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## Endless Summer: California Municipalities Continue to Enact A Variety of Employment Laws

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Beyond the labor and employment developments taking place at the state level in California, employers must keep an eye on breaking news at the local level as well.<sup>1</sup> In recent years, municipalities up and down the coast have passed ordinances affecting employers, such as wage increases and scheduling ordinances. This article highlights some of the gnarliest laws that have been enacted, or are currently in the pipeline, in several major California cities.

### “Ban-the-Box”

California state law continues to evolve concerning “ban-the-box” laws, which, generally speaking, restrict employers from asking about or considering an applicant’s criminal history in hiring decisions. Indeed, new state regulations kicked in on July 1, 2017 concerning the use of criminal history information.<sup>2</sup>

In the meantime, however, the City of Los Angeles enacted its Fair Chance Initiative, which took effect on January 1, 2017. Under the Fair Chance Initiative, employers with ten or more employees located or doing business in the City of Los Angeles are prohibited from inquiring about or requiring the disclosure of an applicant’s criminal history, unless and until a conditional job offer has been made. Moreover, an employer cannot take an adverse action against an applicant to whom a conditional offer has been made, based on his or her criminal history, unless the employer performs a written assessment that effectively links the specific aspects of that criminal history with risks inherent in the duties of the job sought. Even if the employer complies with these requirements, before taking any adverse action, an employer must provide the applicant with a “fair chance

<sup>1</sup> For a summary of key bills presently pending before the state legislature, see Bruce Sarchet et al., [Golden State Worriers: California Labor & Employment Bills to Watch](#), Littler ASAP (June 12, 2017).

<sup>2</sup> See, e.g., Jennifer Mora, [California Employers Are Subject to New Requirements When Using Criminal History Information](#), Littler Insight (Feb. 21, 2017) (summarizing new regulations effective July 1, 2017).

process,” including written notification of the proposed adverse action, a copy of the written assessment, and any other information or documentation supporting the proposed adverse action. During this process, the applicant must be permitted to contribute information that should be considered in the employer’s assessment.<sup>3</sup>

San Francisco made waves back in 2014, with the implementation of its ground-breaking Fair Chance Ordinance. The Fair Chance Ordinance applies to employers who are located or do business in San Francisco with 20 or more employees worldwide. Covered employers may not inquire about, require disclosure of, or take adverse action based on various types of criminal history. For example, such employers may not consider: arrests that did not result in conviction, juvenile convictions, convictions more than seven years old, or information related to offenses other than felonies or misdemeanors, such as infractions. The ordinance prohibits employers from asking about an applicant’s conviction history or unresolved arrests until after the employer has conducted a live interview with the applicant, or has made a conditional employment offer. The same is true for criminal background checks, which are subject to an individualized assessment process similar to the process in Los Angeles’ Fair Chance Initiative.<sup>4</sup>

## Lactation Accommodation

San Francisco blazed another trail last month, as the Board of Supervisors passed a lactation accommodation ordinance. On June 30, 2017, Mayor Lee approved the ordinance, which requires employers to offer breaks to employees for lactation purposes and to adopt policies setting forth how employees may request accommodations. Under the ordinance, employers must also provide a location for lactation that is private and free from intrusion, other than a bathroom. The law goes beyond existing state law because it specifies that the lactation location must be safe and clean, have a surface suitable for holding a breast pump and other personal items, include a place to sit, and have access to electricity. Of note, the ordinance does not require an employer to construct an appropriate room, remove retail space, or incur other undue hardships in making such accommodation.<sup>5</sup>

## Paid Time Off

Over the last few years, California municipalities have been especially industrious when it comes to mandating paid time off. At present, seven localities have adopted their own paid sick leave laws—which apply to private employers in addition to the requirements of the state’s Healthy Workplaces, Healthy Families Act (HWHFA).

In Northern California, for example, paid sick leave laws are on the books in Berkeley (effective October 1, 2017), Emeryville, Oakland, and San Francisco.<sup>6</sup> And to the South, employees in Los Angeles, San Diego, and Santa Monica are entitled to paid sick time.<sup>7</sup> Some localities, including Los Angeles and Long Beach, also have ordinances applicable specifically to hotel employers.<sup>8</sup>

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3 L.A., Cal., Mun. Code §§ 189.01 *et seq.*; see Jennifer Mora et al., *City of Los Angeles Mayor to Sign Long-Awaited ‘Ban the Box’ Law*, Littler Insight (Dec. 9, 2016).

4 S.F., Cal., Police Code §§ 4901 to 4919; see Rod Fliegel & Jennifer Mora, *San Francisco’s OLSE Issues ‘FAQs’ On Fair Chance Ordinance*, Littler Insight (Dec. 17, 2014).

5 S.F., Cal., Police Code §§ 33001.3 *et seq.* The ordinance itself is available at <https://sfgovlegistar.com/Viewashx?M=F&ID=5293283&GUID=D2B32479-4B90-4468-B365-BADBIF5AC8DC>.

6 Adam Fiss & Sebastian Chilco, *Berkeley Enacts California’s Newest Local Paid Sick Leave Law*, Littler Insight (Sept. 6, 2016); see Berkeley, Cal., Mun. Code §§ 13.100.030 *et seq.*; Emeryville, Cal., Mun. Code §§ 5-37.01 *et seq.*; Oakland, Cal., Mun. Code §§ 5.92.010 *et seq.*; S.F., Cal., Admin. Code §§ 12W.1 *et seq.* In 2016, San Francisco enacted amendments to its paid sick leave law. Those amendments took effect on January 1, 2017. San Francisco Ordinance No. 160034 (Feb. 23, 2016).

7 See L.A., Cal., Mun. Code §§ 187.01 *et seq.*; San Diego, Cal., Mun. Code §§ 39.0101 *et seq.*; Santa Monica, Cal., Mun. Code §§ 4.62.010 *et seq.*

8 See L.A., Cal., Mun. Code §§ 186.00 *et seq.*; Long Beach, Cal., Mun. Code §§ 5.48.010 *et seq.*

While differing in various details, these ordinances share some common characteristics. Generally speaking, for example, most local paid leave laws cover all employers with employees working within the city's geographic boundaries. To be eligible for leave, an employee typically must work at least two hours per week in the particular city. On the whole, these ordinances allow employees to accrue one hour of paid time off per 30 hours of work, as under the state HWHFA. Some, but not all, of these municipal ordinances authorize employees to use paid time off to obtain services (legal, medical, psychological, social, etc.) to assist victims of domestic violence, sexual assault, or stalking. But boiled down, the purpose of these local laws is to extend paid leave benefits to employees who might not be entitled to leave under the HWHFA.

San Francisco additionally enacted a paid parental leave (SFPPL) ordinance, which requires private employers (with at least one employee in the city, and more than 20 employees overall) to provide supplemental compensation to employees who use California paid family leave (FTDL) benefits for new child bonding. Along with other requirements, to be covered by this “baby bonding” ordinance an employee must perform at least eight hours of work per week for an employer in San Francisco, and at least 40% of the employee's total weekly hours for the employer must be worked in the city. The SFPPL became operative on January 1, 2017 for employers with 50 or more employees and on July 1, 2017 for employers with 35 or more employees. The ordinance takes effect for smaller employers on January 1, 2018.<sup>9</sup>

### Predictive Scheduling and Opportunity to Work

As discussed in Littler's recent podcast,<sup>10</sup> three cities in the Bay Area—Emeryville, San Francisco, and San Jose—have approved predictive scheduling and/or “opportunity to work” ordinances.

This trend began in San Francisco, which rolled out the Family Friendly Workplace Ordinance in 2014. This ordinance prohibits caregiver discrimination and gives employees a right to request “flexible” or “predictable working arrangements” to assist with caregiving responsibilities for children, family members with serious health conditions, or parents 65 years or older.<sup>11</sup>

San Francisco dove deeper the following year. The Retail Workers' Bill of Rights (RWBOR), effective July 3, 2015, applies to any person or entity that owns or operates a “formula retail establishment” (*i.e.*, a chain) with 20 or more employees in the city. Under the RWBOR, employers must provide new employees, prior to the start of employment, with a written “good faith estimate” of the employee's expected minimum number of scheduled shifts per month, as well as the days and hours of those shifts. Moreover, employers are required to give employees two weeks' advance notice of their schedules. If an employer initiates a change to that schedule, such as a cancelled shift, it must compensate the affected employee with up to four hours of “predictability pay.” If the employer's business changes ownership, the new owners must retain the existing employees (excluding the supervisory, managerial, or confidential employees) for at least 90 days.<sup>12</sup>

Among other things, the San Francisco RWBOR also includes an “opportunity to work” provision. It mandates that employers must first offer, in writing, any additional hours of work to current part-time employees before hiring new employees or using subcontractors (including janitorial or security services contractors), temporary services, or a staffing agency. An employee is entitled to this opportunity only if

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9 See Michelle Barrett-Falconer & Sebastian Chilco, [Local and State Developments Impact San Francisco Paid Parental Leave Obligations](#), Littler Insight (Feb. 13, 2017); Michelle Barrett-Falconer & Sebastian Chilco, [Bonding by the Bay: San Francisco Mandates Paid Parental Leave](#), Littler Insight (Apr. 21, 2016); Michelle Barrett-Falconer & Sebastian Chilco, [San Francisco Amends Paid Parental Leave Law to Adapt to State Law Changes and to Clarify Requirements](#), Littler Insight (Sept. 21, 2016). Additional information is available from the San Francisco Office of Labor Standards Enforcement (OLSE), including Frequently Asked Questions, an employer guide, a workplace poster and other resources, at <http://sfgov.org/olse/paid-parental-leave-ordinance>.

10 See Bruce Sarchet & Corinn Jackson, [Employment Law Goes Local – California Municipalities Regulate the Hiring and Scheduling of Workers](#), WPI Podcast (June 30, 2017).

11 S.F., Cal., Admin. Code §§ 12Z.1 *et seq.* More information is available from the OLSE, including Frequently Asked Questions and other resources, at <http://sfgov.org/olse/family-friendly-workplace-ordinance-ffwo>.

12 S.F., Cal., Police Code §§ 3300F.1 *et seq.*, §§ 3300G.1 *et seq.*

qualified to perform the additional work and if the work is similar to work the current employee has already performed. Employers are not required to offer additional hours of work that would cause an employee to work more than 35 hours in the workweek.

Emeryville was next to dip its toe in the secure scheduling waters. That city's new Fair Workweek Ordinance took effect on July 1, 2017. It imposes scheduling and opportunity-to-work requirements on certain fast food and retail employers that have 56 or more employees globally. Under the Fair Workweek Ordinance, employers must provide a good faith estimate of a new employee's work schedule prior to or at the commencement of employment and must entertain an employee's request to modify that schedule. Employees have a right to request a flexible working arrangement, receive their work schedules two weeks in advance, receive predictability pay for changes to those schedules, and at least 11 hours of rest between shifts. Like San Francisco's RWBOR, the Emeryville ordinance also obligates employers to offer additional work hours to current part-time employees before hiring new workers.

Emeryville recently promulgated draft regulations implementing the Fair Workweek Ordinance. The proposed regulations purport to clarify how employers can comply, including how they should calculate coverage and determine when predictability pay is or is not required. Comments on the draft regulations may be submitted through July 31, 2017.<sup>13</sup>

Meanwhile, down I-880, San Jose voters passed an opportunity-to-work initiative, known as Measure E, in last year's election. Measure E applies generally to San Jose employers with 35 or more employees but includes both a small business and a hardship exemption. Measure E obligates employers to offer additional hours of work to existing employees who, in the employer's good faith and reasonable judgment, have the skills and experience to perform the work. Employees are eligible for consideration if they perform at least two hours of work per calendar week for the employer and are either entitled to the state minimum wage or are Welfare-to-Work participants. Measure E became operative on March 13, 2017.<sup>14</sup>

## Salary History

Although the California state legislature is weighing a salary history bill (AB 168), San Francisco is poised to beat it to the punch. The San Francisco Board of Supervisors approved a salary history measure (Ordinance 170450) on June 27, 2017. This measure would amend the Police and Administrative Codes to ban employers, including city contractors and subcontractors, from asking applicants about their current or past salary, or considering an applicant's salary information in determining whether to hire an applicant or what salary to offer. The ordinance would also prohibit employers from disclosing a current or former employee's salary history without that employee's authorization, unless the salary history is publicly available. This ordinance must pass a second reading on July 11, 2017 to move forward. If enacted, the new requirements would take effect July 1, 2018.<sup>15</sup>

## Wage Increases & Related Duties

California law permits local governments to regulate employees' compensation. Many local jurisdictions have used this authority to establish minimum wage rates for employers doing construction work or providing services to the municipality. Lately, however, an increasing number of municipalities have used this authority to establish broader minimum wage requirements.

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<sup>13</sup> Emeryville, Cal., Mun. Code §§ 5-39.01 *et seq.* For more information on the Emeryville ordinance, and to access the proposed regulations, visit <http://www.ci.emeryville.ca.us/1136/Fair-Workweek-Ordinance>.

<sup>14</sup> San Jose, Cal., Mun. Code §§ 4.101.010 *et seq.* For more information on the San Jose ordinance, visit <https://www.sanjoseca.gov/index.aspx?NID=5360>.

<sup>15</sup> Details about the ordinance and its progress are available at <https://sfgovlegistar.com/LegislationDetail.aspx?ID=3015043&GUID=DAFA9BFB-6960-40A3-81C7-670DD91444BA&Options=&Search=>

Such ordinances exist, for example in Berkeley, Cupertino, El Cerrito, Emeryville, Los Altos, Los Angeles (city and county), Malibu, Milpitas, Mountain View, Oakland, Palo Alto, Pasadena, Richmond, San Diego, San Francisco, San Jose, San Leandro, San Mateo, Santa Clara, Santa Monica, and Sunnyvale. Local wage increases typically take effect annually, on either January 1 or July 1. These local ordinances often include their own notice, record-keeping, and wage statement requirements as well, complicating the compliance burden for employers.

In the City of Los Angeles, for example, the minimum wage rose on July 1, 2017 to \$10.50 per hour for smaller employers (with 25 or fewer employees). The rate applicable to larger employers (with 26 or more employees) is now \$12.00.<sup>16</sup> Pursuant to a 2016 amendment of the wage ordinance, additional increases are scheduled through July 1, 2021, at which point the minimum wage will have reached \$15.00 for all employers. Beginning in 2022, the minimum wage will increase based on the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W) for the Los Angeles metropolitan area.<sup>17</sup>

The City of Los Angeles ordinance also provides that employees aged 14 through 17 must be paid at least 85% of the mandated minimum wage during the first 160 days of their employment. Thereafter, they must be paid the full applicable minimum wage. Of particular interest to restaurant and other hospitality employers, the ordinance bans the use of tip credits. Employers also may not use the cost of medical benefits provided to an employee to offset the minimum wage requirements.<sup>18</sup>

## Conclusion

While some states prohibit municipalities from enacting local ordinances on these topics, the Golden State shows no interest in taming the tide of municipal activity. It is important that California employers remain compliant with the law in each locality in which they operate. We will continue to monitor and report significant developments at the statewide and local levels.

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<sup>16</sup> L.A., Cal., Mun. Code § 187.02.

<sup>17</sup> See Diane Kimberlin & Shiva Shirazi Davoudian, *Copycat Ordinance: Los Angeles County to Adopt \$15 Minimum Wage Similar to Recent Los Angeles Citywide Ordinance*, Littler ASAP (July 29, 2015); Shiva Shirazi Davoudian, *The Trend Continues: Los Angeles City Council Tentatively Approves Citywide \$15 Minimum Wage and Proposes Sick Leave Ordinance*, Littler ASAP (May 20, 2015).

<sup>18</sup> L.A., Cal., Office of Wage Standards, Rules and Regulations Implementing the Minimum Wage Ordinance, Regulation #2: Employer Requirements (rev. June 20, 2017), available at <http://wages.lacity.org/sites/g/files/wph471/f/MWO-RulesandRegulations-2017-06.pdf>.

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