Folger Levin LLP

NEW LEGAL DEVELOPMENTS
FOR CALIFORNIA INDEPENDENT SCHOOLS
2019

Onward to 2019!

There were a number of significant legal developments this year that may dramatically impact schools and other employers. The longer-term consequences of the #metoo movement were reflected in major changes in the laws concerning sexual harassment, and laws in many other areas will also have significant impacts on California independent schools. Among the key changes are:

- New requirements for sexual harassment prevention training for all employees, including non-supervisors and temporary and seasonal employees such as athletic coaches and substitute teachers;
- New legal protections for employers who disclose information about harassment complaints in job references;
- A new (and dramatically different) test for determining independent contractor status that may require schools to change relationships with workers previously classified as contractors;
- Court decisions upholding the elimination of the "personal beliefs" exemption for vaccination requirements.

Please remember that the following update provides general information and is not intended to provide legal advice as to any specific factual situation. If you have questions about the application of these laws to a particular situation, please contact one of the attorneys in our Educational Organizations Practice Group listed below, who would be happy to assist you.

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DISCRIMINATION, HARASSMENT & RETALIATION

MOST EMPLOYERS NOW REQUIRED TO PROVIDE SEXUAL HARASSMENT TRAINING TO ALL EMPLOYEES

California law has required for more than a decade that employers with 50 or more employees provide sexual harassment prevention training to all supervisory employees every two years. Senate Bill 1343 expands this requirement to provide that by January 1, 2020, all California employers with five or more employees must provide two hours of classroom or "other effective interactive training" regarding sexual harassment to all supervisory employees and one hour of training to all non-supervisory employees. The training must be provided within six months of an employee's hire and every two years thereafter. For seasonal and temporary employees, the training must be provided within thirty calendar days after their hire date or within 100 hours worked, whichever occurs first. Training provided during 2019 (but not in earlier years) satisfies the new training requirements.

The new law also requires the Department of Fair Employment and Housing (DFEH) to develop online sexual harassment prevention training courses that will meet the requirements of the new training law, and to post those courses on its website. Employers are required to include a link to the DFEH training in their harassment prevention policies or distribute information on the training separately.

What does this new law mean for independent schools?

While many schools already provided harassment prevention training to all employees as a best practice, the new requirement that temporary and seasonal employees receive training within thirty days of their hire date or within 100 hours worked may be challenging for schools that rely on temporary workers to act as regular substitute teachers or athletic coaches.

NEW LAWS LIMIT CONFIDENTIALITY IN HARASSMENT SETTLEMENT AGREEMENTS

As part of a movement to make allegations of harassment public, several new California laws prohibit confidentiality provisions in agreements entered into on or after January 1, 2019.

First, Code of Civil Procedure Section 1001 prohibits settlement agreements that require claimants not to disclose facts relating to claims brought in court or before an administrative agency for sexual assault, sexual harassment, employment discrimination based on sex, or retaliation for reporting or opposing sexual harassment or discrimination. Section 1001 applies only to settlements of lawsuits and administrative claims and not pre-litigation settlements. The new law does not prohibit agreements to keep the amount of a settlement confidential. Employers should note, however, that while California law still allows parties to agree to keep the amount of a settlement confidential, the federal tax law passed in December 2017 provides that parties may not deduct the cost of the settlement of a sexual harassment claim if the settlement agreement requires the claimant to keep the amount of the settlement confidential.

Second, Civil Code Section 1670.11 prohibits any provision in a contract or settlement agreement that would limit a party's right to testify concerning alleged criminal conduct or sexual harassment by the other party.

Finally, the legislature added a new provision to the Fair Employment and Housing Act (FEHA) making it a violation of public policy for an employer to require employees, as a condition of receiving a raise or bonus or continuing employment, to waive claims under FEHA (including discrimination, harassment and retaliation claims) or to sign a non-disparagement agreement or any document that appears "to deny the employee the right to disclose information about unlawful acts in the workplace, including, but not limited to, sexual harassment." This provision, however, does not apply to "negotiated settlement agreements" that settle FEHA claims filed by the employee in court, with the DFEH or an alternative dispute resolution forum, or claims made through the employer's internal complaint process.

Employers considering settling claims of sexual assault, harassment, discrimination or retaliation should consult with legal counsel to ensure the settlement agreement complies with these new laws.

PROTECTION FOR DISCLOSING HARASSMENT COMPLAINTS IN JOB REFERENCES

Consistent with the new laws that protect victims' rights to disclose information about sexual harassment, an amendment to Civil Code 47 provides a "qualified privilege" defense to a defamation action when an employer, in response to a request for a job reference from a prospective employer, discloses information about a complaint of sexual harassment against a current or former employee that was based on "credible evidence." An employer also has a qualified privilege defense if it discloses whether it would decline to rehire a former employee based on the employer's determination that the former employee engaged in sexual harassment.

Employers should remember that this new law provides only a "qualified privilege," meaning that the privilege will be lost if the individual bringing a defamation claim can show that the employer disclosed the information with malice or that the complaint of harassment was not based on credible evidence. Also, this law gives protection to an employer who discloses a complaint against the employee seeking a reference, not the fact that a job applicant made complaints about harassment.

In light of this new law, schools seeking job references may wish to specifically ask former employers about any complaints against the job applicant of sexual harassment of either other employees or students.

HIGHER HURDLE FOR SUMMARY JUDGMENT ON HARASSMENT CLAIMS

An amendment FEHA will make it harder for employers to defeat claims of workplace harassment. Government Code Section 12923 establishes new, lower, standards for plaintiffs to withstand summary judgment on claims for unlawful workplace harassment. Under the terms of the new law, harassment cases are "rarely appropriate for disposition on

summary judgment." Among the changes in the legal standard are:

- A claimant does not need to prove that her "tangible productivity" actually declined as a result of workplace harassment; she need only prove that a reasonable person would find that harassment made it more difficult for her to do her job;
- A single incident of harassing conduct is sufficient to require a jury to decide whether a claimant was subjected to a hostile work environment if the harassing conduct unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment.
- Even "stray remarks" made by someone not involved in allegedly discriminatory decisions may be sufficient to establish unlawful discrimination.

INCREASED LIABILITY FOR HARASSMENT CLAIMS

In addition to changing the legal standards for establishing claims of harassment, the California legislature also increased the potential liability for employers. Under amendments to FEHA:

- Employers may now be potentially liable for the acts of all types of harassment (not just sexual harassment) by nonemployees (vendors, contractors, guests) if the employer, or its agents or supervisors, knew or should have known of the conduct and failed to take immediate and appropriate corrective action. Previously, employers could be liable only for sexual harassment by nonemployees.
- Employers who defeat harassment lawsuits will have an even harder time recovering their attorneys' fees. Under the new law, a court is prohibited from awarding attorneys' fees to a prevailing defendant employer "unless the court finds the action was frivolous, unreasonable, or groundless when brought or that the plaintiff continued to litigate after it clearly became so."
- And it's not just employers who face greater liability for harassment-related claims—individual employees who engage in harassment may now be liable not just for harassment but also for retaliation. Under prior law, only the employer could be liable for retaliation.

HARASSMENT BASED ON PROFESSIONAL RELATIONSHIPS

In addition to prohibiting sexual harassment by employers, California law has prohibited sexual harassment in professional relationships where one person holds himself or herself out as being able to help another person establish a business or professional relationship directly or with a third party. The law, California Civil Code Section 51.9, expressly prohibited harassment by physicians, attorneys, landlords and teachers. Reacting to publicity about the prevalence of harassment by individuals in powerful positions in government and the entertainment industry, the legislature has amended Section 51.9 to prohibit sexual harassment in a wider range of professional relationships, including harassment by lobbyists, elected officials, directors or producers, and investors.

LACTATION ACCOMMODATION

California adds additional lactation accommodation requirements effective January 1, 2019. Existing law requires that employers make reasonable efforts to provide a location other than a toilet stall for lactation accommodation, but under the new law, that location must be something other than a bathroom. The new state law also requires that the location for lactation accommodation generally should be a permanent location, but may be a temporary location if:

1. the employer is unable to provide a permanent location due to operational, financial, or space limitations;
2. the temporary location is private and free from intrusion while being used for lactation purposes; and
3. the temporary location is not used for other purposes while being used for lactation.

One general exception exists for these new requirements: If an employer can prove that it is an undue hardship to comply with these requirements, the employer may provide a location, including a bathroom, other than a toilet stall for lactation purposes.

LAWS AFFECTING STUDENTS

UPDATED IMMUNIZATION REQUIREMENTS

The California Department of Public Health has issued new regulations concerning the immunization requirements for students enrolling in private or public schools in California as well as pre-school, child care, and other pre-kindergarten facilities A summary of the requirements applicable to K-12 is available here. California schools are required to check immunization records for all new student admitted to transitional or standard kindergarten through 12th grade and for students advancing to 7th grade.

The changes affecting pre-kindergarten facilities include requiring the Varicella (chicken pox) vaccine beginning at age 15 months instead of 18 months, requiring the Hib vaccine for students who have not reached 5 years of age rather than 4 years and 6 months, and requiring a parent or guardian to submit proof of immunization within 30 days after students age into requirements.

Before 2016, families could avoid the school immunization requirements by submitting a "personal beliefs" affidavit. In response to the resurgence of illnesses like chicken pox and measles, the legislature eliminated the "personal beliefs" exemption starting in 2016. Opponents of vaccination filed a number of legal challenges to the elimination of the exemption, arguing that their constitutional rights were violated. In 2018, two different California Courts of Appeal rejected challenges to the vaccination law, finding that the elimination of the personal beliefs exemption did not violate constitutional protections. *Brown v. Smith,* 24 Cal. App. 5th 1135 (2018); *Love v. State Dept of Education*, No. C086030 (Cal. Ct. App. 3rd Dist., Nov. 20, 2018).

STATUTE OF LIMITATIONS EXTENDED FOR MANDATED REPORTER'S FAILURE TO REPORT SEXUAL ASSAULT

Under the Child Abuse and Neglect Reporting Act (CANRA), mandated reporters, including employees of private schools, are required to report suspected abuse and neglect to law enforcement or child protective services agencies. Failure to report suspected abuse or neglect is a criminal violation. Assembly Bill 2302 extends the statute of limitations for prosecuting mandated reporters for failure to report sexual assault to five years. This new law highlights the importance of ensuring that school employees understand their obligations to report suspected abuse.

STUDENT ID CARDS MUST INCLUDE SUICIDE PREVENTION INFORMATION

Starting in July 2019, public and private schools in California that serve pupils in any of the grades from 7 to 12 and that issue student identification cards must have printed on either side of the cards the telephone number of the National Suicide Prevention Lifeline (1-800-273-8255). Schools may also include on the identification cards The Crisis Text Line, which can be accessed by texting HOME to 741741, and a local suicide prevention hotline telephone number.

OPIOID FACT SHEET REQUIRED FOR STUDENT ATHLETES

Starting in 2018, private schools that offer athletic programs are required to distribute to all athletes and, for athletes under age 17, their parents, the "Opioid Fact Sheet for Patients" published by the Centers for Disease Control. Schools are required to obtain an acknowledgment of receipt from each athlete and their parents or guardians before the athlete begins practice or competition.

WAGE AND HOUR

CALIFORNIA SUPREME COURT ADOPTS NEW TEST FOR INDEPENDENT CONTRACTORS

In *Dynamex Operations West Inc. v. Superior Court,* the California Supreme Court rewrote the test for determining whether a worker is an "employee" or an "independent contractor" for purposes of California wage-and-hour claims under the Industrial Welfare Commission Wage Orders, the regulations governing payment of wages in California.

Dynamex involved drivers for a delivery company who had worked as employees before being reclassified by the company as independent contractors. The drivers then filed a class action lawsuit claiming that they were improperly classified, and the California Supreme Court addressed the question of what test to apply for claims alleging violations of the Wage Orders. The Court's ruling changes the longstanding "control test" standard applied by the Labor Commissioner and courts for many years and instead institutes a brand-new test with huge impacts for California employers.

Under the new test (called the "ABC" test), an individual will be presumed to be an employee (rather than an independent contractor), unless the hiring business can satisfy each element of a three-factor "ABC" test:

A. That the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; and

B. That the worker performs work that is outside the usual course of the hiring entity's business; and

C. That the worker is customarily engaged in an independently established trade, occupation, or

business of the same nature as the work performed for the hiring entity.

To meet prong (A), the hiring entity may not either exercise control or retain the right to exercise control over the worker. This prong is the most like the existing "control" test.

For prong (B), the worker may not be performing work that is a usual part of the hiring entity's business. In *Dynamex*, while the Supreme Court remanded the case for the trial court to decide this issue, it seemed clear that the employer could not prove this prong of the test; Dynamex was engaged in a delivery service business, so the drivers who made deliveries for defendant Dynamex were performing the same work being carried on in the usual course of the employer's business The Court cited as examples of workers performing work within the usual course of an employer's business entertainers hired by a resort to entertain its guests and art teachers hired by an art museum to teach art to its members. In contrast, a retail store bringing in a plumber to fix a leak in the store would be able to satisfy prong (B) of the test.

Finally, as to prong (C), the hiring entity must show that the worker actually is engaged in an independently established business, with evidence (such as marketing materials) that the independent business is in fact operating, not merely an agreement that says the worker may provide services to others.

What should schools do?

This sweeping new decision will have major implications on the classification of workers under California law. California schools should carefully review their classification of independent contractors to ensure that they meet the new ABC test. Factor "B" may be a particular hurdle for anyone working at a school who is involved in providing instruction to students, whether or not part of the regular school day or the regular curriculum.

DE MINIMIS RULE REJECTED

Under federal law's longstanding *de minimis* rule, employers may be excused from paying employees for trivial amounts of time that would be difficult for an employer to record. The California Supreme Court's decision in *Troester v. Starbucks Corp.*, 5 Cal. 5th 829 (2018), however, rejected the application of the *de minimis* rule to an employee's regularly reoccurring activities, finding that California statutes and wage orders do not incorporate the federal rule or an equivalent state rule.

In *Troester*, the employer argued that the *de minimis* rule should defeat an employee's claim that he was owed compensation for 4 to 10 minutes of work he performed each day closing the store after clocking out. This work included initiating a store closing procedure on a computer separate from the one on which he clocked out, activating the store's alarm, exiting, and locking the door.

The Court held that the California Labor Code and wage orders do not incorporate the federal *de minimis* rule and do not incorporate a comparable rule under state law applicable to the regularly occurring work at issue, and thus the time was compensable and should have been paid by Starbucks. At the same time, the Court limited its holding to regular and reoccurring small amounts of time, declining to decide whether there may be any set of facts involving minute or irregular work periods that would be unreasonable to record and therefore non-compensable.

In arriving at its conclusion, the Court rejected longstanding California Department of Labor Standards Enforcement (DLSE) guidance that had adopted the federal rule, reminding employers that the DLSE's Enforcement Manual is not binding on courts, even if it may sometimes be persuasive.

What should employers do?

Employers should ensure that employees record all time worked. The Court noted that employers, aided by technological advances, can devise ways to ensure that even small or irregular amounts of work are recorded. This can include restructuring work, for example, by having employees clock out only after completing all work tasks. Where work cannot easily be tracked, adopting means to estimate work time can be an acceptable option.

OVERTIME ON FLAT-SUM BONUSES

Under both federal and state law, employers must pay non-exempt employees overtime (as well as state sick leave and meal and rest break premiums) based on an employee's "regular rate" of pay. In addition to an employee's base rate of pay, the regular rate incorporates additional forms of compensation, such as non-discretionary bonuses. However, as illustrated by the California Supreme Court's decision in *Alvarado v. Dart Container Corp.*, 4 Cal. 5th 542 (2018), the regular rate under state law is not always calculated in the same manner as under federal law.

The employer in *Alvarado* paid employees who worked on the weekend an attendance bonus of $15 for each weekend day an employee worked. Although the employer did include this non-discretionary bonus in each employee's regular rate for calculating overtime, the question addressed by the Court was, for purposes of calculating the regular rate, whether the bonus was attributable to all hours worked, or only to non-overtime hours worked. Attributing the bonus only to non-overtime hours worked would result in higher overtime payments to non-exempt employees each workweek.

The employer had calculated overtime on the bonus pursuant to the federal rule of dividing the bonus by all hours worked in the pay period to determine the hourly value of the bonus, and then multiplying that hourly value by 0.5 to calculate overtime, consistent with federal law and an existing California Court of Appeal decision adopting that formula. The plaintiff argued that the hourly value of the bonus should be based only on non-overtime hours worked by the employee (resulting in a higher base for the overtime), and that the bonus hourly rate should be multiplied by 1.5 rather than 0.5 to calculate overtime because the employer owes both base compensation and the overtime premium on the flat-sum bonus. While the difference per employee each pay period using the plaintiff's method was not substantial, the cumulative amount for all employees plus penalties was significant.

The California Supreme Court agreed with the plaintiff, determining that the flat-sum bonus compensated an employee only for non-overtime hours worked. Therefore, the Court held that the regular rate for overtime on a flat-sum bonus must be determined by first dividing the bonus amount by the non-overtime hours the employee worked during the workweek and then multiplying the result by 1.5 (for time-and-a-half overtime)

What should schools do?

Schools should review compensation they provide non-exempt employees beyond the employees' base wages to determine whether that extra compensation must be included in calculating overtime and, if so, how overtime on the extra compensation should be calculated. For example, "stipends" for afterschool activities or premiums for attending weekend events may need to be included in calculating overtime for the workweek.

US DOL ISSUES NEW GUIDANCE ON COACHES' EXEMPT STATUS

In January 2018, the U.S. Department of Labor (DOL) re-issued an opinion letter addressing whether school athletic coaches may be considered exempt employees under the federal Fair Labor Standards Act. DOL Opinion Letter FLSA 2018-6 The DOL concluded that coaches whose primary duty involves teaching, instructing or imparting knowledge to students may meet the duties requirement for exempt status. Coaches whose primary duties are not related to teaching—such as administrative or clerical duties—would not be exempt under the DOL regulations.

While coaches do not need to meet any minimum educational or salary requirements to be exempt as teachers under federal law, California law does require that teachers receive a minimum salary and have at least a bachelor's degree to qualify under the exemption for K-12 teachers in private schools. In the past, the minimum salary requirement made it generally impractical for schools to classify coaches as exempt but with a 2017 law allowing schools to prorate the minimum salary for part-time exempt teachers, more coaches may meet the salary requirement.

NEW TEST FOR UNPAID INTERNS AND STUDENTS

The DOL has dropped its prior 6-factor test for unpaid intern status, and instead adopted the "primary beneficiary test" used by several federal courts of appeals to determine whether an intern or student is an employee for purposes of federal wage-and-hour law. This new DOL test differs from the test used by the California DLSE, and California employers must comply with both the federal and California standards.

Under the primary beneficiary test, the economic reality of the employer-intern relationship is examined to determine which—the employer or the intern—is the primary beneficiary of the relationship, using the following factors:

4. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee.
5. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
6. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
7. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
8. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
9. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
10. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

This test is factually intensive, and no factor is determinative.

What should employers do?

While the primary beneficiary test incorporates a number of the factors that were in the DOL's prior 6-factor test, the 6-factor test (used in California) was stricter, and required that all 6 factors be present to classify an individual as an unpaid intern. As it stands, the tests used by the DOL and DLSE are now different. Unless and until the DLSE adopts the primary beneficiary test, California employers should examine both tests, and classify interns as employees if that would be the result under either one of the tests.

CALIFORNIA MINIMUM WAGE INCREASE

Effective January 1, 2019, the statewide minimum wage will increase to $11.00/hour for employers with 25 or fewer employees, and to $12.00/hour for employers with 26 or more employees.

Because the minimum salary for most exempt employees in California (other than teachers) is two times the minimum wage, the increase in the minimum wage also will increase the minimum annual salary for most exempt employees to $45,760 for employers with 25 or fewer employees, and to $49,920 for employers with 26 or more employees.

For exempt teachers, the minimum salary is based on the salaries of public school teachers both in the area a school is located and statewide. Schools should review changes in public school salaries to determine the minimum salary for exempt teachers.

Note that many local jurisdictions have adopted their own minimum wage ordinances which require employers to pay a higher minimum wage to non-exempt employees. The local minimum wage requirements do not affect the minimum salary requirement for exempt employees.

DLSE ISSUES NEW INTERPRETATION OF SPLIT-SHIFT PREMIUM REQUIREMENT

California wage orders require non-exempt employees to be paid a split-shift premium when their shift includes an unpaid break between work periods which is longer than a *bona fide* meal period, is not a rest or meal period, and is for the benefit of the employer. The split-shift premium due is equal to one hour of pay at the minimum wage; however, any amount that an employee earns over the minimum wage during the workday is credited towards the split-shift premium. For schools, split shift premiums may be required for employees

such as crossing guards or "carpool monitors" who work only at the beginning and end of each school day.

On its website, the DLSE now expresses the opinion that the split-shift premium should be calculated using the higher of the state or local minimum wage. While this opinion does not have the effect of a formally adopted regulation and may exceed the DLSE's authority, it does indicate how the DLSE may rule in administrative hearings.

What should employers do?

It is not clear whether the DLSE's new approach will be adopted by courts, but employers may wish to consider the DLSE guidance and use the higher of the state or local minimum wage for purposes of calculating split-shift premiums.

TIME COMMUTING IN EMPLOYER VEHICLE NOT COMPENSABLE

Under California wage orders, employers must pay employees for all hours worked. The wage orders define "hours worked" as time when the employee is subject to the control of the employer or time the employee is "suffered or permitted" to work.

Under both state and federal law, time spent commuting to and from their primary work location is generally not considered hours worked. Plaintiffs in *Hernandez v. Pacific Bell Telephone Co.*, 29 Cal. App. 5th 131 (2018), however, alleged that their optional use of company vehicles to commute between their initial and final worksites and their homes made their commute time compensable hours worked. The plaintiffs attempted to further bolster their claims with the facts that they were required to transport company materials and equipment in the company vehicle and were restricted in what they could do with the vehicle during the commute.

The appeals court found that the use of company vehicles did not make commuting time compensable, in part because employees had the option to drive their own cars to the employer's worksite to pick up the company vehicles. The plaintiffs cited various cases where courts had found that time spent driving when delivering equipment was compensable time. However, the court distinguished between the incidental transport of equipment necessary to perform an employee's job, which requires comparably little effort as compared to the job itself, and the transport of equipment as a job. The court held that the employees' commute time was not compensable simply because they transported equipment to perform their job once they arrived at a worksite.

HIRING

CALIFORNIA PROHIBITION ON SALARY INQUIRIES

Since January 2018, California employers have been prohibited from inquiring about a job applicant's prior salary history or considering salary history in determining whether to hire an applicant or how much to pay the applicant. That law was designed to reduce perpetuating historical gender-based wage disparities. In response to ambiguities in the law, the law now has been amended to clarify that:

- Employers may ask about an applicant's salary expectations for the position being applied for;
- Only external applicants (not current employees) are entitled to a pay scale upon request, only after completing an initial interview, and the pay scale provided only needs to include salary or hourly wage ranges.
- An employer may make a compensation decision based on a current employee's existing salary, so long as any resuilting wage differential is justified by factors described in the law, incldluing a *bona fide* factor other than sex.

NEW LIMITS ON CONSIDERING DISMISSED CONVICTIONS

With certain exceptions, Labor Code Section 432.7 generally prohibits employers from seeking information about, or considering in making employment decisions, an applicant's convictions that have been dismissed or sealed. Under an amendment to Section 432.7 effective January 1, 2019, employers are not prohibited from seeking information about a particular conviction—from an applicant or other source—when:

1. The employer is required by law to obtain information regarding the particular conviction of the applicant, regardless of whether that conviction has been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation.
2. The applicant would be required to possess or use a firearm in the course of his or her employment.
3. An individual with that particular conviction is prohibited by law from holding the position sought by the applicant, regardless of whether that conviction has been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation.
4. The employer is prohibited by law from hiring an applicant who has that particular conviction, regardless of whether that conviction has been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation.

What does this new law mean for independent schools?

California private schools are barred from employing individuals who have been convicted of certain enumerated crimes, including violent and serious felonies and crimes requiring registration as a sex offender, even if those crimes have been judicially dismissed. The amendment to Section 432.7 does not affect a private school's ability to employ individuals convicted of such crimes. Where an applicant has been convicted of a crime that does not bar employment in a private school, however, a school may be prohibited from considering the conviction if it has been dismissed as described in Section 432.7.

NEW NOTICE REQUIRED FOR BACKGROUND CHECKS

Employers that obtain consumer reports, such as background or credit checks, on applicants or employees generally are required to provide a copy of the federal "Summary of Your Rights Under the Fair Credit Reporting Act" to the applicant or employee (and in California, also a California notice as well). In September, the federal Consumer Financial Protection Bureau released an updated version of this disclosure notice as a result of changes in the law requiring notice that a consumer can request a security freeze of their consumer credit report.

Use of the updated federal Summary of Your Rights was required as of September 21, 2018. It can be found here.

Employers that use third-party companies to provide their consumer reports should confirm that those companies are using the new notice.

Note: Schools do not need to provide this notice unless they require background checks in addition to the Livescan criminal records check.

IMMIGRATION

2018 CALIFORNIA IMMIGRATION LAW PARTIALLY ENJOINED

Effective January 1, 2018, the California Immigrant Worker Protection Act (AB 450) imposed various prohibitions and requirements on employers regarding worksite inspections by federal immigration enforcement agents. However, some provisions of the new law now have been put on hold after litigation initiated by the Trump administration.

Among other restrictions, the law prohibited employers from providing "voluntary consent" to the entry of immigration enforcement agents to "any nonpublic areas of a place of labor." Likewise, employers were prohibited from "provid[ing] voluntary consent to an immigration enforcement agent to access, review, or obtain the employer's employee records." Under AB 450, employers were required to confirm the existence of a valid, judicial warrant before assisting federal immigration authorities. Violators of the law could be fined up to $10,000 for repeated offenses.

Even before the suit by the federal government, interpretation of AB 450 caused confusion. In February, the Labor Commissioner and Attorney General's office issued guidance on the interpretation and enforcement of the controversial new law, guidance which is now under review.

The federal government then filed suit early this year to prevent the implementation of AB 450. The federal district court, in ruling on a preliminary injunction, sided in part with the Trump Administration. The federal court enjoined California from enforcing nearly all provisions of AB 450 as to private employers, except for the provisions in the law requiring employers to provide employees notice of inspections.

Practically speaking, this means that the most controversial parts of the law - imposing penalties for voluntary cooperation with immigration authorities and employee "reverification"-- are on hold for the foreseeable future. While employers must still notify employees in advance of a federal inspection of I-9's or other employment records, they need not be concerned about correctly determining whether immigration authorities have provided the appropriate type of warrant if attempting to search their premises or access records. That said, private employers may still elect not to voluntarily cooperate with immigration officials, and may opt to request to see a judicial warrant before providing this type of access to immigration officials.

The preliminary injunction ruling is up on appeal, and a final ruling on the merits in this case is not anticipated for some time.

USCIS RESTARTS IMMIGRATION "NO-MATCH" PROGRAM

Suspended since 2012, this year the Social Security Administration (SSA) announced that it will be restarting in Spring 2019 its practice of issuing so-called "No-Match" notification letters. Formally called "Employer Correction Requests," the notices inform employers when there is a mismatch between information on an employee's W-4 and the SSA's records. If employers receive such a notice, they should investigate and contact legal counsel. The mismatch could arise for innocuous reasons, such as a clerical error, so it is important that no corrective action be taken against an employee without further inquiry.

SAN FRANCISCO ORDINANCES

BAN-THE-BOX LAW AMENDED TO ALIGN WITH STATE LAW

Since January 1, 2018, California law has prohibited employers with five or more employees from asking for criminal history information on employment applications and from inquiring about or considering criminal history at any time before a conditional offer of employment is made. The California law also limits what convictions may be considered and requires employers to conduct an individualized assessment of a candidate's criminal history and the relationship to the specific duties of the job being applied for before denying a candidate employment. San Francisco has amended its own background check ordinance (the Fair Chance Ordinance or FCO), to make it consistent in most respects with California law. The FCO has also been amended to increase penalties for violations and to clarify procedures for bringing complaints.

Because California private schools are required by state law to conduct a Livescan background check on all applicants who are seriously being considered for employment and to deny employment if a candidate has been convicted of certain crimes, conflicting requirements in the California and San Francisco background check laws do not apply to schools. For this reason, California private schools are not required to wait until after a conditional offer is made to conduct a background check nor are private schools required to conduct an individualized assessment as to convictions that bar private school employment under state law.

What San Francisco private schools should do

Although subject to different background check requirements than outlined in the California and San Francisco background checks laws, schools should take this opportunity to review their background check processes to ensure that they evaluate the results of Livescan background checks before an employee begins employment. If a Livescan report shows a conviction for a crime that bars employment in a private school, the applicant may not be employed regardless of the time that has passed since the conviction or the candidate's rehabilitation efforts. If the Livescan report shows convictions that do not prohibit an applicant from working at a school, the school should conduct an individualized assessment to determine whether the applicant should be employed in light of the conviction, considering the nature of the conviction, evidence of rehabilitation and the job for which the applicant is applying.

MINIMUM WAGE INCREASE

Effective July 1, 2018, the San Francisco minimum wage increased to $15.00 per hour for work performed in San Francisco. On July 1, 2019 and each year thereafter, the minimum wage rate will be adjusted based on the annual increase in the Consumer Price Index.

Employers that have contracts with the City and County of San Francisco are subject to a higher minimum wage under San Francisco's Minimum Compensation Ordinance (MCO). As of November 11, 2018, private employers who are city contractors must pay their employees who perform any work funded (in whole or in part) under the contract with the City, or on a project funded under the contract, a minimum wage of $17.00 per hour; non-profit organization may pay no less than the San Francisco minimum wage of $15.00 per hour.

NEW RATES FOR HEALTH CARE SECURITY ORDINANCE

As of January 1, 2019, under SF's Health Care Security Ordinance, the health care expenditure rate will be $2.93 per hour for large businesses (100+ employees total) and $1.95 per hour for medium-sized businesses (20-99 employees total) and non-profits with 50-99 employees.

The minimum rate for the exemption for managers, supervisors and confidential employees will be an annual salary of $100,796 or $48.46/hour.

NEW RULES INTERPRET THE SAN FRANCISCO PAID SICK LEAVE ORDINANCE

The San Francisco Office of Labor Standards Enforcement (OLSE) published new Rules Interpreting the Paid Sick Leave Ordinance on June 7, 2018. The San Francisco Paid Sick Leave Ordinance (PSLO) requires employers to provide paid sick leave to all employees (including temporary and part-time employees) who perform work in San Francisco. These new rules predominately mirror the OLSE's prior 2007 rules, but clarify a few areas for employers.

- Notification Requirements: Under the prior 2007 rules, policies that required employees to give "reasonable notification" for foreseeable absences, and policies that required notification "as soon as practicable" for unforeseeable absences were "in principle reasonable and thus presumptively lawful." Under the new rules, these policies are now "presumptively reasonable." Accordingly, if the OLSE contests an employer's notification requirements, these rules appear to shift the burden to the OLSE (or an employee) to show that the policy or practice is unreasonable.

- Regular Rate of Pay: Just as California paid sick time is calculated at "the regular rate of pay" for non-exempt employees (rather than the straight time rate), the new rules clarify that sick time under the PLSO must be paid at the regular rate of pay as defined by state law.

- Enforcement: The original Rules did not detail how OLSE would investigate and resolve disputes. In general, the OLSE has the authority to conduct investigations, monitor compliance, and obtain restitution and penalties for PSLO violations, which means that an OLSE representative may review employer records, speak with employees, and conduct audits. The rules now address how the OLSE will calculate how much an employer owes for a non-compliant sick leave policy, inadequate records, or for not allowing the OLSE access to records. The rules also set short timelines for the employer to respond to an OLSE Notice of Preliminary Determination (NOPD).

Although the rules do not represent major changes to the PSLO, San Francisco employers should take this opportunity to review their paid sick leave policy to ensure the policy complies with the PSLO.

SALARY HISTORY ORDINANCE

The San Francisco Consideration of Salary History Ordinance, also known as the Parity in Pay Ordinance, took effect on July 1, 2018. Just as required by California law (which took effect on January 1, 2018), the San Francisco ordinance prohibits employers from (1) asking applicants about their current or past salary or (2) disclosing a current or former employee's salary history without that employee's authorization unless the salary history is publicly available.

Critically, San Francisco employers must display on a 8.5" x 14" paper the "Employer Consideration of Salary History Poster" at each workplace or job site.