THE GOLDSTEIN LAW FIRM, A.P.C.
Established 1977

ATTORNEYS AT LAW

LABOR & EMPLOYMENT LAW NEWSLETTER

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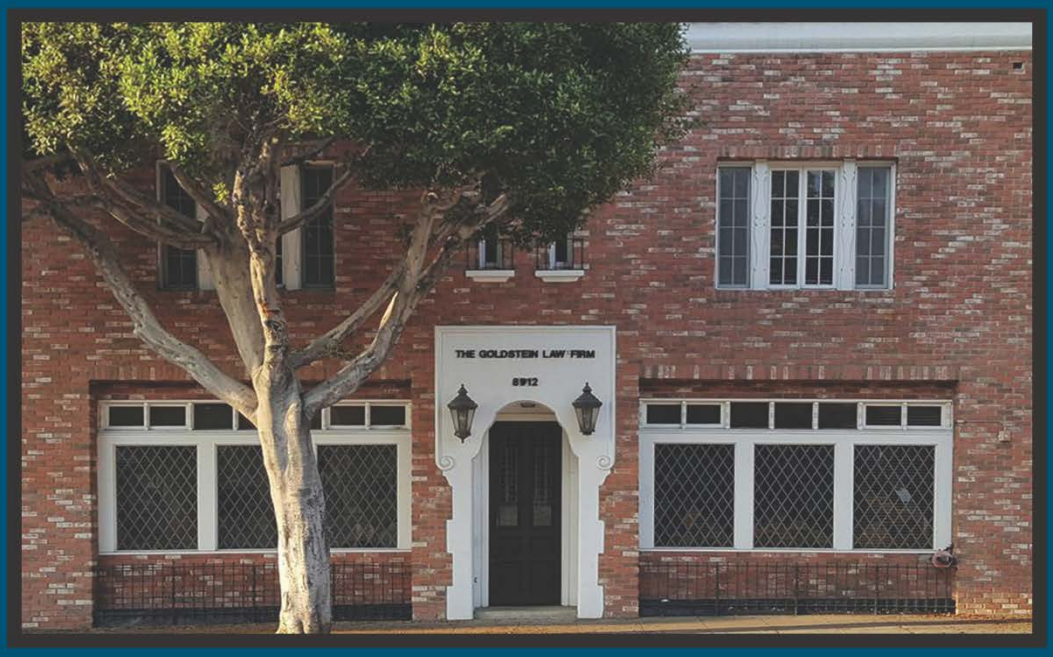

Representing Employers Since 1977

"An ounce of prevention is worth a pound of cure"

KNOWLEDGE IS POWER, AND THE BEST DEFENSE IS AN OFFENSE ARE WORDS TO LIVE BY IN THE LABOR, EMPLOYMENT AND WAGE AND HOUR LEGAL ENVIRONMENRT OF CALIFORNIA- THE GOLDSTEIN LAW FIRM

I. California's AB 450, What Employers Must Know to Comply Without Running Afoul of Federal Immigration Laws and ICE Enforcement

In a recent email statement, California Department of Industrial Relations Communications Director Erika Monterozza said that "The Labor Commissioner's Office will investigate complaints of employers who allow federal immigration authorities access to non-public areas of workplaces without a judicial warrant, or who fail to notify employees of a Notice of Inspection received from immigration authorities." Regardless of your personal opinions about whether California's sanctuary state laws are pre-empted by federal law, The Goldstein Law Firm recommends that employer full comply with AB 450 until the Courts determine the validity of the law.

A. What Are the Basic Provisions of AB 450?

1. Under the new law every public and private employer in California, or any person acting on the employer's behalf must refrain from waiving Fourth Amendment to the U.S. Constitution protections against unreasonable searches and seizures by (a) granting voluntary consent to enter any non-public areas at a place of labor, except if presented with " a judicial warrant" issued by a Judge and not merely an administrative warrant issued by ICE; (b) granting voluntary consent to an immigration enforcement agent to access review or obtain the employer's employee records with " a subpoena or judicial warrant, " except if the immigration agency (most often, this would be Homeland Security Investigations (HIS), an agency of the U.S. Immigration & Customers Enforcement) issues a Notice of Inspection (NOI) of Employment Eligibility Verification Form I-9s and other records required to be maintained under federal immigration regulations in order to verify employment eligibility.
2. Posted Notice of Worksite Inspection. Employers are required to post a notice at the worksite in the language the employee normally uses to communicate employment related information to employees, within 72 hours of receiving an NOI, a Notice of Inspection (a copy of which must also be posted at the same time) that an immigration agency, identified by name has issued a NOI and will conduct inspections of I-9 forms or other employment records. The Notice should also state the date that the employer received the NOI and the nature of the inspection to the extent known.
3. Give notice to any labor organization that represents the employees within 72 hours of the immigration agency's issuance of the NOI.
4. Within 72 hours of the employer's receipt of a written immigration agency notice informing the employer of the agency's inspection of the I-9s and the employer's

employment records, typically entitled a "Notice of Suspect Documents (NSD), provide a written notice to affected employees who apparently lack work eligibility (any, I applicable the employee's union representative) of the obligation of the employer and affected employees, containing the following information:

(a) A description of any and all deficiencies or items identified in the written immigration inspection results notice related to the affected employee.]

(b) The time period for correcting any potential deficiencies or items identified in the written immigration inspection results notice related to the affected employees.

(c) The time and date of any meeting with the employer to correct any identified deficiencies.'

(d) Notice that the employee has the right to representation during any meeting scheduled with the employer.

5. Employers are to refrain from re-verifying the employment eligibility of a current employee at a time or in a manner not required by the employment eligibility provisions of the Immigration Reform and Control Act of 1986, or that would violate any E-Verify Memorandum of Understanding the employer has entered into with the Department of Homeland Security.
6. The Penalties for California Employers Who Violate AB 450
    1. Imposition of penalties of from $2,000 to $10,000 per violation.

B. <u>How Employers Should Deal with Immigration Issues and Comply with California's AB 450.</u>

1. Only allow ICE agents to enter public areas of your business and not areas of your business that are not open to the public under the ICE agent has a judicial warrant signed by a Judge.
2. Fully cooperate with ICE agents by providing the agents with all required documentation of your employee's right to work in the U.S.
3. If you receive a notice that Ice will be visiting your place of business to check I-9 documents, provide a written notice of ICE's visit and the purpose of the visit to all employees in English and in the language that is predominate your employees.
4. Designate a manager to deal with all ICE related issues.
5. You may wish to have the file with I-9 forms for your employees separated from the employees' personnel files.
6. Train the contact person with ICE to document ICE's actions, such as asking the names of the agents; the number of agents, whether or not the agents carried weapons; the agents badge numbers; questions asked and any statements made by the ICE agents; any property takes/searched or persons questions; names of other witnesses who observed the raid; name and circumstance of any person detained; and any use by ICE agents of force or intimidation.

7. Contact The Goldstein Law Firm if you have any questions about the implementation of AB 450 or your company is experiencing an ICE raid or has received a Notice of Inspection from ICE.

II. There is Still Confusion Among Employers Dealing With the Government Code Section 12952- Not Asking Job Applicants on Your Employment Application About Their Criminal Record-Some More Helpful Suggestions

1. Eliminate any language of your job application that request whether the applicant has been convicted of " a felony", "a crime", "a misdemeanor involving dishonesty, except for employer positions for which government agencies are required by law to check the conviction history of applicants; positions with criminal justice agencies; Farm Labor Contractors, as defined in the Labor Code; and position the federal and or state law requires employers to check an applicant's criminal history before hire or restricts.
2. The following language should be inserted into your Employment Application "NOTICE TO APPLICANTS: YOU WILL NOT BE ASKED WHETHER YOU HAVE BEEN CONVICTED OF A FELONY IN THE APPLICATION PROCESS UNLESS AND UNTIL YOU HAVE BEEN GIVEN A WRITTEN CONDITIONAL OFFER OF EMPLOYMENT AT WHICH TIME YOU WILL BE REQUESTED TO PROVIDE THIS INFORMATION IN ACCORDANCE WITH GOVERNMENT CODE SECTION 12952."

3. To avoid liability for negligent hiring or retention, you must ask a job applicant who has been given a firm, but conditional job offer of employment and met the minimum qualifications for the job, whether they have been convicted of a crime and the circumstances of the convictions, including any sentence they received.
4. All conditional job offers should be in writing and clearly state that as a condition of receiving a final offer the prospective employee is required to disclose his or her criminal history that will be verified in a criminal background check.
5. Once you make a firm written offer of employment based on a job applicant's qualifications as set forth in the applicants written employment application and resume, you should request the applicant in a properly drafted written form whether the applicant has been convicted of a crime and other relevant information regarding the crime or crimes the applicant was convicted of, including any sentence that the applicant received for the crime.
6. Any job offers given to a job applicant should be conditioned on the applicant truthfully completing the written form asking whether the

applicant has been convicted of a crime and other relevant information regarding the crime or crimes the applicant was convicted of, including any sentence that the applicant received for the crime.

7. To avoid liability for negligent hiring or retention you should condition the job offer on the applicant passing a background check to verify the statement made in the application process and a substance abuse screen as part of a physical examination related to the job the applicant has applied for.
8. You should seek to independently verify the information provided by the applicant about his or her criminal record or absence of such a record.
9. If you use a third-party screening firm (consumer reporting agency) to obtain background information on applicants or existing employees, you must follow the requirements of the federal Fair Credit Reporting Act ("FCRA"), including the FCRA's provisions requiring advance consent for a background check and providing appropriate notices when any adverse employment decision is based, in whole or in part, on the information disclosed in a background report.
10. Your decision to hire a person with a criminal record should be based on an assessment of the qualification of the individual job applicant's qualifications.
11. Your decision should be based on the following: (1) on the nature of the crime they committed, violent or non-violent; (2) the nature of the sentence imposed for the crime; (3) whether the crime was a single offense or for multiple offenses; (4) how long ago they were convicted of the crime or crimes and if they completed their sentence; (5) what they have done to rehabilitate themselves; and (6) whether in fact they are more qualified for the position then other applicants for the same position.
12. You have a duty under the new law to communicate your decision to the applicant in writing. The notice may, but is not required to, justify or explain the reason for your action.
13. Employers. except for law enforcement agencies, that exclude hiring job applicants because they have been convicted of a crime or crimes can be subject to charges of discrimination by private individuals under the California Fair Employment and Housing laws, and for Title VII violations by the U. S. Equal Employment Opportunity Commission. This is because the impact of such a policy of automatic exclusion of persons with a criminal record disparately falls on job candidates who are members of minorities who are more likely to have jail or prison records.

14. **If you have any questions about how to deal with the hiring of job applicants who have a criminal record, contact The Goldstein Law Firm for advice and counsel.**

III. How Do You Comply with the Americans With Disabilities Act and California Disability Discrimination Reasonable Accommodation Requirement and Not Return Employees to Work Who Really Can Perform the Job?

An employee who has not been to work for 5 or 6 months because of a disability shows up at your door with a note from his doctor stating that he or she can return to work without restrictions. You have an open position but want to make certain the employee can really perform the essential duties of the job. The employee took and exhausted his or her 12 weeks of Family Medical Leave and California Family Rights Act leave. You do not know the specific nature of the illness that required the employee to be off work because of privacy laws. What can you legally do to make certain that the employee can actually perform the essential duties of the job he or she will be assigned to without the risk of immediate injury or re-injury to his or her condition?

If the employee was returning to work from the 12 weeks of FMLA/CFRA leave you would have to accept the doctor's note releasing the employee back to work. If you requested and insisted that the employee obtain a fitness for duty release you would be violating the California Family Leave Act regulations.

In this scenario the employee has exhausted his or her FMLA/CFRA leave and has not been work for 5 or 6 months. You can request that the employee pass a fitness for duty physical examination paid for by the employer to determine whether the employee can perform the essential duties of the job they would be returned to, with or without a reasonable accommodation. As the employer you would have to pay for the examination. If your doctor certifies the employee is fit for duty to perform the essential duties of the job you would return to employee to work knowing that the employee can actual perform the job duties. If the doctor and/or the employee or his or her representative requests an accommodation, you have the right to determine whether it is reasonable or creates an undue hardship. There are a number of private non-profit organization that can assist you in the determination for specific disabilities. If you determine that the accommodation is not reasonable you have a legal obligation to engage in good faith in an interactive process to find a reasonable accommodation to return the employee to work, if possible.

Remember workers compensation insurance carriers want injured employees to be off of their payroll and back on your as soon as possible. That may mean that some injured employees are prematurely released to return to work when they cannot actually

perform the essential duties of the job. You as the employer have the right to make the ultimate decision consistent with both federal and state disability laws to determine who to return to work based on fact based medical opinion. In many cases doctors are unaware of the actual job duties that their patient is required to perform. Therefore, make certain that any doctor rendering an opinion on the issue of fitness for duty is provided with an up to date job description with actual job duties and physical and mental requirements of the employee's job.

By following these basic procedures you can avoid returning disabled employee to work to jobs they cannot actually perform.

If you have any questions about "How Do You Comply with the Americans With Disabilities Act and California Disability Discrimination Reasonable Accommodation Requirement and Not Return Employees to Work Who Really Can Perform the Job, contact The Goldstein Law Firm.

THE GOLDSTEIN LAW FIRM PRACTICE AREAS

Employment Law, Wage and Hour Law, Labor Law, Class Actions, Business Litigation, Contract Disputes, Arbitrations, Corporate and Transactional Law, Shareholder Disputes, Commercial Law, Appellate Law, Corporate Investigations, Wrongful Death, Training & Workshops

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