

California Employment Law Corner

What's on Your Job Application?

California continues to enact new regulations governing the information that can be collected from job applicants. Two important changes went into effect January 1, 2018, and a third on July 1, 2018 that may have slipped by you unnoticed. So here they are just in case you need to go back and update your application or interviewing procedures.

Ban on Seeking Job Applicant's Compensation History¹

Assembly Bill 168 created **Labor Code Section 432.3**, which applies to all employers, including all public employers, regardless of size. Under Section 432.3, employers will be prohibited from relying on an applicant's compensation history as a factor in determining whether to make a job offer or what compensation to offer an applicant. For purposes of the statute, "compensation" includes not only salary, but benefits as well. Employers may not ask applicants about their compensation history, nor otherwise seek it from a third party, such as a recruiter. However, if an applicant voluntarily and without prompting discloses his or her compensation history, the employer may consider that information in determining its compensation offer, subject to Section 432.3(i), which explicitly states that prior compensation alone cannot be used to justify a disparity in compensation.

The new law also requires employers to provide the "pay scale" for a position upon an applicant's reasonable request. While the term "pay scale" is not defined by the statute, the provision of a "salary range" for the position would appear to satisfy the new law's requirement.

What should you Do - employers should remove questions about prior compensation from their applications and any applicant interview guidelines, advise Human Resources staff, hiring managers, and recruiters that they are not to seek compensation history information, and prepare to provide a pay scale for each open position. While the law does not require that a pay scale be provided to an applicant in writing, doing so may be the better practice as documentation will avoid any possible confusion or ambiguity in terms of what information was provided and when.

Ban on Asking About the Job Applicants' Conviction History²

Labor Code Section 432.7 has long prohibited an employer, whether a private individual, corporation or public agency, from asking a job applicant to disclose, or from utilizing as a

¹ The new statute can be found here:
http://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=201720180AB168

² The new statute can be found here, including information of what employers may be exempt from the regulation. http://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=201720180AB1008

factor in determining any condition of employment, information concerning an arrest or detention that did not result in a conviction, or information concerning a referral or participation in any pre-trial or post-trial diversion program.

Assembly Bill 1008, which adds new Government Code Section 12952 to the Fair Employment and Housing Act (“FEHA”), expands existing protections by prohibiting employers with five or more employees from (1) including on an employment application any question seeking disclosure of an applicant’s conviction history, (2) inquiring into or considering an applicant’s conviction history until after a conditional employment offer has been made, and (3) considering, distributing, or disseminating information developed as a result of a background check that is related to (a) certain arrests not followed by a conviction, (b) referral to or participation in a pre-trial or post-trial diversion program, and (c) convictions that have been sealed, dismissed, expunged, or statutorily eradicated.

California’s New National Origin Regulations³

On a related note, the new Fair Employment Housing Act (FEHA) regulations that address national origin protections went into effect on **July 1, 2018**. Although California already has strict rules that prohibit harassment, discrimination and retaliation based on protected classes, including national origin, the new regulations expand those rules and address specific acts that may constitute national origin discrimination.

The new regulations protect both applicants and employees, apply equally to workers who are undocumented and broadly define national origin. They also delineate the types of policies or practices that may constitute national origin discrimination. They discuss language restrictions, including English-only policies, and the very narrow circumstances where such policies may be allowed.

For example, the new regulations broadly define “national origin” to include an individual’s or ancestors’ actual or perceived:

- Physical, cultural or linguistic characteristics associated with a national origin group;
- Marriage to or association with persons of a national origin group;
- Tribal affiliation;
- Membership in or association with an organization identified with or seeking to promote the interests of a national origin group;
- Attendance or participation in schools, churches, temples, mosques or other religious institutions generally used by persons of a national origin group; and
- Name that is associated with a national origin group.

These policies or practices may constitute national origin discrimination:

³ The new statute can be found here: <https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2018/05/FinalTextRegNationalOriginDiscrimination.pdf>

- Language restriction policies, including English-only policies.
- Discrimination based on an applicant's or employee's accent.
- An employer cannot discriminate based on an applicant's or employee's English proficiency unless the employer can show that the proficiency requirement is justified by business necessity.
- Height and weight requirements - unlawful unless the employer can show that the requirements are job related and consistent with business necessity, and that the purpose of the requirement cannot be met by less discriminatory means.
- It is unlawful to recruit applicants or employees based on national origin, and to assign positions, facilities or geographical areas of employment based on national origin.
- Employers are prohibited from inquiring into an applicant's or employee's immigration status or discriminating against an applicant or employee based on immigration status, unless required to do so by federal immigration law.
- Undocumented applicants and employees are protected to the same extent as any other applicant or employee.

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