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Human Resources
Task Force

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What is “**new**” that will put shops in the
crosshairs ***soon***?



“Ban the Box”



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“Ban the Box”



What is this all about?

- The latest expansion of “Employee Rights”
- What are the “Protected Categories”?
(Those categories upon which you cannot make *any* employment decision...before or during employment)



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PROTECTED CATEGORIES

(Comprehensive national list, not all apply in all States)

- Race
- Color
- Sexual Orientation
- Gender Identity / Expression
- National Origin
- Ancestry
- Age
- Military / Veteran Status
- Marital Status
- Medical Condition
- Disability
- Citizenship Status
- Religion / Dress & Grooming
- Registered Dom. Partner
- Sex
 - Breastfeeding
 - Pregnancy
 - Childbirth
- Genetic Information



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What is this all about?

- The list of “Protected categories” is effectively expanded by one...

Convicted Criminals

are now a *protected class*

in many states!



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What is this all about?

- **As of June 2017**
 - 28 states, 150 total jurisdictions (cities, counties, states, etc.)
- **Complete prohibition, or delayed inquiry, into Criminal History of Applicants!**



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California is most recent example:

- **IMPORTANT NOTE: This was **NOT** accomplished by judicial action! There was no “Vote” of anyone!**
- **The California “Fair Employment and Housing Council” issued “Regulations” effective July 1, 2017...**



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California is most recent example:

- “Delayed Inquiry” –Cannot ask until post-offer...
- The regulations contain four main components:
 - **Expansion of the types of criminal history that an employer may not consider: marijuana, convictions older than 7 years, etc.**
 - **Must include an analysis** of the relationship between the conduct underlying the conviction and the duties and responsibilities of the job, the length of time since the conduct occurred and the risk of the conduct reoccurring on the job.



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California is most recent example:

- The regulations contain four main components:
 - **Notification** to the applicant or employee of a disqualifying conviction and opportunity for the applicant or employee to provide evidence of factual inaccuracy.
 - Prohibition from considering criminal history when doing so will result in an **adverse impact on individuals within a protected category.**



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So What Should I Do???

1. Double-check what applies to your jurisdiction;
2. Adjust your Employment Application to conform to your law;
3. Train you managers on compliance with your law.



What is putting shops in the crosshairs *now*?



- Wage & Hour Claims

- Improper “Exemption” Classification

- ✦ White-Collar Exemptions

- ✦ Commissioned Sales

- Minimum Wage Claims

- ✦ “Traditional” Claims

- ✦ The California Factor



What is putting shops in the crosshairs now?



- Remember our Discussion of White-Collar Exemptions...
 - Executive, Professional, Administrative
 - Duties Test
 - ✦ “Primary duty” must be management, AND
 - ✦ Customarily and regularly direct two or more other workers, AND
 - ✦ Authority to hire or fire other employees, or make suggestions on employee status that are given particular weight

What is putting shops in the crosshairs now?



- Remember our Discussion of White-Collar Exemptions...

- Executive, Professional, Administrative

- Duties Test

- Salary Test

- ✦ \$455 a week

- ✦ (\$23,600 annually)

- ✦ The December 2016 increase to \$47,476 annually DID NOT HAPPEN!



What is putting shops in the crosshairs now?



• So Where's the Liability?

○ Misclassified Employees – Do they meet the tests for the Executive Exemption?!

✦ Estimators

✦ Production Managers

✦ Painters

○ If not, do they meet the tests for the 7(i) exemption?



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What is putting shops in the crosshairs now?



- The Commissioned Sales “7(i)” Exemption

- ✦ Retail Establishment
- ✦ More than 1/2 income from “commissions” (“flat rate” counts)
- ✦ Make at least 1 1/2 times Minimum Wage for all hours worked!

If Tests are Met = Exempt from OT!



What is putting shops in the crosshairs now?

• Let's Talk Minimum Wages for a minute...

✦ 7(i) exemption...

- Make at least 1½ times Minimum Wage for all hours worked – So Minimum Wage is an issue!

✦ Executive Exemption (Some states)

- The Minimum Salary is tied to Minimum Wage...



What is putting shops in the crosshairs now?

- Let's Talk Minimum Wages for a minute...
 - ✦ You'll Remember, "out in California..."
 - ✦ Flat Rate Compensation was killed...
 - *Gonzalez v. DTLA Motors* – Flat rate only compensates for time spent actually working on vehicle.
 - *Bluford v. Safeway* – Rest Periods must be paid at minimum wage.
 - **AB1513** – Codified *DTLA Motors* and *Bluford*, plus increased rest period pay to greater of minimum wage or effective rate.



What is putting shops in the crosshairs now?

- Let's Talk Minimum Wages for a minute...
 - ✦ Pure COMMISSION Compensation is now dead as well...
 - *Vaquero v. Stoneledge Furniture LLC [Ashley Furniture]* – Commission wages only compensates for time spent actually engaged in direct selling activities.
 - Rejects concept of paying draws against anticipated commissions
 - All commissioned employees must be paid separately (at minimum wage or greater) for all rest periods and non-sales time.
 - ✦ Now must be Hourly “**plus**” Commission, **not** the “**greater of**” hourly wages or commission.



What is putting shops in the crosshairs now?



- **So why should I care? My shop is not in the communist republic of California!**

- The “Tech” (flat/piece-rate) issue was an insular California issue...

- This new “Commission” issue has legs that could potentially be expanded outside California...beware!!!



What is putting shops in the crosshairs now?



You cannot afford to stick your head in the sand and ignore these compliance issues any longer!

You either start paying attention, educate yourself (competent legal counsel is recommended), and do whatever it takes to get into compliance, or you will find yourself listed as a statistic!



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Minimum Wage Compliance

So What Should I Do???

1. **Get competent legal advice regarding your jurisdiction;**
2. **Adjust your Pay Plans to get ahead of the curve in compliance so you limit liability as much as possible;**
3. **Get binding Arbitration Agreements in place with all employees immediately to head off class-action liability!**





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Questions?

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