

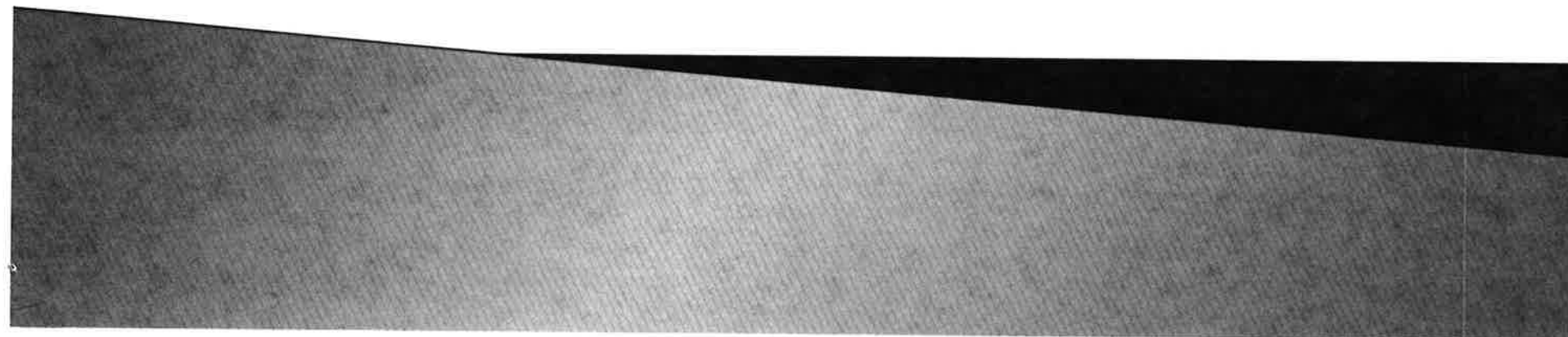


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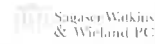
## **NEW LAWS FOR 2018: THE ONSLAUGHT CONTINUES**

Ian B. Wieland



**Overview**

- ▶ "Ban-The-Box" Criminal History
- ▶ Applicant's Salary
- ▶ Parental Leave
- ▶ New Requirement for Mandatory Sexual Harassment Training
- ▶ Immigrant Worker Protection Act
- ▶ Retaliation
- ▶ Marijuana & Drug Testing



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**AB 1008 aka "ban-the-box"**

- ▶ Goes into effect January 1, 2018.
- ▶ Prohibits employers with five or more employees from asking applicants about criminal convictions until a conditional job offer has been made
  - This includes the little box on most job applications that asks applicants to disclose criminal history.
  - Also includes inquiring into or considering the conviction history of an applicant.
- ▶ Added as protected characteristic under Fair Employment and Housing Act
  - Enforced by Department of Fair Employment and Housing



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**Ban-The-Box - Restrictions on Considering Information**

- ▶ It is an unlawful employment practice for employers to consider, distribute, or disseminate information about any of the following *while conducting* a criminal check in connection with an application:
  - Arrests not followed by conviction, except when individual is out on bail or his or her own recognizance pending trial (aka, stale arrests);
  - A referral to or participation in a pretrial or post-trial diversion program; and
  - Convictions that have been sealed, dismissed, expunged or statutorily eradicated pursuant to law.

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**Ban-The-Box: Pre-Adverse Action Process**

- › Once a "conditional" job offer is made, the employer can ask the employee to report prior convictions
- › If the employer wants to deny that person the job based on their criminal record, the employer has to make what is called an "individualized assessment"
  - That assessment must justify that the applicant's criminal record has a direct and adverse relationship on the specific duties of the job

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**Ban-The-Box: Pre-Adverse Action Process**

- › In making the individualized assessment, the employer must consider the following three factors:
  - 1. the nature and gravity of the offense or conduct;
  - 2. the time that has passed since the offense or conduct and completion of the sentence; and
  - 3. the nature of the job held or sought.

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**Ban-The-Box: Pre-Adverse Action Letter Requirements**

- › Employer has to let the employee know that the preliminary decision is to deny employment. The pre-adverse action letter must contain all of the following:
  - 1. Specify/identify the conviction or convictions that are the basis for the preliminary decision to rescind the offer.
  - 2. A copy of the conviction history report, if any.
  - 3. An explanation of the applicant's right to respond to the notice of the employer's preliminary decision before the decision becomes final and the deadline by which to respond - 5 business days. Applicant's response may include submission of evidence challenging the accuracy of the conviction history report and/or evidence of rehabilitation or mitigating circumstances.

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**Ban-The-Box: Notice of Final Denial or Disqualification**

- ▶ If an employer makes a final decision to deny an application based in whole or in part on the applicant's conviction history, the employer must notify the applicant in writing of the following:
  - 1. The final denial or disqualification.
  - 2. Any existing procedure the employer has for the applicant to challenge the decision or request reconsideration.
  - 3. The right to file a complaint with the California Department of Fair Employment and Housing.

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**AB 168 - Applicant Salary History**

- ▶ Effective January 1, 2018.
- ▶ AB 168 makes it illegal for employers, regardless of size, to ask for salary history of an applicant
  - Includes questions about benefits received at prior employment
- ▶ Bars employers from relying on an applicant's prior compensation in determining whether to offer employment or determining what salary to offer.
- ▶ Requires businesses to provide applicants a "pay scale" upon reasonable request
  - A pay scale is essentially a range of compensation a company is willing to pay for a certain job
  - Criteria such as education, experience and skill are usually determining factors that decide placement on that scale

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**Applicant Salary History**

- ▶ Employers are permitted to ask how much an applicant is expecting, but they cannot use that information to decide eligibility
- ▶ Applicants may voluntarily and without prompting disclose information about salary history, *although the employer cannot consider that information in determining whether or not to hire the individual.*
- ▶ Prohibitions also apply to agents such as employment or placement agencies

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### Applicant Salary History

- ▶ Since new Labor Code provision, violations can be basis for lawsuits under the Private Attorney General Act ("PAGA")
- ▶ Reminder: Employers must also comply with California Fair Pay Act
  - Prior salary alone cannot be the basis for pay differential between genders, ethnicity, race
- ▶ Fair Pay Act amended by AB 46 to include application to public as well as private employer



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### What should employers do to protect themselves? Consider:

- ▶ Train hiring managers about new law and that they are not to seek information from applicants regarding prior salary and benefits history
- ▶ Remove any requests or questions about salaries at prior employment on applications or other documents provided to candidates
- ▶ Prepare a set "pay scale" for the positions the employer is hiring for.
  - The law does not set forth what information must be included on the pay scale.
  - In addition, the law does not explicitly require that this information must be provided in writing to the applicant. However, employers should consider whether the pay scale should be done in writing in case there is a dispute about whether the pay scale was provided to the applicant and what information was conveyed to the applicant.



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### SB 63 - Parental Leave

- ▶ Extends current legislation requiring unpaid leave for new parents to companies with 20 to 49 employees
- ▶ Prohibits an employer from refusing to allow an employee to take up to 12 weeks of parental leave to bond with a new child within one year of the child's birth, adoption, or foster care placement. The employee must:
  - Have more than 12 months of service with the employer,
  - At least 1,250 hours of service with the employer during the previous 12-month period, and
  - Works at a worksite in which the employer employs at least 20 employees within 75 miles



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**Parental Leave**

- ▶ Prohibits an employer from refusing to maintain coverage under a group health plan for an employee who takes this leave
  - Employee may be required to pay his/her share
- ▶ Allows the employer to recover coverage costs if both of the following conditions occur:
  - (1) The employee fails to return from leave after the period of leave to which the employee is entitled has expired
  - (2) The failure of the employee to return from leave is for a reason other than the continuation, recurrence, or onset of a serious health condition or other circumstances beyond the control of the employee



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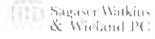
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**Parental Leave**

- ▶ If both parents are employed by the same employer, the employer is not required to grant leave totaling more than 12 combined weeks
  - Employer may, but is not required to, grant simultaneous leave to both of these employees.
- ▶ Parental leave runs concurrently to parental leave taken as described the Education Code.



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**Parental Leave**

- ▶ Unlawful for an employer to refuse to hire, or to discharge, fine, suspend, expel, or discriminate against, an individual because of either of the following:
  - (1) An individual's exercise of the right to parental leave
  - (2) An individual's giving information or testimony as to his or her own parental leave, or another person's parental leave, in an inquiry or proceeding related to guaranteed rights
- ▶ Employee entitled to reinstatement to same or equivalent position



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**Parental Leave**

- ▶ New pilot mediation program under Department of Fair Employment & Housing
- ▶ Allow employer to request participation in mediation within 60 days of receipt of "Right-to-Sue" Notice from DFEH
  - Employee cannot institute civil litigation until mediation is complete

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**SB 396 -Sexual Harassment Training-New Requirements**

- ▶ Effective January 1, 2018.
- ▶ Training must include information on gender identity, gender expression and sexual orientation.
- ▶ Requires employers to post a poster, developed by the Department of Fair Employment and Housing, on transgender rights. Link to poster: [https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/11/DFEH\\_E04P-ENG-2017Nov.pdf](https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/11/DFEH_E04P-ENG-2017Nov.pdf)

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**SB 396 -Sexual Harassment Training-New Requirements Cont.**

- ▶ Expands definition of an "individual with employment barriers" to include transgender and gender nonconforming
- ▶ Changes codified in Government Code sections 12950 and 12950.1

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**SB 295: Harassment Training Obligations for Farm Labor Contractors**

- ▶ Effective January 1, 2018
- ▶ Harassment training must be provided for each agricultural employee in language understood by employee
- ▶ Farm Labor Contractor must provide list of all materials used and number of employees trained for calendar year prior to month for renewal application as part of application process
- ▶ Civil penalty of \$100/violation



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**AB 450 – Immigrant Worker Protection Act**

- ▶ Effective January 1, 2018
- ▶ Shields workers from immigration enforcement while on the job
- ▶ Prohibits employers from voluntarily providing federal immigration enforcement agents access to a non-public portion of business without a warrant.
- ▶ Prohibits employer from allowing access to personnel records without subpoena or court order
- ▶ Prohibits employer from allowing inspection of I-9 forms without "Notice of Inspection"



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**Immigrant Worker Protection Act**

- ▶ Requires employers to notify employees of *Form I-9* inspections within 72 hours of receipt of Notice of Inspection
  - Must post notice in workplace & notice to any authorized employee representative
  - Labor Commissioner will develop template for notice
  - Must provide copy of Notice of Inspection to employees upon request



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**Immigrant Worker Protection Act**

- ▶ Employer must provide each **affected** employee and employee representative with copy of notice from immigration agency within 72 hours of receipt
  - Must also provide each **affected** employee and employee representative with notice of employer's and employee's obligations as result of inspection
  - "Affected" employee is one whose work authorization documents have been identified to have deficiencies
  - Notice hand delivered to affected employee only in workplace (or mail and email if hand delivery not possible)

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**Immigrant Worker Protection Act**

- ▶ Enforced by Labor Commissioner
- ▶ Civil penalties of \$2,000-\$5,000 for first violation & \$5,000-\$10,000 for subsequent violations
- ▶ Prohibits employer from re-verifying employment eligibility of current employee at time or in manner not required under federal law
- ▶ Civil Penalty of up to \$10,000

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**AB 450 - Immigrant Worker Protection Act Cont.**

- ▶ Conflicts with Federal law
  - Only prevents voluntary consent
- ▶ 7-11 January 9, 2018 ICE raids
  - 98 stores in 17 states and D.C., including CA and NY
  - 21 people arrested
- ▶ What to do? Call counsel.

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### What should you do to prepare for Immigrant Worker Protection Act?

- ▶ Employers should review I-9 requirements and company I-9 processes
  - <https://uscis.gov/i-9>
- ▶ Understand I-9 audit process and "Notice of Suspect Documents"
  - Notice identifies individuals whose documents appear deficient
  - Informs employers that they are employing individuals that likely lack work authorization
  - Instructs employers to terminate employees who are unable to correct deficiencies in work authorization within a reasonable time (10 days?)
- ▶ Prepare for possible workplace ICE raid

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### SB 306 - Retaliation

- ▶ Effective January 1, 2018.
- ▶ Authorizes the Labor Commissioner's office, with or without receiving a complaint, to investigate an employer when it suspects retaliation or discrimination:
  - during the course of adjudicating a wage claim,
  - during a field inspection concerning labor standards, or
  - in instances of suspected immigration-related threats
- ▶ Authorizes the Labor Commissioner or an employee to seek immediate injunctive relief from a court, upon a finding of "reasonable cause" that the law has been violated
  - This means that employers could be forced to reinstate employees pending the months or years it takes to litigate a claim of unlawful retaliation

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### Retaliation

- ▶ Provides that any temporary relief does not restrain an employer from disciplining or terminating an employee for conduct unrelated to the retaliation claim
  - Be careful to have good objective evidence that discipline is not related
- ▶ Authorizes the Labor Commissioner to issue citations directing employer to cease alleged violation & take actions necessary to remedy (reinstatement or back pay) (Labor Code 98.74)
  - Civil penalties of \$100/day up to maximum of \$20,000
  - Employer may challenge citation by administrative appeal
  - Employer must post bond

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