

## RECAP OF 2018 EMPLOYMENT LAW UPDATE SEMINAR

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### THE YEAR IN REVIEW AND PREVIEW – 2018

#### Employment Law Seminar Summary

## HIRE

**“Ban the Box” (AB 1008; Gov. Code, § 12952):** This law makes it generally illegal for employers with five or more employees to ask about criminal history on job applications or consider an applicant’s criminal history until after the employer has made a conditional offer of employment to the applicant. This law is in addition to San Francisco and Los Angeles’ pre-existing “Ban the Box” ordinances. Employers must comply with both state and local laws.

**Salary History (AB 168; Labor Code, § 432.3) and San Francisco’s Parity in Pay Act (San Francisco Police Code § 3300J):** Employers cannot ask about an applicant’s compensation history and cannot rely on compensation history when determining whether to offer employment and/or in determining what compensation to offer an applicant. (Note that pursuant to Labor Code § 432.3, when an applicant voluntarily discloses compensation history, an employer may consider or rely on that information in determining the applicant’s salary).

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## COMPENSATE

### Minimum Wage Updates

**Statewide minimum wage as of January 1, 2018:** \$10.50 per hour (25 employees or fewer)/\$11.00 per hour (26 employees or more)

**Municipal ordinance-based minimum wage as of January 1, 2018 (unless otherwise noted):**

- Berkeley:
  - January 1, 2018: \$13.75
  - October 1, 2018: \$15.00
- Cupertino: \$13.50
- El Cerrito: \$13.60
- Emeryville:
  - January 1, 2018: \$14.00 (55 or fewer employees)/\$15.20 (56 or more employees)
  - July 1, 2018: \$15.00 (55 or fewer employees)/\$15.60 (estimated) (56 or more employees)
- Los Altos: \$13.50
- Los Angeles:
  - January 1, 2018: \$10.50 (25 or fewer employees)/\$12.00 (26 or more employees)
  - July 1, 2018: \$12.00 (25 or fewer employees)/\$13.25 (26 or more employees)
- Malibu:
  - January 1, 2018: \$10.50 (25 or fewer employees)/\$12.00 (26 or more employees)
  - July 1, 2018: \$12.00 (25 or fewer employees)/\$13.25 (26 or more employees)
- Milpitas:
  - January 1, 2018: \$12.00
  - July 1, 2018: \$13.50
- Mountain View: \$15.00
- Oakland: \$13.23
- Palo Alto: \$13.50
- Pasadena:
  - January 1, 2018: \$10.50 (25 or fewer employees)/\$12.00 (26 or more employees)
  - July 1, 2018: \$12.00 (25 or fewer employees)/\$13.25 (26 or more employees)
- Richmond: \$13.41
- San Diego: \$11.50
- San Francisco:
  - January 1, 2018: \$14.00
  - July 1, 2018: \$15.00

- San Jose: \$13.50
- San Leandro:
  - January 1, 2018: \$12.00
  - July 1, 2018: \$13.00
- San Mateo: \$13.50 (general)/\$12.00 (for 501(c)(3) non-profits)
- Santa Clara: \$13.00
- Santa Monica:
  - January 1, 2018: \$10.50 (25 or fewer employees)/\$12.00 (26 or more employees)
  - July 1, 2018: \$12.00 (25 or fewer employees)/\$13.25 (26 or more employees)
- Sunnyvale: \$15.00

### California Pay Increases

- Partially-exempt inside sales commissioned employees: \$15.75 (25 or fewer employees)/\$16.50 (26 or more employees)
- Employees who provide their own tools: \$21.00 (25 or fewer employees)/\$22.00 (26 or more employees)
- Exempt physicians and surgeons: \$79.39 per hour
- Computer Software Professionals: \$43.58 per hour/\$7,565.85 per month/\$90,790.07 per year

**California Salary Thresholds for Exempt Employees:** \$43,680.00 (25 or fewer employees)/\$45,760.00 (26 or more employees)

**IRS Reimbursement Rate:** 54.5 cents per mile

**Wage Discrimination (AB 46; Labor Code, §§ 1197.5, 1199.5):** This law expands the California Fair Pay Act—which prohibits wage discrimination based on gender, race, and ethnicity—to cover public employers. However, the penalty/damages portion of the Act only applies to private employers.

**Contractors Liable for Unpaid Wages of Subcontractors' Employees (AB 1701; Labor Code, § 218.7):** Contractors are liable for the unpaid wages, benefits, or contributions that a subcontractor fails to pay for labor connected to a contract. The Governor issued a memo when he signed the bill that said that the sponsors of the law committed to sponsoring legislation next year to clarify any confusion over the scope of the new law.

**Employees Entitled to a “Day of Rest” (Mendoza v. Nordstrom, Inc. (2017) 2 Cal.5th 1074):** An employee is entitled to a day of rest after working six consecutive days in a defined workweek. The day of rest requirement is triggered even if the employee works less than 30 hours in a workweek if the employee works more than six hours any day during that workweek. An employee can waive the day of rest as long as the employer makes the employee aware of the right to a day of rest and remains neutral about the employee’s choice to work the seventh day.

**Paying Commissioned Employees for Rest Breaks (Vaquero v. Stoneledge Furniture, LLC (2017) 9 Cal.App.5th 98):** The California Court of Appeals held that commissioned hourly employees have to be paid separately for rest breaks.

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# MANAGE

## Municipal Paid Sick Leave Laws

- Berkeley's paid sick leave ordinance (BMC § 13.100) went into effect on October 1, 2017. It provides that employees who work at least two hours per week in Berkeley and are entitled to minimum wage accrue one hour of paid sick leave for every 30 hours worked. Employers may provide covered employees with an advance of paid sick leave, so long as the employee can accrue additional paid sick leave after working enough hours to have accrued the amount allocated up front. Small employers (25 or fewer employees) may cap accrual and usage at 48 hours; employers with 26 or more employees may cap accrual at 72 hours, but they may not cap usage.
- Los Angeles's paid sick leave ordinance (LAMC § 187.06) now applies to all employers, not just large employers.
- Santa Monica's paid sick leave ordinance (SMMC § 4.62.025) increased the caps on how much paid sick leave an employee can accrue on January 1, 2018: small employers (those with 25 or fewer employees) may cap accrual at 40 hours per year (however the California statute requires a minimum of 48 hours); large employers (those with 26 or more employees) may cap accrual at 72 hours per year.

## **Immigration Enforcement (AB 450; Gov. Code, §§ 7285.1, 7285.2, 7285.3, Labor Code, § 1019.2):**

Employers (1) may not voluntarily permit an immigration enforcement agent to enter nonpublic areas of workplace without judicial warrant; (2) may not voluntarily permit an immigration enforcement agent to access, review, or obtain employee records without subpoena or court order; (3) must give notice to current employees of an inspection within 72 hours of receiving notice of the inspection; and (4) must give notice to affected employees within 72 hours of receipt of results of the investigation. Penalties range from \$2,000 to \$10,000 per violation.

**Legalization of Marijuana (California Proposition 64):** Effective January 1, 2018, buying marijuana in California was decriminalized under California law. Employers may still prohibit employees from being under the influence of marijuana at work. Marijuana is still an illegal controlled substance under Federal law.

## **Revisions to the Fair Employment and Housing Act (AB 1556; Gov. Code, §§ 12900 et seq.):**

The law deletes all gender-specific personal pronouns in the Fair Employment and Housing Act, which includes the statute authorizing Pregnancy Disability Leave, further protecting the rights of transgender, nonbinary, and gender nonconforming persons.

**Paid Family Leave (AB 908; CUIA, §§ 2655, 2655.1, 3303):** This 2017 law increases the amount of paid family leave benefits from 55% of weekly wages to 60% or 70% depending on the income of the employee and also removes the seven-day waiting period for eligibility for Paid Family Leave.

**San Francisco Paid Parental Leave Ordinance:** The Ordinance supplements Paid Family Leave payments to full wages (up to a cap) while the employee is on parental leave. As of January 1, 2018, the Ordinance applies to all private employers with 20 or more total employees. The Ordinance is not a leave entitlement.

**“Baby Bonding” Leave for Small Employers (SB 63; Gov. Code, § 12945.6):** Public and private employers with 20 to 49 employees within a 75-mile radius must permit eligible employees to take up to 12 weeks of unpaid, job protected leave to bond with a newborn or newly placed foster or adopted child. While the employee is on bonding leave, the employer must pay for and maintain the employee’s health care. The new leave requirement does not apply to employees who are covered by both the FMLA (Family and Medical Leave Act) and the CFRA (California Family Rights Act).

**San Francisco Lactation in the Workplace Ordinance:** The Ordinance requires employers to specify the process employees can use to request an accommodation to breastfeed, defines the minimum standards for lactation locations, outlines best practices, and changes the San Francisco Building Code to specify the technical specifications for lactation rooms.

**Notifications for Victims of Domestic Violence, Sexual Assault, and Stalking (AB 2337; Labor Code, § 230.1):** Per the 2017 statute, the Labor Commissioner developed a new form that employers may use to comply with the statute’s requirements to inform new employees in writing of protections from employment discrimination or retaliation for exercising their rights if they are a victim of domestic violence, sexual assault, or stalking and inform current employees in writing upon request.

**Additions to Mandatory Sexual Harassment Training (SB 396; Gov. Code, §§ 12950, 12950.1, CUC § 14005, 14012):** Employers with 50 or more employees must include, as a component of their harassment prevention training, training regarding harassment based on gender identity, gender expression, and sexual orientation; the training must include practical examples. Employers with five or more employees must post a new notice (developed by the Department of Fair Employment and Housing) regarding transgender rights in all workplaces in addition to the existing poster on discrimination in employment.

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## SEPARATE

**Employers should step up their harassment prevention efforts in 2018.** While the law on harassment remains unchanged, employers would be wise to audit and update their harassment policies, complaint procedures, and investigation procedures. Employers should also strongly consider providing training for all employees—not just supervisors—regardless of the company’s employee headcount.

**Courts Have to Consider the Totality of the Circumstances in Sexual Harassment Cases (Zetwick v. County of Yolo (9th Cir. 2017) 850 F.3d 436):** In a case where a male sheriff hugged a female correction officer over 100 times during a 12-year period, the district court was wrong to grant summary judgment to the sheriff without considering the frequency of the hugs, the cumulative effect of the hugs, the totality of the circumstances, the greater impact of harassment by a supervisor, and evidence that the sheriff hugged and kissed other female employees.

**An Employer can be Liable for Sexual Harassment by a Trespasser (M.F. v. Pacific Pearl Hotel Management (Cal.App., Oct. 26, 2017, No. D070150) 2017 WL 4831603):** In this case, an employee of the hotel was raped by a trespasser while the employee was cleaning one of the hotel rooms. The employer argued that it could not be liable under FEHA because it could not have known the trespasser posed a risk to its employees prior to the trespasser coming on the hotel property and

harassing them. However, the court held that the employer was liable for the employee's damages because (1) the employee was raped while working the employer's premises, (2) the employer knew or should have known the trespasser was on the premises before the rape occurred because the trespasser was encountered by other employees, and (3) the employer knew or should have known that while on the premises the trespasser had aggressively propositioned at least one other employee for sexual favors.

**Employers Cannot Require Employees to Keep Information from Workplace Investigations Confidential (Banner Health Systems v. NLRB (D.C. Cir. 2017) 851 F.3d. 35):** The NLRB held in 2015 that employers cannot have a blanket rule banning employees from discussing ongoing workplace investigations of employee misconduct. To require confidentiality, the employer must show, on a case by case basis, that it has an objectively reasonable basis to believe the integrity of the investigation will be compromised without confidentiality. The NLRB identified four objective factors to consider: witnesses needing protection, the danger of evidence being destroyed, the danger of evidence being fabricated, and prevention of a cover-up. The Banner case upheld the NLRB 2015 ruling. Therefore, employers need to carefully consider the NLRB's objective elements on a case by case basis before requiring employees to keep information from a workplace investigation confidential.

**Employers Can Rely on the Findings of Workplace Investigations (Jameson v. Pacific Gas & Elec. Co. (2017) 16 Cal.App.5th 901):** An employer's reliance on a good faith investigation can defeat a wrongful termination claim.

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For more information, please visit the following links:

- **The Labor Commissioner's Office - Victims of Domestic Violence Leave Notice**
- **The Department of Fair Employment and Housing - Transgender Rights in the Workplace**
- **EDD - For Your Benefit: California's Programs for the Unemployed**
- **EDD - California Paid Family Leave Pamphlet**