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FLASH UPDATE – Changes to the Hiring Process

Statewide “Ban the Box” Legislation Implemented

Mirroring local ordinances in progressive enclaves San Francisco and Los Angeles, the state legislature has broadened protections for job applicants statewide. Beginning January 1, 2018, all California employers with five or more employees will be prohibited from asking applicants about criminal convictions prior to providing a conditional job offer, whether on an application or during the job interview. After a conditional job offer is made, employers may conduct a criminal background check, but they may not consider: (1) any arrest that did not result in conviction; (2) referral to or participation in a pre- or post-trial diversion program; or (3) convictions that have been sealed, dismissed, expunged, or statutorily eradicated.

An employer that intends to deny employment based on the criminal conviction history of an applicant must make an individualized assessment of whether the conviction history actually has a direct adverse effect on the applicant's ability to perform job functions, and then must follow specific procedures to inform the applicant of the decision not to hire. Given the specific and fact-intensive nature of the individualized assessment and notification procedures required under this law, employers should consult counsel when using conviction history to rescind a conditional job offer.

Employers Prohibited from Seeking Salary History

California's Fair Pay Act was amended last year to prohibit an employer from relying solely on an employee's past salary to justify the employee's pay. In October's legislative session, the limitations on consideration of salary to determine employee compensation were expanded. Also beginning in January, employers may not ask applicants about salary history or benefits. An employer may not rely on applicant's salary history as one of the factors to determine what salary offer to make to the applicant unless the applicant *voluntarily* provides the salary history during the interview without prompting from the employer. Salary history may also not be used to decide whether to offer the job to the applicant. In fact, employers are not permitted to ask about salary history during a job interview. In addition, employers must provide applicants with the pay scale for the position if requested by the applicant.

Employers should review application forms and abandon any inquiries that seek information regarding the past compensation of an applicant. Instead, employers should inquire as to what an applicant expects to earn at the new job for which he or she is applying. We further suggest that employers keep written records of interview questions and responses to protect themselves in the event of future litigation.

The purpose of our Employment Law Update is to inform clients and interested parties of recent developments in employment law. It should not be regarded as a substitute for comprehensive legal advice.

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