CALIFORNIA LABOR AND EMPLOYMENT LAW: TIPS TO PREPARE FOR 2018

by LEIGH A. WHITE

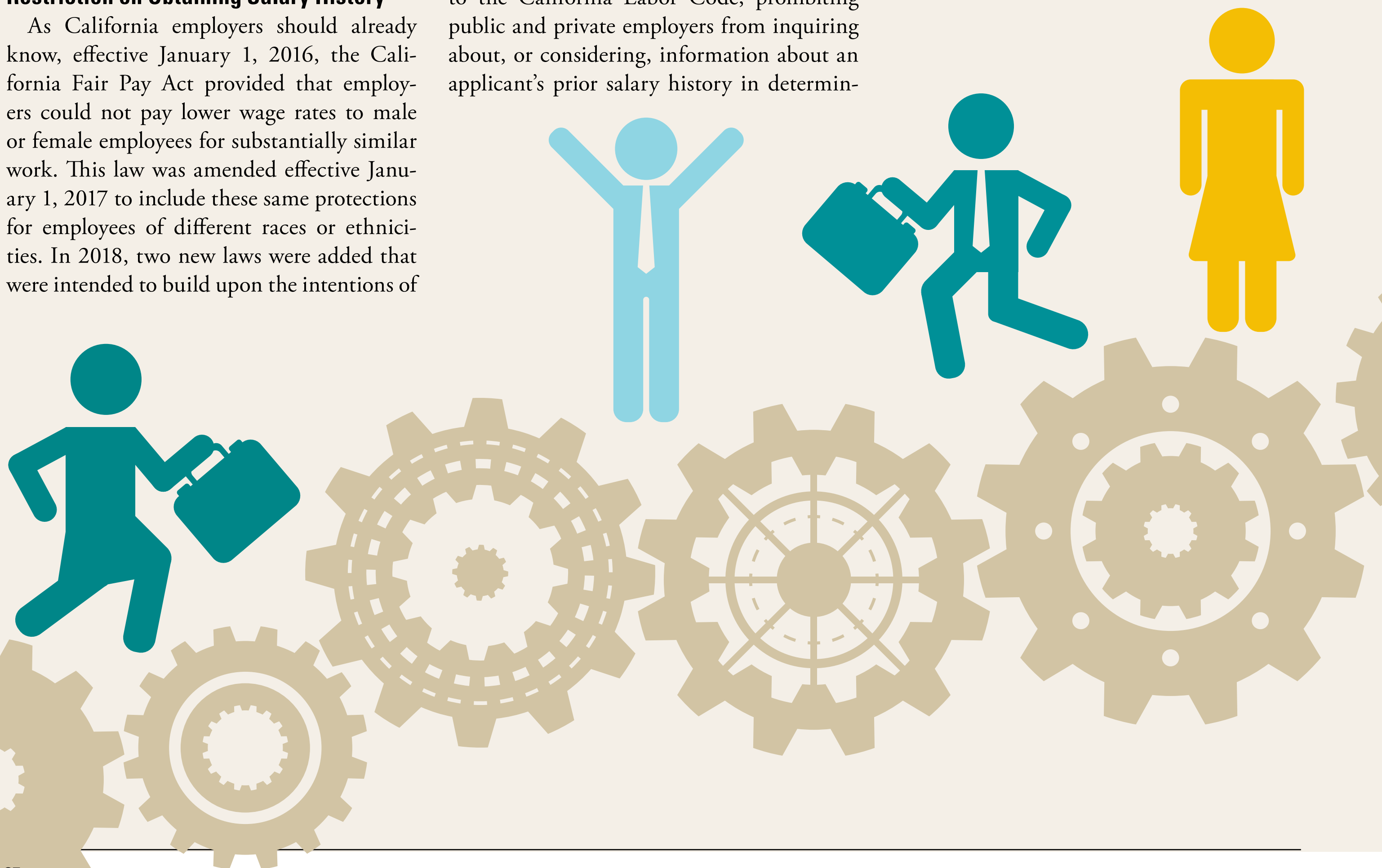
The new year brings with it more than New Year's resolutions. For California employers, it always brings a slate of new laws and regulations impacting their businesses. Below are some of the new laws affecting California employers, and recommendations on how to comply with the new laws.

Restriction on Obtaining Salary History

As California employers should already know, effective January 1, 2016, the California Fair Pay Act provided that employers could not pay lower wage rates to male or female employees for substantially similar work. This law was amended effective January 1, 2017 to include these same protections for employees of different races or ethnicities. In 2018, two new laws were added that were intended to build upon the intentions of the Fair Pay Act. The first was AB 46, which expanded California's equal pay laws to cover public employers.

The other new law touching on fair pay is AB 168, prohibiting inquiries into prior pay history of job applicants. This law went into effect on January 1, 2018 and is intended to stop historical pay discrepancies for women and minorities. This law added section 432.3 to the California Labor Code, prohibiting public and private employers from inquiring about, or considering, information about an applicant's prior salary history in determining whether to hire the applicant and/or the amount to pay the applicant if hired. This law does not apply to salary history information that is disclosable to the public under federal or state law.

However, under this new law, an applicant may still voluntarily (without being prompted) disclose his or her salary history, and if the applicant volunteers that informa-



tion, the employer may consider it in determining compensation. This law also requires the employer to provide the pay scale for the position if an applicant asks for it, but the employer may provide a pay range, and there is no prescribed limit to the range.

Recommendation: Employers should review their job applications to make sure that they do not contain questions that ask for, or prompt applicants to provide prior pay information. All hiring managers and those who participate in the interview process should be informed that they cannot ask questions calling for, or prompting disclosure of, prior pay.

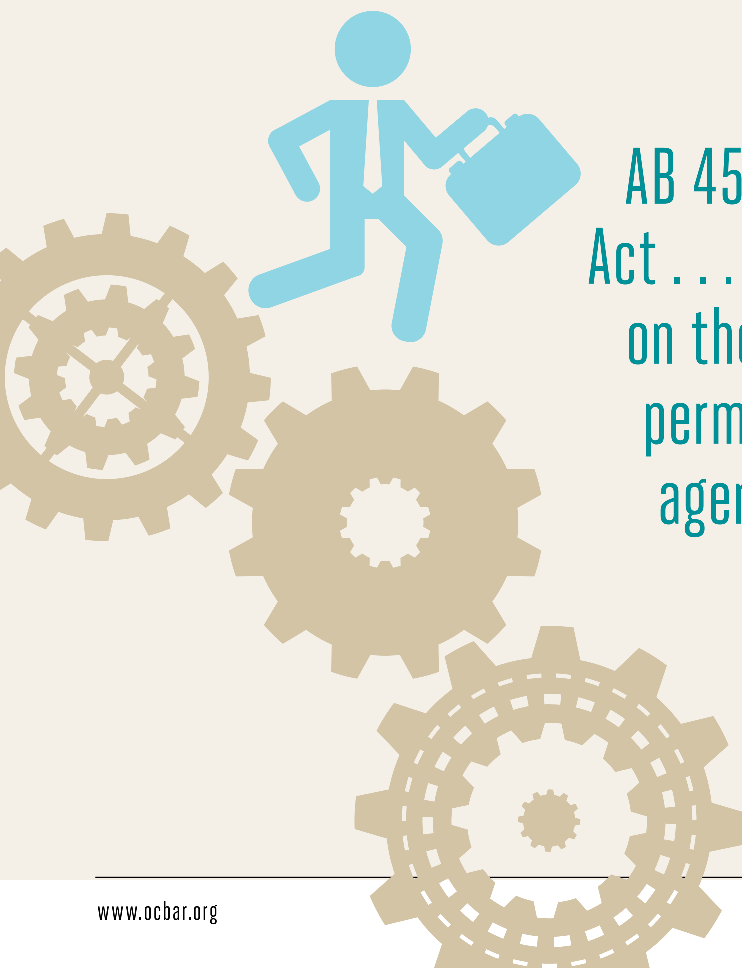
Consideration of Criminal History in Employment Decisions

The Fair Employment & Housing Council also changed its regulations regarding consideration of criminal histories in employment decisions. Located at California Code of Regulations title 2, section 11017.1, the regulations (which incorporate prior provisions of law) reiterate that, unless otherwise permitted by law, employers are prohibited from considering the following types of criminal history, or seeking such history from any source, when making any employment decisions: (1) an arrest or detention that did not result in a conviction; (2) referral to or participation in a pre- or post-trial diversion program; (3) a conviction that has been judicially dismissed, sealed, expunged, or statutorily eradicated (such as juvenile records); (4) certain specified juvenile processes; or (5) non-felony conviction for possession of marijuana that is two or more years old. Local laws and city ordinances may provide additional limitations. The regulations also provide that in addition to the above categories, employers are prohibited from considering any other forms of criminal history in employment decisions if doing so would have an adverse impact on persons in FEHA-protected categories. The applicant or employee has the burden of showing that taking criminal convictions into consideration has an adverse impact on such categories of persons, and provides guidance on how to make such a showing. If an applicant or employee makes that showing, the burden shifts to the employer to show that the policy is job-related and consistent with business necessity. The applicant or employee may then show that there is a less discriminatory means of effectively achieving the specific business necessity.

Recommendation: Review employment applications to ensure impermissible information is not being sought from applicants, train persons involved in the hiring process about the regulations, and carefully consider what type of information is obtained through background checks before using them in making hiring or employment decisions.

Immigrant Worker Protection Act

The new year also brought new laws to protect California employees against the federal government's emphasis on immigration issues. AB 450, the Immigrant Worker Protection Act, which became effective January 1, 2018, prohibits employers and those acting on the employer's behalf from voluntarily permitting an immigration enforcement agent to enter a nonpublic area of the employer without a warrant, unless otherwise required to permit access by law. This law also prohibits the employer or its agents from



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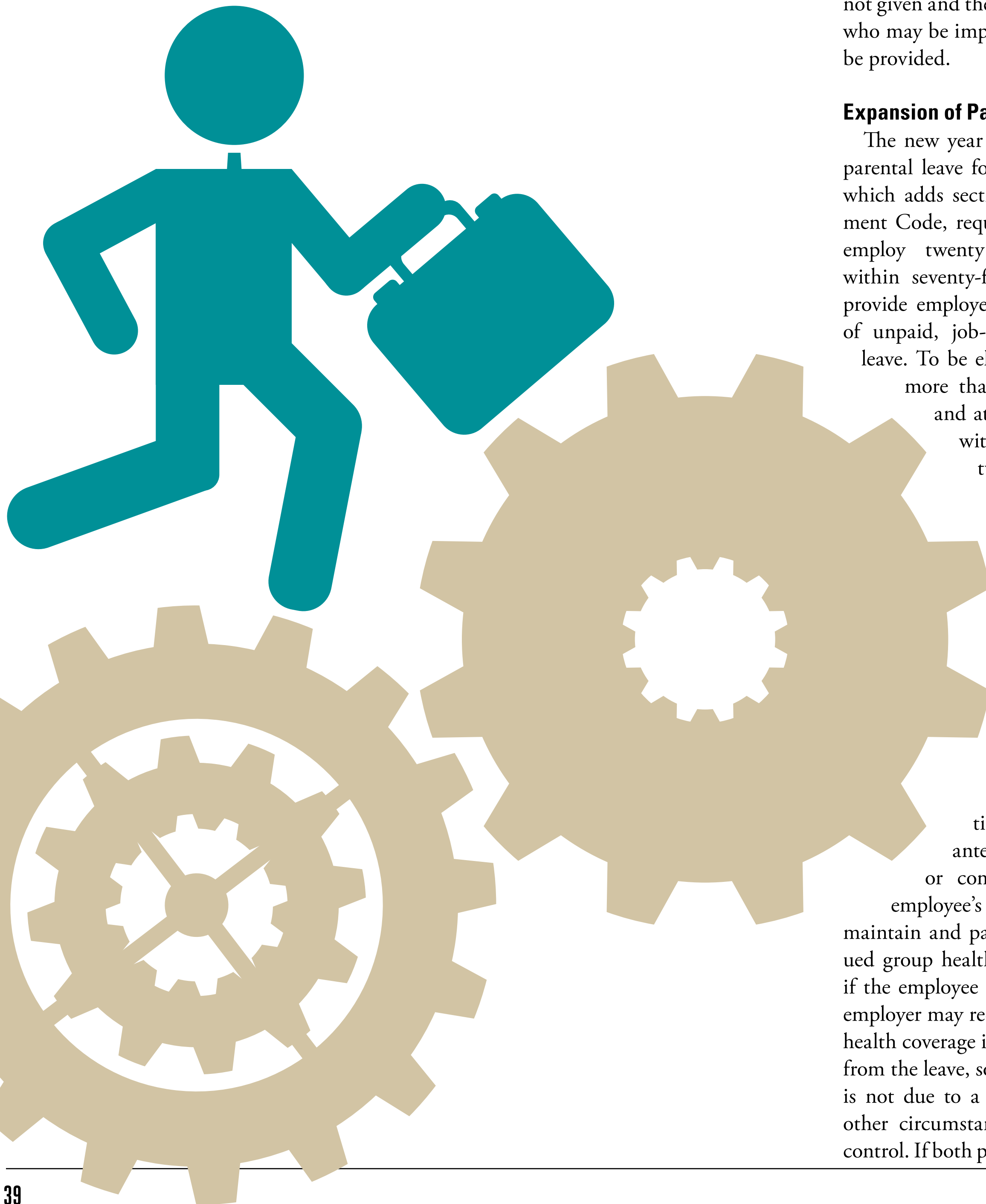
voluntarily giving the immigration enforcement agent access to, or a copy of, employee records without a subpoena or court order, again unless otherwise required to provide it by federal law, such as through a Notice of Inspection (NOI) issued by the agency to inspect Form I-9s and other records required to be maintained under federal immigration regulations to verify employment eligibility. If a NOI has been issued, this law requires the employer to post a notice, within seventy-two hours after receiving the NOI, to advise the employees (in the language with which the employer normally communicates to those employees) which immigration agency has issued the NOI, the date on which the NOI was issued, the fact that the NOI was issued and the agency will conduct an inspection of records, and the nature of the inspection to be conducted. The employer must also give written notice to the "employee's authorized representative," such as the employee's union, within seventy-two hours. The employer must provide a copy of the NOI to any employee who requests it. After the immigration agency conducts the inspection, the employer must provide any affected employee (who may not have proper work eligibility) and the employee's representative a notice with a description of all deficiencies identified in the immigration inspection results notice related to the affected employee, the time period for correcting any potential deficiencies identified, the time and date of any meeting with the employer to correct deficiencies, and a statement that the employee has the right to representation during any meeting with the employer. The employer must also refrain from re-verifying the employment eligibility of employees at a time or in a manner not required by law. This law imposes civil fines on employers for violations of this law ranging from $2,000 to $10,000 per violation, depending on the type of violation.

Recommendation: Train all onsite managers to contact Human Resources or legal counsel immediately if federal immigration agency personnel arrive so that improper access is not given and the proper notices to employees who may be impacted (and their unions) can be provided.



Expansion of Parental Leave

The new year also brings an expansion of parental leave for smaller businesses. SB 63, which adds section 12945.6 to the Government Code, requires employers that directly employ twenty to forty-nine employees within seventy-five miles of each other to provide employees with up to twelve weeks of unpaid, job-protected parental bonding leave. To be eligible, employees must have more than twelve months of service and at least 1,250 hours of service with the employer during the twelve-month period before the leave. The leave must be provided upon the request of eligible employees to bond with a new child within one year of the child's birth, adoption, or foster care placement. Employees may use any type of accrued paid time off, such as paid vacation and sick leave, during the parental leave. In addition, employers must guarantee employment in the same or comparable position upon an employee's return from leave, and must maintain and pay for the employee's continued group health plan coverage the same as if the employee had continued to work. The employer may recoup its costs of maintaining health coverage if the employee fails to return from the leave, so long as the failure to return is not due to a serious health condition, or other circumstances beyond the employee's control. If both parents entitled to leave for the

same child are employed, the employer only has to provide twelve weeks of leave total to the employees (which may be granted simultaneously if the employer chooses). The law also contains an anti-retaliation and anti-discrimination provision. The law also provides for a two-year mediation pilot program through which the employer may request employees making claims of discrimination or retaliation to mediate through the Department of Fair Employment and Housing (DFEH) if the legislature funds the program.

Recommendation: Smaller employers should determine whether they are covered by the law, and if so, draft and distribute a leave of absence policy that complies with the provisions of this law, develop forms and procedures for employees to use for this type of leave, and train managers and supervisors about the requirements of this leave.

Expansion of Anti-Harassment Training Requirements

Employment protections for lesbian, gay, bisexual, and transgender (LGBT) employees are also an area of emphasis in 2018. SB 396 adds to the state-mandated anti-harassment training that is already required to be provided to all supervisors for any employer with more than fifty employees. This law requires the anti-harassment training to include information on how to identify and prevent harassment based on gender identity, gender expression, and sexual orientation. These components must be included in the anti-harassment training for supervisors starting January 1, 2018. The new law also requires employers to display a DFEH poster regarding transgender rights in a prominent and accessible location. By highlighting these protected characteristics in anti-harassment training, this law is intended to help improve the prevention of workplace harassment of LGBT employees.

SB 396 is closely tied to the DFEH's Transgender Identity and Expression Regulations that took effect on July 1, 2017. Those new DFEH regulations outline the rights of transgender employees in the workplace, and when combined with prior DFEH guidance on this issue, provide that: (1) employers must give employees the right to use a restroom that corresponds with their gender identity, use gender-neutral signage for single-occupancy restrooms under their control, and prohibits requiring proof of sex or gender for an employee to use a particular restroom; (2) employers cannot enforce dress codes in a discriminatory manner and may not deny employees the right to dress in a way that reflects their gender identity (e.g., a transgender woman cannot be held to a higher dress standard than a non-transgender woman); (3) employers must use the name and/or gender identity requested by the employee unless there is a legally-mandated obligation to use the employee's legal name or gender; (4) the employer cannot require documentation of proof of sex, gender, gender identity, or gender expression as a condition of employment; and (5) employers are prohibited from asking applicants questions designed to detect a person's sexual orientation or gender identity (such as asking about marital status, a spouse's name, or the applicant's relation to household members, or whether they plan to have surgery).

Recommendation: Employers should make sure that their anti-harassment and anti-discrimination policies are up-to-date on these issues, ensure that their anti-harassment training has been updated to include the new requirements, review the dress code to ensure compliance, make sure that single-occupant restroom signage is compliant, ensure that the new DFEH poster that includes transgender rights is posted, and train all employees to use a co-worker's preferred name and pronoun. Finally, supervisors should be vigilant to identify and prevent harassment related to gender identity, gender expression, and sexual orientation.

New Rules for Wage-Related Claims of Retaliation and Discrimination

2018 also brings changes to wage-related issues in California. SB 306 expands the California Labor Commissioner's authority to investigate discrimination and retaliation related to wage issues. This new law authorizes the Division of Labor Standards Enforcement (DLSE) to investigate an employer, regardless of whether a complaint has been filed, when, during a wage claim or other investigation, the Labor Commissioner suspects retaliation or discrimination. The law also allows the Labor Commissioner or an employee to seek injunctive relief (such as requiring reinstatement of a terminated employee pending resolution of the claim) on a finding of "reasonable cause" that a violation of the law has occurred. Even if such injunctive relief is granted, the law does not prohibit an employer from disciplining or firing an employee for conduct that is unrelated to the retaliation claim. The law also authorizes the Labor Commissioner to issue citations directing specific relief to persons determined to be responsible for violations and to create certain procedural requirements. This law amends Labor Code section 98.7 and adds sections 98.74, 1102.61, and 1102.62.

Recommendation: Employers should closely monitor any requested discipline or other potential adverse employment actions for employees who have made wage claims or employees who may be impacted by DLSE investigations to ensure that any employment actions taken are not retaliatory.

Construction Contractor Liability

AB 1701 makes a general contractor jointly liable for the unpaid wages, fringe benefits, or other benefit payments or contributions of a subcontractor at any tier, starting with all contracts entered into on or after January 1, 2018. This is designed to provide protection to employees working on a job site regardless of their actual employer, and also attempts to prevent the misclassification of employees as independent contractors. The bill applies even if the general contractor has paid the subcontractor; hence, the general contractor should ensure that subcontractors are paying their employees.

Wrap-Up

Due to the difficult nature of remaining in compliance with California's increasing employment-related laws and regulations, it is important for employers to review their policies and practices in an effort to limit potential exposure.

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