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Employment Practices

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Employment Practices

Employment Practices; veteran preferences

Government Code §12940 (amended).

AB 291 (Hannigan); STATS. 1981, Ch 270

Support: California Chamber of Commerce

Existing law makes it an unlawful employment practice to discriminate on the basis of sex absent a bona fide occupational qualification or a security regulation.¹ Similarly, the California Fair Employment and Housing Commission has adopted a regulation that specifically prohibits use of military service or veteran status as a basis of employee selection other than as a measure of the prospective employee's job related experience unless permitted by the California Constitution² or applicable federal law.³ The California Constitution, however, allows the Legislature to provide employment preferences in civil service for veterans and their surviving spouses.⁴ With the enactment of Chapter 270, employers may use veteran status as a factor in employment selection or give special consideration to Vietnam era veterans without violating existing law prohibiting sex discrimination in employment practices.⁵

COMMENT

Arguably, Chapter 270 may be subject to constitutional attack on the theory that women are under-represented in the military and preferences to veterans would discriminate against women.⁶ In the case of *Massachusetts v. Feeney*,⁷ however, the United States Supreme Court recognized the adverse effect the use of veteran preferences in employment selection had on women,⁸ but held that granting of preferences to veterans for state jobs is not unlawful sex discrimination in violation of the equal protection clause of the fourteenth amendment.⁹

1. CAL. GOV'T CODE §12940(a).

2. CAL. CONST. art. VII, §6(a).

3. 2 CAL. ADMIN. CODE §7291(c).

4. CAL. CONST. art. VII, §6(a).

5. See CAL. GOV'T CODE §12940(a)(4).

6. See generally CAL. CONST. art. I, §8 (a person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin).

7. 442 U.S. 256 (1979).

8. See *id.* at 269-71.

9. See *id.* at 280-81. But see *Boren v. California Dep't of Employment Dev.*, 59 Cal. App.

3d 250, 257, 130 Cal. Rptr. 683, 687 (1976) ("a seemingly neutral statute which actually disqualifies a disproportionate number of one sex is discriminatory and vulnerable to the strict scrutiny test; it is enough if the statistics show that the standard affects women only"); *Hardy v. Stumpf*, 37 Cal. App. 3d 958, 965, 112 Cal. Rptr. 739, 744 (1974) (the court concluded that the height and weight requirement for a position on the Oakland Police Force discriminated against women as a class).

Employment practices; access to criminal records

Labor Code §432.7 (amended); Penal Code §11105.2 (new), §§11105; 13300 (amended).

SB 277 (Rains); STATS. 1981, Ch 681

Support: California Parent Teachers Association; California Peace Officer's Association; Department of Finance; Department of the Youth Authority

SB 964 (O'Keefe); STATS. 1981, Ch 967

Support: Department of Finance

AB 347 (McAlister); STATS. 1981, Ch 1103

Support: Attorney General; Department of Finance

Opposition: American Civil Liberties Union; California Attorneys for Criminal Justice; State Public Defender

Existing law allows specified persons¹ to receive state or local summary criminal history information² under limited circumstances.³ Chapter 681 permits an employer⁴ to request from the Department of Justice records of all convictions⁵ relating to sex crimes⁶ committed by any person applying for employment or volunteering for a position that involves supervisory or disciplinary power over a minor.⁷ Any request for these records must include the applicant's fingerprints which may

1. See CAL. PENAL CODE §§11105(b), (c), 13300(b), (c) (including peace officers, state courts, district and prosecuting city attorneys, public defenders, and parole and probation officers).

2. See *id.* §§11105(a)(2) (definition of state summary criminal history information), 13300(a) (definition of local summary criminal history information).

3. See *id.* §§11105 (access to state summary criminal history information), 13300 (access to local criminal history information). The Attorney General may provide this information to assist any agency, officer, official of the state or a local government, public entity, or any other entity in fulfilling their employment, certification, or licensing duties.

4. See *id.* §11105.2(d) ("employer" means any nonprofit corporation or other organization specified by the Attorney General that employs or uses the services of volunteers that have supervisory or disciplinary power over children).

5. See generally *Central Valley Chapter of the 7th Step Foundation, Inc. v. Younger*, 95 Cal. App. 3d 212, 157 Cal. Rptr. 117 (1979) (right to privacy is violated when arrest records containing nonconviction data are disseminated to public employers who are prohibited by law from considering an arrest record that did not result in conviction).

6. See CAL. PENAL CODE §11105.2(e) (definition of sex crime).

7. *Id.* §11105.2(a).

be taken by the employer.⁸ The Department of Justice must furnish this information to the requesting employer and send a copy of the information to the applicant.⁹ Six months after the requested information is sent to the employer and applicant, the Department must destroy the application.¹⁰

In a related change, Chapter 1103 allows public utilities¹¹ access to state or local summary criminal history information when needed for use in employing current or prospective employees who in the course of their employment may seek entrance to private residences.¹² This information must be limited to the record of convictions or arrests for which the person is released on bail or on his or her own recognizance pending trial.¹³ If the information is supplied, a copy must be furnished to the employee.¹⁴ Furthermore, any information obtained is confidential and the public utility must not disclose the contents except for the purpose that it was acquired.¹⁵ The public utility must destroy the information and all copies within thirty days after employment, promotion, or transfer is decided, or, if the employee is out on bail or on his or her own recognizance, within thirty days after the case is resolved.¹⁶ Any violation is a misdemeanor and gives the injured employee a cause of action against the public utility to recover damages proximately caused by the violation.¹⁷

Finally, Chapter 1103 also allows conviction information to be furnished to any accredited¹⁸ four-year college or university¹⁹ when needed in conjunction with an application for admission by a convicted felon to any special education program for convicted felons.²⁰ If the college or university requires the convicted felon to be fingerprinted, Chapter 1103 permits the felon's fingerprints to be furnished along with the conviction records.²¹

8. *Id.* §11105.2(b).

9. *See id.*

10. *See id.*

11. *See* CAL. PUB. UTIL. CODE §216 (definition of public utility).

12. *See* CAL. PENAL CODE §§11105(c)(9), 13300(c)(9) (Chapter 1103, however, does not impose a duty upon a public utility to request summary criminal history information about current or prospective employees).

13. *See id.* §§11105(c)(9), 13300(c)(9).

14. *See id.* §§11105(c)(9), 13300(c)(9).

15. *See id.* §§11105(c)(9), 13300(c)(9).

16. *See id.* §§11105(c)(9), 13300(c)(9).

17. *See id.* §§11105(c)(9), 13300(c)(9).

18. *See id.* §11105(c)(9) (accreditation by a regional accreditation organization approved by the United States Department of Education).

19. *See id.*

20. *See id.*

21. *See id.*

Finally, existing law prohibits an employer from asking an applicant for employment to disclose any information concerning an arrest or detention that did not result in conviction or any information concerning a referral to and participation in any pretrial or posttrial diversion program.²² This prohibition, however, does not apply to persons seeking employment as peace officers or positions with the Department of Justice.²³ Chapter 1103 extends this exception to include persons seeking employment in other criminal justice agencies.²⁴

22. *See* CAL. LAB. CODE §432.7(a).

23. *See id.* §432.7(d).

24. *See id.*; CAL. PENAL CODE §13101 (definition of criminal justice agency).