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# Special Report

## New California Employment Laws Effective in 2018

# California Employer Challenges in 2018

The purpose of this report is to provide a summary of some of the major laws that may impact your operations and to help you plan and prepare for these new compliance challenges. It is part of our broader commitment to helping clients meet their compliance obligations. The laws covered in this report are effective January 1, 2018 unless otherwise noted.

As always, please contact your Human Resources Business Partner if you have any questions.

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## SB 63 – New Parent Leave Act

Senate Bill 63—the [New Parent Leave Act](#) (“Act”)— requires employers with 20 or more employees to provide up to 12 weeks of job-protected parental leave to eligible employees. Eligible employees are employees who (1) have more than 12 months of service with the employer, (2) have worked at least 1,250 hours during the previous 12-month period; and (3) work at a worksite in which the employer employs at least 20 employees within 75 miles. The Act does not cover employees already covered under the state’s family care and medical leave law, *i.e.* California Family Rights Act (CFRA), and the federal Family and Medical Leave Act (FMLA).

Leave under the Act is limited to “parental leave” to bond with a new child within one year of the child’s birth, adoption, or foster care placement. It does not include the entire range of employee and family member “serious health conditions” for which leave is available under CFRA and the FMLA. The leave is unpaid; however, employees are entitled to utilize accrued vacation pay, paid sick time, other accrued paid time off, or other paid or unpaid time off negotiated with the employer, during the period of parental leave.

Employers must provide employees taking leave a “guarantee of employment” in the same or a comparable position following the leave. If an employer fails to provide such a guarantee before the leave begins, the employer will be deemed to have refused to allow the leave.

Employers must maintain and pay for continued group health coverage during the leave. The coverage must be at the same level and under the same conditions that would have been provided had the employee continued to work. Costs of maintaining the health coverage may be recovered from employees who fail to return to work following the leave because of a reason other than a serious health condition or other circumstances beyond the employee’s control.

If both parents are employed by the same employer, employers are not required to grant parents leave totaling more than 12 weeks. Employers are also not required to grant leave to both employees simultaneously.

Finally, the new law prohibits an employer from discriminating against an employee for exercising his/her rights, or from restraining or denying any rights provided under the Act.

## SB 396 – Sexual Harassment Prevention Training for Supervisors

Employers subject to California’s mandatory sexual harassment training requirement for supervisors must ensure their programs include prevention of harassment based on gender identity, gender expression, and sexual orientation following an amendment ([Senate Bill 396](#)) to California’s Fair Employment and Housing Act (FEHA).

SB 396 amends Government Code section 12950.1, which requires an employer with at least 50 employees to provide supervisors at least two hours of training regarding sexual harassment and abusive conduct. Amended Section 12950.1 includes harassment training on gender identity, gender expression, and sexual orientation. The training must provide examples of such harassment, and the trainer must have knowledge or expertise in this area.

As of January 1, 2018, employers must also display a poster issued by California’s Department of Fair Employment and Housing regarding transgender rights in a prominent and accessible location in the workplace. The Department’s poster is available on its website.

## SB 490 – Commissions: Board of Barbering and Cosmetology Licensees

California Labor Code 204, with certain exceptions, requires that all wages be paid twice during each calendar month on days designated in advance by the employer as the regular paydays and requires the minimum wage for all industries to be \$10.

[Senate Bill 490](#) (SB 490) adds Section 204.11 to the Labor Code, and it requires that “commission wages” to any employee who is licensed by the State Board of Barbering and Cosmetology, *e.g.* barbers, cosmetologists, estheticians, manicurists, electrologists, and apprentices, to be due and payable at least twice during each calendar month on a day designated in advance by the employer as the regular payday. “Commission wages” are wages paid to an employee who is licensed under the California Barbering and Cosmetology Act (Act) to provide services for which the license is required, if when paid they are a percentage or a flat sum portion of the sums paid to the employee by the client receiving the service. “Commission wages” are also wages paid for selling goods.

SB 490 also provides that:

- The employee and employer may agree to a commission in addition to the base hourly rate.
- Employees must be paid a regular base hourly rate of at least two times the state minimum wage rate in addition to the commissions paid.

- Employees may be compensated for rest and recovery periods at a rate of pay not less than their regular base hourly rate.

## SB 621 – Overtime for Private School Teachers

[Senate Bill 621](#) takes effect on January 1, 2018. It adds a new provision that enables private schools to do what public schools already routinely do--offer shared or part-time contracts to teachers, paying them the proportional percentage of the salary minimum that corresponds with the proportion of the work schedule for which the teacher is being hired. For example, if a teacher is hired to each 50% of a regular, full-time schedule, then as long as the school pays the teacher at least half of the minimum required salary, that teacher may be classified as exempt.

The new law also makes clear that schools can look to salary schedules from the 12 months prior to the school year in question when determining the salary minimum. This was added to recognize the reality that most private schools set salaries in the spring for the ensuing school year and cannot try to guess what the public school salary schedules will be in the following year. Instead, they can rely on existing salary schedules at the time the salary decisions are made.

Finally, the new bill explains that the reference to “county” in the passage that talks about the salary minimum being 70% of the lowest scheduled salary is intended to mean the “county office of education” for the county in which the school is located.

## AB 168 – Salary History Inquiry Ban

[Assembly Bill 168](#) added Labor Code 432.2 generally requires all employers, of any size, to adhere to these new rules:

- Cannot ask for prior salary information. An employer **shall not**, orally or in writing, **ask for or seek salary history information, including compensation and benefits**, about an **applicant for employment**.
- Cannot use prior salary information to set wage rates for applicants. An employer **shall not rely on the salary history information of an applicant for employment** as a factor in determining whether to offer employment to an applicant or what salary to offer an applicant.

- Must provide pay scale for position. Upon request, an employer **shall provide the pay scale for a position to an applicant** applying for employment.
- The new law does not apply to salary history information disclosable to the public pursuant to federal or state law.

There are also some other unique provisions. The new law does not prohibit an applicant from voluntarily disclosing salary history information to a prospective employer. If an applicant voluntarily and, without prompting, discloses salary history information to a prospective employer, the law does not prohibit that employer from considering the voluntarily disclosed salary history information. However, the new law does remind employers that, even with voluntary disclosure by an applicant, the employer must still be mindful of Labor Code 1197.5. This section was amended last year to clarify the prior salary history, by itself, cannot be used to justify any disparity in compensation.

The new law is effective January 1, 2018. The law will have a significant practical impact for employers. Employers will likely need to move to update employment applications to remove questions regarding prior salary history or wage rates. Individuals who conduct hiring interviews of applicants should be trained on the new law. Employers should consider establishing pay grades for each position based on lawful, non-discriminatory factors and be prepared to respond to applicants who request the pay scale for a position. California continues to be on the forefront of fair pay legislation.

In anticipation of the effective date, you should familiarize yourself with your new obligations under the law. In order to ensure prohibited information is not solicited, you should also review and modify your existing employment applications, policies and practices, and processes for interviewing job applicants, negotiating and setting compensation, and verifying prior employment. Our current model employment application, available on FormSource/Forms Library, does not include questions that seek an applicant's salary history

## **AB 450 – Worker Immigration Protection**

Under [Assembly Bill 450](#), California's public and private employers will be prohibited from voluntarily consenting to a federal immigration enforcement agent's request to enter nonpublic areas in the workplace or to voluntarily allowing the agent access to employee records unless the agent provides a judicial warrant.

Employers must also provide notice to employees as follows:

- **Pre-Inspection Notice:** Within 72 hours of receiving a federal immigration agency’s notice of inspection (“NOI”) of employment records, including I-9 Employment Eligibility Verification forms, an employer must provide notice to each of its current employees. The posted notice must include (1) the name of the immigration agency conducting the inspection; (2) the date the employer received notice of the inspection; (3) the nature of the inspection to the extent known; and (4) a copy of the NOI. On or before July 1, 2018, the Labor Commissioner will create a template of this notice for employers to use.
- **Post-Inspection Notice:** Within 72 hours of receiving written notice of an immigration agency’s inspection results, an employer must provide each affected employee (and his/her collective bargaining representative, if any) with written notice of the results. The notice must include (1) a description of any and all deficiencies or other inspection results related to the affected employee; (2) the time period for correcting any deficiencies identified by the immigration agency; (3) the time and date of any meeting with the employer to correct the deficiencies; and (4) notice that the employee has a right to be represented during any scheduled meeting with the employer. The notice must be tailored to the affected employee and hand-delivered to the employee at the workplace. If this is not possible, the employer must endeavor to mail and e-mail the employee and the employee labor union, if applicable.

Finally, an employee is prohibited from re-verifying the employment eligibility of a current employee outside the time and manner required by federal law, under Section 1324a(b) of Title 8 of the United States Code. Violations of this provision can result in civil penalties up to \$10,000.

If an employer fails to comply with AB 450, it will be subject to a civil penalty between \$2,000 to \$5,000 for a first violation and \$5,000 up to \$10,000 for each subsequent violation. The penalties are recoverable by the Labor Commissioner.

## **AB 1008 – Use of Criminal History**

Pursuant to [Assembly Bill 1008](#), all employers in California with five or more employees are prohibited from making pre-offer inquiries about an applicant’s conviction history. An employer may inquire about an applicant’s history after a conditional offer of employment is made; however, the employer cannot deny an applicant a position solely or partly because of the applicant’s conviction history until the employer performs an individualized assessment.

Given the new law’s requirements, it is imperative that employers establish a protocol for obtaining and considering criminal history information and performing individualized assessments. Employers should

also review their employment applications and other employment-related documents to determine whether they should be revised. Our current model employment application does not contain any criminal history questions and can be found on FormSource/Forms Library.

## **AB 1701 – Construction Contractor Liability for Unpaid Wages and Fringe Benefits**

Beginning with contracts entered into on or after January 1, 2018, direct (general) construction contractors in California will be held jointly liable for their subcontractors' unpaid employee wages, fringe benefit or other benefit payments or contributions under Assembly Bill 1701. The joint liability requirement is codified in [Labor Code Section 218.7](#).

The law does not apply to individuals performing work under contracts with the State of California, special districts, municipalities or political subdivisions. It also does not provide a private right of action against the direct contractor. Instead, the law may be enforced by the Labor Commissioner, joint labor-management cooperation committees or labor unions. The Commissioner may recover unpaid wages and benefits through an administrative hearing, a citation or a civil suit, while joint labor-management cooperation committees and labor unions may recover damages solely through civil suits. The latter two groups also may recover attorney's fees and costs. The statute of limitations for bringing a claim is one year, which begins to run when the completion of the direct contract is recorded, when cessation of work on the direct contract is recorded or when the actual work covered by the direct contract is completed, whichever is earlier.

## **Wage & Hour –Minimum Compensation Thresholds**

California exempts certain computer software professionals and licensed physicians and surgeons from its overtime pay requirements if they are compensated at or above compensation levels set by the state and satisfy a primary duties test. The California Department of Industrial Relations ("Department") adjusts the minimum compensation levels each year for the upcoming year. The adjustment is based on the state's Consumer Price Index for Urban Wage Earners and Clerical Workers.

On October 3, 2017, the Department announced that, effective January 1, 2018, employers wishing to avail themselves of the computer software professionals' overtime exemption must pay computer professionals a minimum of \$43.58 per hour or a minimum salary of \$90,790.07 annually or \$7,565.85



monthly. For the licensed physicians and surgeons overtime exemption, the minimum allowable compensation is set at \$79.39 per hour.

For copies of the Department's announcements, please visit the following links:

Computer Software Professionals: <https://www.dir.ca.gov/oprl/ComputerSoftware.pdf>

Licensed Physicians and Surgeons: <https://www.dir.ca.gov/oprl/Physicians.pdf>