This is a dramatic shift from current law that allows certain such inquiries.

The purpose of this law is to provide convicted felons a “fair chance” to obtain employment. Once a conditional offer has been extended, an employer may withdraw the offer because of a criminal record, but only if the employer can show that there is a direct and adverse relationship between the conviction and specific job duties. The employer must complete an individualized assessment to make that determination and provide to the applicant written notification and an opportunity to challenge the



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denial of employment. The notification must include a notice of the disqualifying conviction(s), a copy of the conviction history report, if any, and an explanation of the applicant’s right to respond. The notification may, but is not required, to contain justification or explanation of the employer’s reasoning for preliminarily denying the applicant. After the applicant follows procedures for challenging the rejection, if the employer nonetheless decides to withdraw the offer, the employer must send to the applicant a second written notice describing any

existing procedures the employer has for further challenge or reconsideration, and of the right to file a complaint with the Department of Fair Employment and Housing. Each step in the process has stringent deadlines.

The law presents challenges, not only in establishing the requisite connection between the conviction(s), job duties and business necessity, but also in meeting the carefully timed procedural deadlines.

The consequences for violating this law are those available for violation of discrimination laws, including

compensatory and punitive damages and attorney's fees.

**To do list for employers:** Update application forms; advise and train interviewers; set up a process for required notices; update required postings; beware of record keeping requirements; ensure recruiters and background check vendors know the law.

### **AB 168—Salary Inquiry Ban**

As of Jan. 1, employers, regardless of size, who employ California employees are forbidden from inquiring into the salary history, including compensation and benefits, of California applicants. Employers may not directly or indirectly elicit any information regarding an applicant's salary history to determine the amount of salary to be offered to the applicant. The law precludes obtaining this information through third parties, such as recruiters. This law goes hand in hand with the California Fair Pay Act (CFPA), enacted to eliminate pay disparities based on past gender and race discrimination. Under the CFPA, job duties—and not salary history, race or gender—must determine pay. As all employees must be paid equally for substantially similar work, salary history is deemed not to be relevant to the current position.

If an applicant voluntarily, and without prompting, discloses salary, the potential employer may consider the disclosed information to set that applicant's salary, keeping in mind that salary history alone can never be used to justify a pay disparity for "substantially similar work" as defined by the CFPA.

AB 168 also requires disclosure of the salary range for the position applied for if an applicant requests the information.

While AB 168 does not specify available remedies for violating the

law in particular, should an employee hired prove a pay disparity, remedies available for discrimination such as compensatory and punitive damages will be recoverable. Inquiring into salary history in violation of the statute may make it easier to state a case of unlawful pay disparities.

**To do list for employers:** Review application forms to delete inquiries about salary history; revise interview questions and train interviewers; notify recruiters not to provide salary history; update required postings; be aware of record keeping requirements; prepare for questions about salary ranges; do not rely on salary history to set current compensation.

### **SB 63—New Parent Leave Act**

SB 63 expands coverage of the California Family Rights Act (CFRA). Currently, covered employers are those with at least 50 employees employed anywhere, though only employees working in California are eligible for leave. SB 63 extends the definition of covered employer to those with between 20 and 49 employees working in a 75 mile radius in California. As of Jan. 1, these employers also must provide up to 12 weeks of leave for purposes of baby bonding, child adoption or foster placement. Employees must take and complete the leave within one year of the child's arrival though it may be taken intermittently. Employees taking New Parent Leave are guaranteed job protection.

As under CFRA, to be eligible for New Parental Leave, an employee must be employed by the current employer for more than 12 months and have worked for the employer at least 1,250 hours during the previous 12-month period.

The law incorporates the regulations applicable to CFRA where rel-

evant, and consistent with the law. As in the case of CFRA, where both parents work for a single employer, they may take only a combined total of 12 weeks of leave.

Anticipating mistakes by unwitting small employers, AB 63 creates a mediation pilot program, which allows employers to request mediation within 60 days of receiving a right-to-sue notice for alleged violations of this new law, and no lawsuit may be filed until mediation is completed. The pilot program will be in place until Jan. 1, 2020.

Consequences for violating the new parental leave law are compensatory and punitive damages, and attorney fees.

**To do list for covered employers:** Update leave policies handbooks, and required postings; create processes for tracking leave; anticipate the needs and burdens related to position protection.

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