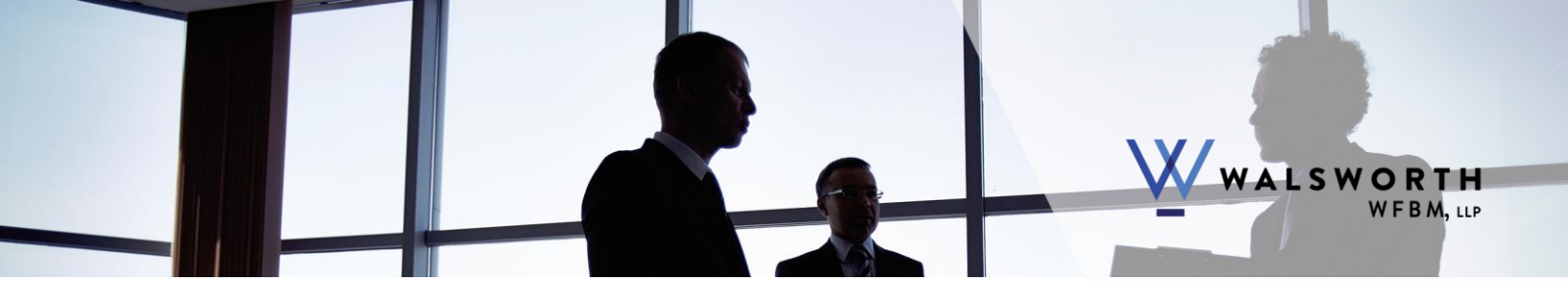


Employment Litigation

2017 Year-End Update

Walsworth is pleased to provide you with its year-end update regarding employment litigation.

Employers Cannot Inquire About an Applicant's Criminal History Until the Employer Has Made a Conditional Offer of Employment

Pursuant to newly enacted Government Code Section 12952, effective January 1, 2018, California employers with five or more employees are prohibited from:

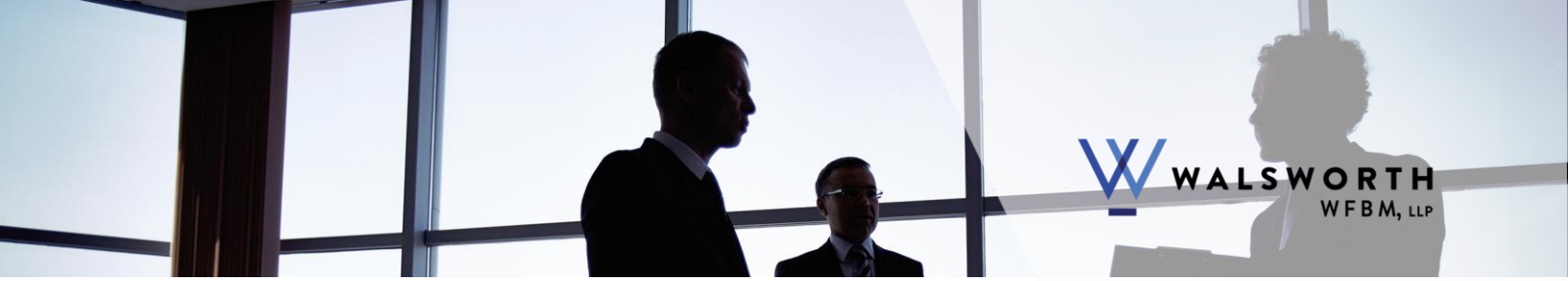
- including on any application for employment any question that seeks disclosure of an applicant's conviction history, unless the application is presented to the applicant after the employer has made a conditional offer of employment;
- inquiring into or considering the conviction history of an applicant before making a conditional offer of employment;
- considering, distributing, or disseminating information about any of the following while conducting a conviction history background check in connection with any application for employment:
    a) an arrest not resulting in a conviction, except in certain limited circumstances allowed by Labor Code Section 432.7, which contains a narrow exception relating to public agencies and convictions for crimes of moral turpitude by prospective concessionaires;
    b) referral to or participation in a pretrial or post-trial diversion program; and
    c) convictions that have been sealed, dismissed, expunged, or statutorily eradicated pursuant to law; and
- interfering with, restraining, or denying the exercise of, or the attempt to exercise, any right under Section 12952.

An employer can inquire about an applicant's conviction history once a conditional offer of employment has been made. Certain steps must be followed if the employer then intends to rescind the offer of employment solely or in part because of the applicant's conviction history.

The employer must make an individualized assessment of whether the applicant's conviction history has a direct and adverse relationship with the specific duties of the job that justify denying the applicant the position. In making the individualized assessment, the employer must consider:

- the nature and gravity of the offense or conduct;
- the time that has passed since the offense or conduct and completion of the sentence; and
- the nature of the job held or sought.

The employer is not required to commit the results of this individualized assessment to writing. However, if the employer makes a preliminary decision that the applicant's conviction history disqualifies the applicant, then the employer must notify the applicant of this preliminary decision in writing.



The employer may justify or explain its reasoning in the notification but is not required to do so. However, the notification must include all of the following:

a) notice of the disqualifying conviction or convictions that are the basis for the preliminary decision to rescind the offer;

b) a copy of the conviction history report, if any; and

c) an explanation of the applicant's right to respond, within five business days, to the notice of the employer's preliminary decision before that decision becomes final.

The explanation must inform the applicant of the right to submit evidence challenging the accuracy of the conviction history report that is the basis for rescinding the offer, evidence of rehabilitation or mitigating circumstances, or both.

If within five business days the applicant notifies the employer in writing that the applicant disputes the accuracy of the conviction history report and that the applicant is taking specific steps to obtain evidence supporting that assertion, then the applicant has an additional five business days to respond to the notice of preliminary decision. The employer must consider information submitted by the applicant before making a final decision.

If the employer makes a final decision to rescind the offer of employment, then the employer must notify the applicant in writing and must include all of the following:

- the final denial or disqualification;
- any procedure the employer has for the applicant to challenge the decision or request reconsideration; and
- a statement of the applicant's right to file a complaint with the Department of Fair Employment and Housing.

Violations of Section 12952 are subject to the damages available under the California Fair Employment and Housing Act, which include compensatory damages, attorneys' fees and costs, and punitive damages.

Note that Los Angeles and San Francisco have additional requirements under their fair chance hiring laws. Also, certain jobs are exempted from the requirements of Section 12952.

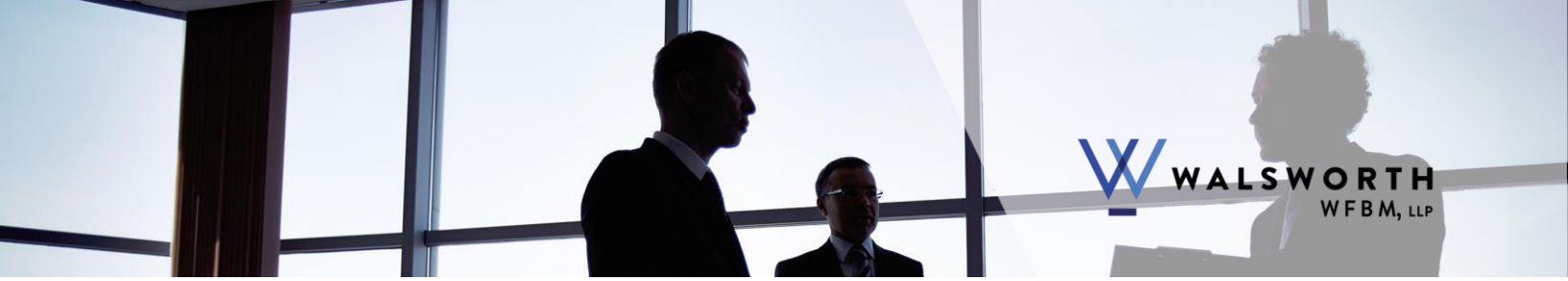
What This Means for Employers

Employers should review their hiring practices and make any necessary revisions, including to employment applications, to be in compliance with Section 12952. In addition, hiring and human resources personnel should be trained to handle the new restrictions under Section 12952 and those of any applicable similar local ordinances, such as those in Los Angeles and San Francisco.

Employees Paid on Commission Are Entitled to Separate Compensation for Rest Periods

Under California law, employers are required to provide nonexempt employees working at least 3.5 hours in a workday with a 10-minute paid, duty-free rest period for each 4 hours worked or major fraction thereof. Rest periods are counted as hours worked for which "there shall be no deduction from wages."

In *Vaquero v. Stoneledge Furniture LLC*, a California appellate court ruled in February 2017 that commission-based compensation plans must separately account and pay for rest periods to comply with California law. The *Vaquero* case involved a class action lawsuit in which furniture sales associates who worked for Stoneledge Furniture LLC doing business as Ashley Furniture



HomeStores alleged that Stoneledge's commission pay plan did not comply with California law regarding rest periods. Stoneledge's commission plan provided for draws.

The court found fault with the commission pay plan, noting that for sales associates whose commissions did not exceed the minimum rate in a given week, Stoneledge deducted from future paychecks wages advanced to compensate employees for hours worked, including rest periods, and for those sales associates that exceeded the minimum rate, it was impossible to determine whether the sales associate was compensated for rest periods and, if so, at what rate.

While Stoneledge kept track of hours worked, including rest periods, the court indicated that Stoneledge violated Labor Code Section 226.7 because its formula for determining commissions did not include any component that directly compensated sales associates for rest periods. The court reasoned that the draw system Stoneledge had in place was improperly deducting for the rest breaks, which in essence constituted wages that could not be deducted.

What This Means for Employers

Employers utilizing commission-based pay plans should review their plans to ensure they are in compliance with the law. One method to comply with the law is to pay employees commissions for sales activities and to separately track and pay hourly compensation of at least minimum wage for rest periods.

Another method—one which would not require tracking rest breaks—would be to pay employees a base hourly rate of at least minimum wage plus incentives based on sales. However, under this method, employers would need to make sure that employee base wages do not exceed 50 percent of the total compensation in order to qualify for the inside sales exemption.

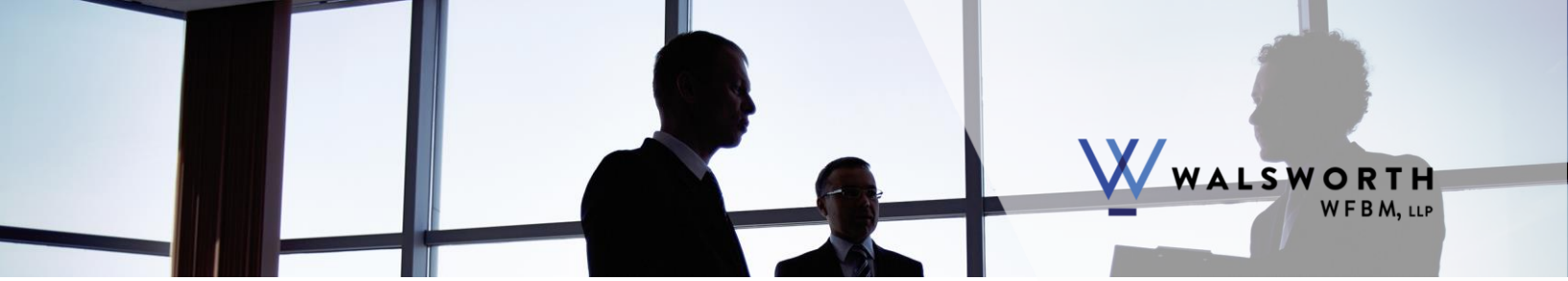
New Law Prohibits California Employers From Requesting or Seeking Salary History Information of Job Applicants

Effective January 1, 2018, California's new Labor Code Section 432.3 will prohibit all California employers from seeking, orally or in writing, personally or through an agent, salary history information (including compensation and benefits) about an applicant for employment.

Further, the new law states that employers must not rely on a job applicant's salary history information as a factor in determining whether to offer employment to an applicant or what salary to offer an applicant. However, if an applicant voluntarily and without prompting discloses salary history information, then the employer can consider or rely on that information in determining the salary for the applicant. Section 432.3 further requires, upon reasonable request, employers to provide the pay scale for a position to an applicant applying for employment.

What This Means for Employers

Employers should review and revise their hiring practices as well as their forms, including job applications, to ensure compliance with this new law. For instance, any questions requesting salary history should be removed from applications, and employees should be trained not to request that information. It is also advisable that employers start setting pay scales, if not already determined, for the jobs they offer so that they are available upon reasonable request by a job applicant.



Contacts

Mary Watson Fisher, Partner
(714) 634-2522 | mfisher@wfbm.com

Sage R. Knauft, Partner
(714) 634-2522 | sknauft@wfbm.com

Laurie E. Sherwood, Partner
(415) 781-7072 | lsherwood@wfbm.com

About Walsworth

Walsworth was founded in 1989 with a commitment to establish a law firm focused on working collaboratively with clients to meet their unique objectives. The firm has since grown to more than 75 attorneys with offices in Orange, Los Angeles, and San Francisco and is known for excellence in litigation and transactional matters. We are equally distinct in our long-standing commitment to diversity, which is recognized through our certification as a Women's Business Enterprise (WBE) by the Women's Business Enterprise National Council and the California Public Utilities Commission, and we are proud to be the largest certified WBE law firm in the United States. Walsworth is also a National Association of Minority and Women Owned Law Firms (NAMWOLF) member, the largest in California and the third largest nationwide. For more information, visit www.wfbm.com.