

Labor and Employment Laws in the State of California



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This booklet is intended to provide an overview of the most important parts of California state employment laws. It is not intended to be legal advice for any specific situation or set of facts. Whenever you are dealing with any employment related situation it is always a good idea to seek the advice of competent legal counsel.

I. INTRODUCTION

This book provides a practical discussion of the unique labor and employment laws in the State of California. While some federal law is discussed for context, our focus is mainly state law. It is important to remember that when both federal and state laws cover the same subjects, an employer must apply the stricter of the two laws, meaning the law that gives the employee greater protection or benefits.

The material is divided into seven main themes, or sections, as follows: 1) employees versus non-employees (independent contractors); 2) hiring issues; 3) discipline and termination; 4) wage and hour laws; 5) employee privacy rights; 6) discrimination; and 7) workplace safety.

This book is not meant to be an exhaustive treatment of California law in any one area, nor does it review applicable federal law. Instead, the information is intended to provide a basic reference guide to help employers quickly address common employment issues under California law. The sources of California law are numerous, including a number of statutory codes and administrative regulations. Citations to particular statutes are provided where appropriate.

For additional information about federal employment issues, you may want to review the various booklets published by Fisher & Phillips LLP, which summarize and explain specific federal laws that govern employers. This book is not a substitute for legal advice. Any questions or concerns relating to these or other employment topics should be directed to qualified legal counsel.

II. EMPLOYER LIABILITY IN CALIFORNIA

Employers in California face potential liability under a multitude of statutes that often differ significantly from similar federal laws. California has its own wage and hour laws, its own anti-discrimination laws, its own OSHA laws. A number of provisions of California statutory law provide additional rights to employees, such as the right to take time off work to attend a child's school activities, the right to use a portion of one's accrued sick leave to care for an ill family member, and even the right of female employees to wear pants to work.

Courts have added still more employee rights under the guise of interpreting "public policy." For example, court decisions have declared it unlawful to terminate an employee who complains about payroll matters affecting himself or others, or who complains of smoking in the workplace. "Public policy" causes of action are also available for violations of most of the state's anti-discrimination laws (as well as safety laws, whistleblower statutes, and other laws), whether or not employees have exhausted their administrative remedies.

California employment law is enforced by state agencies such as the Division of Labor Standards Enforcement (wage and hour laws), the Department of Fair Employment and Housing (discrimination laws), and Cal-OSHA (workplace safety). Aggrieved employees may also file lawsuits in court individually, or on behalf of others as a class action. Employees may also sue under the Labor Code Private Attorneys General Act of 2004 (*Labor Code* §2699), provided that they have first given written notice of the alleged violation(s) to the state Labor and Workforce Development Agency and to the employer.

The Private Attorneys General Act established penalties for violations of the Labor Code of \$100 per employee per pay period for the first violation, and \$200 per employee per pay period for subsequent violations. Penalties recovered under the Private Attorneys General Act are distributed according to the following scheme: 50% to the state's General Fund, 25% to the Labor and Workforce Development Agency, and 25% to the aggrieved employee(s). In addition, employees who prevail in such lawsuits are entitled to recover attorneys' fees and costs.

III. EMPLOYEES VS. NONEMPLOYEES (INDEPENDENT CONTRACTORS)

Any person who performs labor or renders service for another person is presumed to be an employee, and is entitled to the rights of an employee under California law. *Labor Code* §3357. Further, an employee is someone in the service of an employer, whether this relationship is express or implied, oral or written, lawful or unlawful. *Labor Code* §3351. Of course, not everyone who performs services for a business is an employee. Many service providers are independent contractors, such as a courier that is hired from another company to deliver a package. The burden of establishing whether an individual is an independent contractor or an employee is on the party attacking the determination of employment.

The most important factor to consider when determining whether a person is an employee or an independent contractor is the employer's right to control the manner and means of accomplishing the desired result. *Labor Code* §3353. If the employer has the authority to exercise complete control over when, where and how the job is performed, an employer-employee relationship likely exists. If the person performing the work has control over the manner in which it is performed, and the company is merely buying the end result of the work, the person is more likely to be an independent contractor.

In cases where the right of control is less than complete, the courts and the government will look to a variety of factors to determine if the relationship is that of an employer and employee or that of an independent contractor providing services to a customer. The factors can include: whether the service provider is engaged in a separately established business or occupation; whether the service provider supplies the tools, materials, equipment and/or place of work; whether there has been substantial capital investment in the business on the part of the individual, other than personal services; whether the individual's services are available to the general public; whether the individual hires his or her own employees; whether the work requires a particular skill that must be performed by the particular individual; whether the individual holds a general contractor's license; whether the relationship is at-will and if its end may give rise to a breach of contract claim; the method of payment (e.g., hourly rate versus by completed job or project); whether the work is part of the employer's regular business; and the employer's *actual* exercise of control over the manner and means of performing the services.

The expressed intent of the parties to create an independent contractor relationship (for example, a written contract) may also be considered, but merely stating in writing that an individual is considered an independent contractor will not be determinative if other factors suggest that the individual is being treated as an employee in most other respects.

The consequences of misclassifying an employee as an independent contractor include liability for: unpaid wages, including overtime; unpaid payroll taxes; workers' compensation liability; and severe penalties. Moreover, payments made to independent contractors rarely, if

ever, comport with the time and recordkeeping requirements of the California Labor Code and could expose the employer to claims under the Private Attorneys General Act and/or the Unfair Competition Law (*Business & Professions Code* §17200).

Additionally, an employer who is found to have willfully misclassified an employee as an independent contractor will be subject to civil penalties of no less than \$5,000 and no more than \$15,000 for each violation, and civil penalties between \$10,000 to \$25,000 for a pattern and practice of violations. The employer will also be required to prominently display a notice (signed by an officer of the company) on its website for one year admitting to violating the law. If the employer does not have a website, the notice must be displayed in an area that is accessible to all employees and the general public.

California tracks the hiring of independent contractors using a form filed with the Employment Development Department. If the independent contractor is an individual or a sole proprietorship, all employers must file a Form DE 542 for each independent contractor who will receive an IRS Form 1099-MISC. The DE 542 must be filed within 20 days of making payments to the contractor of \$600 or more, or entering into a contract for payment totaling \$600 or more, whichever occurs first. Form DE 542 is available from the EDD's website at http://www.edd.ca.gov/pdf_pub_ctr/de542.pdf.

IV. HIRING ISSUES

A number of California laws regulate how an employer recruits, interviews, and hires employees.

A. Hiring Documentation

1. Employment Applications

Employees and applicants are entitled to receive a copy of any instrument they sign relating to the obtaining or holding of employment upon request. *Labor Code* §432. An “instrument” for these purposes includes an employment application.

2. Mandatory Arbitration Agreements

The California Supreme Court has held that an employee may be required to submit employment claims to arbitration, as long as certain requirements are met. Pre-dispute arbitration agreements are often obtained as part of the hiring process. The agreements generally are enforceable if:

- they provide for neutral arbitrators;
- they provide for all the types of relief available in a traditional court setting, including attorneys' fees and punitive damages;
- they do not attempt to shorten the statute of limitations for “unwaivable” statutory rights (e.g., wage claims and discrimination claims);
- they allow for more than minimal discovery;

- the arbitrator is required to issue a written decision;
- the employee is not required to pay arbitration costs that would not be required in a court setting; and
- the obligation to arbitrate is mutual, i.e., the employer must also arbitrate any employment-related claims it may have against the employee.

3. Mandatory Notice To Nonexempt Employees

At the time of hiring, you must provide to each non-exempt employee (and certain unionized employees) a written notice containing information about the company as well as the rate or rates of pay, and whether the employee is paid by the hour, shift, day, week, salary, piece, commission, or otherwise. A template notice form that contains the information required by section 2810.5 is available from the Labor Commissioner's website at http://www.dir.ca.gov/dlse/LC_2810.5_Notice.pdf.

However, for various reasons an employer may want to modify this form. If the employer is a temporary services employer, the notice must also include the name, the physical address of the main office, the mailing address if different from the physical address of the main office, and the telephone number of the legal entity for whom the employee will perform work.

You must also notify these same employees in writing of any changes to the information set forth in the notice within seven calendar days after the time of the changes, unless the changes are reflected on a timely wage statement, or notice of all changes is provided in another writing required by law within that timeframe.

4. Personnel File Access

An employer must maintain personnel files for at least three years after an employee is terminated. *Labor Code* §1198.5(c)(1). Employees have a right to inspect or receive a copy of their personnel files no later than 30 calendar days from the date the employer receives a written request from the employee, unless the current or former employee (or his or her representative) and the employer agree in writing to a date beyond 30 calendar days. The agreed-upon date may not exceed 35 calendar days from the employer's receipt of the written request. *Labor Code* §1198.5(b). An employee or the Labor Commissioner may recover a penalty of \$750 from an employer who fails to permit a current or former employee, or his or her representative, to inspect or copy personnel records within the times specified by *Labor Code* §1198.5.

Certain records, such as letters of reference, ratings obtained prior to employment, and records related to investigation of a possible criminal offense do not have to be provided to the employee. Also, if an employee or former employee files a lawsuit that relates to a personnel matter, the right of the employee or former employee to inspect or copy personnel records under §1198.5 ceases during the pendency of the lawsuit. However, pursuant to *Labor Code* section §432, employees are still entitled to a copy of any document they have signed relating to their employment, regardless of whether or not they have filed a lawsuit.

B. Unlawful Inquiries

California prohibits employers from considering certain criteria when hiring or making other employment decisions. This means that employers should not make inquiries regarding these subjects during the interview/hiring process, and may not otherwise rely on information regarding these subjects when making employment decisions.

1. Arrest And Criminal Records

Employers may not ask applicants to disclose information concerning an arrest, a detention that did not result in a conviction, or a conviction that has been sealed or dismissed by a court. Also, the California Labor Code prohibits employers from using certain types of convictions to determine employment eligibility, including: 1) any record regarding a referral to and participation in a pre-trial or post-trial diversion program; and 2) convictions for some marijuana-related offenses that are more than two years old. (Certain exceptions exist for government law enforcement agencies, and for “health facility” employers hiring for positions with regular access to patients.)

The Labor Code also prohibits an employer from seeking information from third parties concerning arrests. Criminal background investigation reports received or requested by the employer should not include information relating to an arrest that did not result in a conviction, referral to or participation in a diversion program, or conviction that has been sealed or dismissed. *Labor Code §§432.7 and 432.8.*

Further, an employer cannot use any arrest record that did not result in a conviction, any record that notes a referral to or participation in any diversion program, or any conviction that has been sealed or dismissed as a factor in determining any condition of employment, including hire, promotion, and termination. However, an employer may directly inquire about an arrest for which the employee or applicant is out on bail or has been released on his or her own recognizance pending trial. *Labor Code §432.7(a).*

2. Lie Detector Tests

Labor Code §432.2(a) prohibits private employers from demanding or requiring applicants or employees to submit to a polygraph, lie detector, or other similar test or examination as a condition of employment or continued employment. No employer may request a lie detector or other similar exam without advising the person in writing of their statutory rights, as listed above, at the time the test is to be administered. *Labor Code §432.2(b).*

3. Illegal Contracts

An employer may not require applicants or current employees to agree in writing to any term which the employer knows to be unlawful. *Labor Code §432.5.* This includes items such as non-compete agreements (which are generally unlawful in California, unlike many other states), and random drug testing policies in most industries.

4. Protected Categories

California's Fair Employment and Housing Act prohibits employers and employment agencies from making any non-job-related inquiry that directly or indirectly limits a person's employment opportunities because of race, color, religion, national origin, ancestry, physical or mental disability, medical condition, marital status, sex, pregnancy, sexual orientation, age, or any other category protected by state law. *Government Code* §12940(d). However, employers and employment agencies may inquire into an applicant's age or specify age limitations for a position when the law compels or requires it.

5. Medical Inquiries And Medical Examinations

Generally, an employer may not ask pre-job offer questions that directly or indirectly relate to an applicant's mental or physical disability, medical condition, or to the nature or severity of an applicant's disability or condition. *Government Code* §12940(e)(1). But you may inquire into an applicant's ability to perform job-related functions, and may respond to requests for reasonable accommodation. *Government Code* §12940(e)(2).

California law regarding pre-employment medical examinations is similar to federal law. No medical or psychological examination may be requested until a conditional job offer has been made. In California, medical exams must be job-related and consistent with business necessity. All employees entering the same job classification must be required to undergo the same examination. *Government Code* §12940(e)(3).

C. Drug Screening Of Applicants

Pre-employment drug screening may be conducted without a conditional offer of hire. As long as all applicants entering a particular job classification are tested, and the testing procedure is reasonable and not unnecessarily intrusive, screening will generally be allowed. The rules for drug testing current employees are much more restrictive and are discussed in Section VII. E.

D. Minimum Age Requirements

The employment of minors is strictly regulated. The Labor and Education Codes restrict the number of hours that minors may be employed, the hours of the day that minors may work, and the types of work that minors may perform. California law differs substantially from federal law in this regard.

Employers who hire a minor who is not a high school graduate must obtain a "permit to work" for the minor. *Education Code* §§49100, 49110, and 49160 *et seq.* The permit is issued by the superintendent of the school district or his or her authorized agent, and only then upon a written request of the minor's parent or guardian. The permit must be kept on file by the employer during the term of the minor's employment, and the employer must give written notification of intent to employ a minor to the officer issuing the work permit. *Education Code* §§49161 and 49162.

When school is in session, a minor who is 14 or 15 years old may not work more than three hours outside of school on any school day, nor more than 18 hours per week. *Education Code* §§49112(a) and 49116(a). A minor who is 16 or 17 years old generally may not work more than four hours outside of school on any school day nor more than eight hours when the next day is a non-school day. *Education Code* §§49112(a), (c) and 49116(b). This differs from federal law, which generally restricts 14- to 16-year-old minors to working up to three hours per day and up to 18 hours per week when school is in session.

When school is not in session, minors may not be employed for more than eight hours per day, or forty hours per week (forty-eight hours for minors ages 16 or older). *Labor Code* §1391. The times of day minors are allowed to work are also regulated, whether school is in session or not. *Labor Code* §1391.

E. Credit And Background Investigations

California law strictly regulates an employer's ability to obtain and use criminal record histories, credit reports, and other background investigation reports with respect to applicants and employees. Most of the restrictions relate to the way employees authorize the investigations and the disclosures that must be made before and after the investigation. While some provisions overlap, these restrictions are significantly different than the federal restrictions contained in the Fair Credit Reporting Act (FCRA).

1. Investigative Consumer Reports

California's restrictions pertain to any Investigative Consumer Report (ICR), which is defined to include information about an applicant or employee gathered "through any means." An employer may request an ICR only if the following conditions are satisfied *before* the report is requested: 1) the employer has made specific disclosures to the applicant/employee regarding the nature and scope of the requested report, the agency preparing it, and the applicant/employee's rights under the law; 2) the employer has a proper purpose in requesting the report, which includes evaluating an individual for employment, promotion, reassignment, or retention; and 3) the applicant/employee has authorized the procurement of the ICR in writing. *Civil Code* §§1786.2(f), 1786.16(a)(2). (See exception below.)

Employers must also provide applicants/employees with a form through which they can request a copy of the report, or waive their right to do so. *Civil Code* §1786.53(b)(2). If the applicant/employee elects to receive a copy of the ICR, the employer or its agent must send a copy to the person within three days of the report being provided to the employer. *Civil Code* §1786.16(a)(1). These requirements, including the advance written authorization requirement, do not apply when the employer seeks the ICR due to a suspicion of wrongdoing or misconduct by the subject of the investigation. *Civil Code* §1786.16(a)(2).

The law has also been expanded to include "investigations" into public records conducted by employers without engaging the services of a consumer reporting agency, although such investigations do not include pre-employment reference calls placed by a prospective employer. The employer must provide applicants with copies of public records reviewed as part of an "in-house" investigation within seven days after receipt of the information, unless the applicant

waived the right to receive these documents by checking a box on the company's employment application. *Civil Code* §§1786.53(a), (b)(1) and (b)(2).

2. Credit Checks

Labor Code §1024.5 restricts employers from obtaining credit checks on job applicants and employees in most circumstances. Employers can only conduct credit checks on certain categories of employees, including employees holding managerial positions, employees holding positions with access to bank account info, date of birth, and social security numbers (beyond routine credit card application processing), or for employees with access to certain other confidential or private information.

If you request a consumer credit report for employment purposes, you must provide written notice to the person involved. *Civ. Code* §1785.20.5. If the applicant is denied employment either wholly or partly because of information contained in a consumer credit report, you must advise the consumer of this fact and provide the name and address of the consumer credit reporting agency making the report. *Civ. Code* §1785.20.5(b).

3. Social Media

An employer cannot require or request an employee or applicant for employment to disclose a username or password for the purpose of accessing personal social media. *Labor Code* §980. An employer also cannot require an employee to access personal social media in the presence of the employer. There are exceptions to this prohibition. For example, you can still require employees suspected of emailing confidential company documents to themselves to reveal their personal email password to determine if they sent the emails. An employer can also require an employee to reveal a password for a company-issued smartphone.

F. Forms And Disclosures

In addition to tax-related forms, California employers must provide new hires with the following documents: 1) a workers' compensation informational pamphlet; 2) an Employment Development Department (EDD) State Disability Insurance Provisions pamphlet (Form DE 2515); and 3) a sexual harassment informational pamphlet prepared by the Department of Fair Employment and Housing (Form DFEH-185), or an information sheet written by the employer containing essentially the same information. Employers must also file a Report of New Employees on Form DE-34. The DE-34 must be filed with the EDD within 20 days of the start of work of all employees who are newly hired or rehired. Finally, you must also provide new hires with the EDD Notice of Rights informational pamphlet concerning the California Family Temporary Disability Insurance Act (DE 2511 I), discussed in Section VII. E.

V. DISCIPLINE AND TERMINATION

A. At-Will Status Of Employees

California established the presumption of "at-will" employment in 1872. *Labor Code* §2922 provides: "An employment, having no specified term, may be terminated at the will of either party on notice to the other." The at-will presumption does not apply when an employee

has a contract with an employer for something other than at-will employment, such as limitations on the employer's power to terminate. Such contracts may be express (*e.g.*, in writing) or implied by the conduct of the employer.

If the employer promises the employee continuing employment verbally or in writing, contractual obligations may arise and the employee might not be considered at-will. Written assurances of job security, such as progressive discipline policies, can be used to support the existence of an implied contract not to terminate except for "cause." Other factors a court may consider in determining if an employee is at-will include personnel policies and practices, length of service, assurances of continued employment and industry practices. If an employee can establish the existence of an implied contract based on employer statements and conduct, the employee may assert that his or her termination constitutes a breach of contract.

In practice, an employer's right to discharge employees has been severely restricted by the courts and the Legislature. These restrictions must be considered before terminating any employee, including an at-will employee.

B. Laws Restricting Termination

In addition to numerous federal statutes that limit employers' rights to discipline or terminate employees, California law imposes a number of specific limitations on discipline and termination.

1. Protected Categories

The California Fair Employment and Housing Act (FEHA) prohibits employers who regularly employ five or more persons from discharging or disciplining employees based on any protected classification, such as race, religious creed, color, national origin, ancestry, sex (including pregnancy, childbirth, and related medical conditions), sexual orientation, physical or mental disability, marital status, medical condition, genetic information, gender, age, or military and veteran status. These categories are discussed in further detail below in Section VIII.

2. Whistleblower Status

California law prohibits retaliation against an employee for disclosing information to a government or law-enforcement agency, or to a managerial employee "who has the authority to investigate, discover, or correct the violation or non-compliance," if the employee has reasonable cause to believe that the information discloses a violation of or non-compliance with a local, state or federal statute or regulation. An employer is further prohibited from retaliating against an employee who it thinks may make such a complaint. Likewise, an employer may not retaliate against an employee for refusing to participate in an activity that would result in a violation of or non-compliance with a local, state or federal statute, rule, or regulation. *Labor Code* §1102.5.

3. Civic Duties

California law entitles an employee to take time off upon reasonable notice to the employer for jury duty, for a court appearance as a witness or crime victim, or to obtain a restraining order if a victim of domestic violence or sexual assault. *Labor Code* §§230; 230.5.

Employers must maintain the confidentiality of employees requesting leave relating to domestic violence or sexual assault, to the extent allowed by law. Employers who discharge or discriminate against an employee for taking time off for any of the reasons listed above may be liable to the employee for lost wages and benefits. An employee may take available vacation or personal time to participate in these civic duties.

The Civil Air Patrol Employment Protection Act requires employers to provide not less than ten days of unpaid leave per calendar year for Civil Air Patrol leave, and prohibits employers from requiring the employee to exhaust other forms of available leave first. *Labor Code* §1503.

Employers that employ 50 or more employees must permit an employee who is a volunteer firefighter, reserve peace officer, or emergency rescuer to take temporary leaves of absence, not to exceed 14 days per calendar year, for the purpose of engaging in emergency rescue training. (*Lab. Code* §230.4.)

Employees may also take time off to vote if they cannot get to the polls outside of work hours. *Elections Code* §14000. Up to two hours of this time off shall be without loss of pay, and the time must be taken at the beginning or end of the work shift. Employees must give at least two working days' notice of a request for time off to vote. Employers must post a notice at least ten days before each statewide election informing employees of their right to time off to vote. *Elections Code* §14001. A sample notice is available from the Secretary of State's website at http://www.sos.ca.gov/elections/elections_tov.htm. Statewide elections are regularly held in March and November of even-numbered years, meaning that the notices should be posted in February and October.

4. Domestic Violence/Sexual Assault/Stalking Victims

Employers of 25 or more employees must provide unpaid leave to those employees who are victims of domestic violence, sexual assault, or stalking to allow them to: 1) seek medical attention for injuries or obtain psychological counseling; 2) obtain services from a domestic violence shelter, program, or rape crisis center; and 3) deal with safety planning and other actions to prevent future violence or assault. *Labor Code* §230.1. This law does not give employees a greater right to unpaid leave than is permitted by the federal Family and Medical Leave Act.

The law does prohibit employers from discharging, discriminating against, or retaliating against employees based on their status as a victim of domestic violence, sexual assault, or stalking. *Labor Code* §230, subd. (c). It further requires that an employer engage in a timely, good, faith and interactive process in response to an employee's request for a reasonable accommodation to ensure their safety at work.

5. Organ And Bone Marrow Donation

Employers with 15 or more employees must allow employees to take up to 30 days of job-protected paid leave to donate an organ, and up to five days' job-protected paid leave to donate bone marrow. The employer must maintain and pay for group health coverage during this leave. *Labor Code* §1510.

6. School Visits Or Activities

Employers must permit employees time off to appear at school if they are the parent or guardian of a student who has been suspended, and such attendance has been requested by the school. *Labor Code* §230.7. Employers with 25 or more employees must provide up to 8 hours of unpaid leave per calendar month (up to 40 hours per year) for parents, guardians, and grandparents to participate in school activities (grades K through 12) or activities of a licensed day care center. *Labor Code* §230.8.

7. Political Activity

You may not coerce or influence, or attempt to coerce or influence, your employees to adopt or follow, or refrain from adopting or following, any particular political action or political activity. *Labor Code* §§1101 and 1102.

8. Sexual Orientation

California law prohibits discrimination or different treatment based on actual or perceived sexual orientation, meaning heterosexuality, homosexuality or bisexuality. *Government Code* §12926(q). Thus, an employee who is perceived as homosexual is protected from discrimination or differential treatment whether the sexual orientation is disclosed, undisclosed, or suspected. *Government Code* §12926(m). You must allow employees to appear or dress consistently with their gender identity. *Government Code* §12949. Finally, California law prohibits discrimination based on gender, meaning one's actual gender or the perception of that person's identity, appearance, or behavior. *Government Code* §12926(p); *Penal Code* §422.76. Transgendered people are among those protected.

9. Shopping Investigator Reports

An employer who disciplines or discharges an employee based upon a shopping investigator's report must provide a copy of the report to the employee before disciplining or terminating the employee. *Labor Code* §2930(a). This report must be provided whether the employee requests it or not, and must be provided before the conclusion of any interview that might result in the termination of the employee for dishonesty based on the report. But the rule does not apply if the investigator, duly licensed by the state, is employed exclusively and regularly by one employer in connection with the affairs of only that employer. An independent contractor relationship with the employer is not enough to qualify for this exception.

10. Disclosure Of Wages And Working Conditions

You may not discipline or discharge employees for disclosing the amount of their wages to co-workers or anyone else, nor require an employee to sign a document purporting to deny the employee this right. *Labor Code* §232. Similarly, employers may not prohibit employees from disclosing information about their working conditions. *Labor Code* §232.5.

11. Social Media

Employers may not discipline, discharge, or otherwise retaliate against an employee or applicant for not complying with an unlawful request or demand for access to the employee's or applicant's personal social media. *Labor Code* §980.

12. Illiteracy

Employees who are illiterate may not be terminated for that reason, so long as they are able to satisfactorily perform their jobs. *Labor Code* §1044. Employers with 25 or more employees must reasonably accommodate employees seeking to enroll in an adult literacy program, provided the accommodation does not create an undue hardship. *Labor Code* §1041. While employers must make reasonable efforts to safeguard the privacy of the illiterate employee, you need not provide paid time off for an employee to participate in an adult literacy program. *Labor Code* §§1042, 1043.

13. Military Service

In addition to extensive federal laws dealing with military service issues, California law prohibits discrimination against employees who are members of the military or naval forces of California or of the United States. *Military and Veterans Code* §394(a). An employer may not discharge an employee because of that person's military duties or training, or prevent an individual from enlisting or accepting a commission in the California National Guard or Naval Militia. *Military and Veterans Code* §394(d).

14. Misrepresentations To Prospective Employees

California law prohibits employers from using misrepresentations to influence or persuade applicants or employees to relocate to, from, or within the State. *Labor Code* §970. Promises of job security, promotions, increases in pay, career advancement, or other representations concerning the nature of the position, followed by a relocation and subsequent discharge, can lead to claims for damages. For example, an employer who requires applicants or employees to relocate and promises that their positions will be secure, then eliminates such a position, could be subject to liability. An employee suing under Section 970 may recover double the amount of actual damages suffered. A violation of this law is a misdemeanor.

Employers may not use any advertisement or other solicitation designed to mislead applicants as to compensation or commissions that can be earned. *Labor Code* §976. A violation of this law is also a misdemeanor. *Labor Code* §977.

15. Garnishments

An employee may not be disciplined or terminated as a result of a threatened garnishment, or an actual garnishment, for a single judgment or debt. *Labor Code* §2929(b). An employee discharged in violation of this section is entitled to up to thirty days' wages or any greater amounts available under a contract of employment. *Labor Code* §2929(c). An employee may not be disciplined or discharged because of wage assignments or garnishments for child support, nor may this be used as grounds to refuse to hire an individual. *Family Code* §5290.

Employers must comply with wage deduction orders requiring them to withhold or garnish wages to satisfy an employee's debt.

16. Workers' Compensation

Labor Code §132a prevents employers from discriminating against an employee who files or threatens to file a workers' compensation claim. Employees needing time off from work due to an industrial injury are generally entitled to leave pursuant to their rights under §132a. In limited cases of "business necessity," you may replace and not reinstate an employee on workers' compensation medical leave.

California workers' compensation rules are often at odds with federal and state laws providing disabled employees the right to reasonable accommodations in the workplace. Be sure to carefully review all applicable laws before terminating an employee on workers' compensation leave or refusing to reinstate the employee to his or her former position.

Employers also may not discharge, threaten to discharge, or in any other way discriminate against any employee because that employee testified or intends to testify for another employee in a case before the Workers' Compensation Appeals Board (WCAB). *Labor Code* §132a. A violation of this rule can subject the employer to criminal liability in the form of a misdemeanor, as well as civil liability to the employee for lost wages and benefits. An employee who has been discriminated against in violation of §132a is entitled to reinstatement, back wages and benefits, and a penalty of up to \$10,000.

Employees who are injured as a result of serious and willful misconduct of an employer are entitled to have their compensation increased by one-half as a penalty. *Labor Code* §4553. Similarly, if employees are injured as a result of their own serious and willful misconduct, the compensation may be reduced by one-half. *Labor Code* §4551.

17. Compelled Patronage and Uniforms

An employer may not force, compel, or coerce any employee or applicant to purchase the employer's goods or services or "anything of value" from any other person. *Labor Code* §450. For example, employers may not take adverse action against an employee for purchasing a competitor's goods and services instead of the employer's. In addition, this statute has been construed to prohibit employers from providing bonuses in the form of scrip or gift cards that can only be used at one store and cannot be redeemed for cash.

An employer may not require its employees to purchase its clothes and wear those clothes on the sales floor. However, the employer may determine the weight, color, quality, texture, and style of the uniforms required of its employees. *Labor Code* §452. As a general proposition, employers must provide and maintain the uniforms to be worn by their employees without charge to the employee. *Industrial Welfare Commission Wage Orders*, §9(A).

18. Immigration Status

An employer may not engage in "unfair immigration-related practices" in response to an employee exercising a legal right, such as reporting *Labor Code* violations. *Labor Code* §1019.

Threatening to report a person's immigration status or suspected immigration status, or the status of their relative, can be considered extortion. *Penal Code* §519.

19. Public Policy

Public policy considerations limit an employer's ability to terminate at-will employees. The public policy at issue must be fundamental, substantial and clearly established at the time of the adverse employment action. Generally, only public policies set forth in statutes or constitutional provisions will be recognized. Further, there must be a "nexus" between the adverse action and the public policy at issue, generally meaning that the employee was terminated because of his or her refusal to perform the act contrary to public policy. For example, threatening termination to coerce an employee into committing an unlawful act or concealing wrongdoing would be against public policy.

A violation of public policy may also occur when an employer retaliates against employees for exercising a legal right, such as reporting a dangerous condition to a government agency or refusing to waive legally-required meal and rest periods. Wrongful termination in violation of public policy is a cause of action that exposes employers to tort damages, including punitive damages.

C. Constructive Discharge

An employee who is not actually terminated may still be able to bring an action for wrongful termination using the theory of constructive discharge. "Constructive discharge" occurs when an employer either intentionally creates or allows working conditions so intolerable that a reasonable person in the employee's position would feel compelled to resign. A constructive discharge is treated as if the employer had actually terminated the employee.

D. Relocations, Terminations, And Mass Layoffs

The federal Worker Adjustment Retraining and Notification Act (WARN) requires employers to provide advance notice of covered plant closings and mass layoffs. California has its own "mini-WARN" statute requiring advance notice of relocations, terminations, and mass layoffs. *Labor Code* §1400 *et seq.* This statute is significantly different than federal law.

California's mini-WARN statute applies to any industrial or commercial facility that has employed 75 or more persons in the preceding 12 months. Covered establishments must provide at least 60 days written notice before ordering a "mass layoff" of 50 or more employees during any 30-day period, ceasing or substantially ceasing operations, or relocating operations more than 100 miles away.

Employers contemplating significant layoffs or the relocation or closure of their operations must carefully examine their notice obligations under state and federal law to avoid potential liability for back pay. Civil penalties and attorneys' fees are also available to employees who sue for violation of this statute.

VI. WAGE AND HOUR LAWS

California has some of the most rigorous and unique employee compensation laws in the United States. The California wage and hour laws are enforced by the Division of Labor Standards Enforcement (DLSE), which is headed by the Labor Commissioner.

A. Primary Sources Of California Wage And Hour Laws

California's wage and hour laws for the most part are set forth in the Labor Code and in the Industrial Welfare Commission's Wage Orders. The Wage Orders are categorized by industry and occupation. Employers must determine which Industry Wage Order applies to their business, and follow the rules set forth in the applicable Wage Order(s). A helpful publication designed to assist employers in determining which Wage Order(s) apply to them is available at <http://www.dir.ca.gov/dlse/WhichIWCOrderClassifications.PDF>. If no Wage Order applies to a particular industry, then the Occupation Wage Orders determine the standards for that business. A copy of the applicable Wage Order(s) must be posted at work sites. The Wage Orders are available on the DLSE's website at <http://www.dir.ca.gov/IWC/WageOrderIndustries.htm>.

B. Payroll Records

Labor Code §1174 requires employers to maintain employee records containing the names and addresses of all employees, and the ages of any minors. You must keep records showing the hours worked and wages paid to each employee (or if applicable, the number of piece-rate units earned and the applicable piece rate). These records must be maintained for at least two years, either at a central location in the state or at the plants or establishments where the employees work. If the records are maintained electronically, the DLSE's policy is that they must be retrievable within the State of California, and must be able to be printed at the request of the employee or the DLSE.

In addition, *Labor Code* §226 requires employers to provide accurate itemized wage statements (pay stubs) with each paycheck. These itemized wage statements must include the following items: 1) gross wages earned; 2) total hours worked by the employee, except for exempt employees who are paid on a salary basis; 3) the number of piece-rate units earned and the applicable piece rate, if the employee is compensated on this basis; 4) all deductions; 5) net wages earned; 6) the inclusive dates of the period for which the employee is paid (not just the ending date); 7) the employee's name and identification number, or the last four digits *only* of the employee's Social Security number if no identification number is used; 8) the name and address of the legal entity that is the employer; 9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each rate by the employee. A copy of this statement must be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California.

Employees may recover actual damages or penalties of \$50 for the initial pay period and \$100 for each subsequent pay period, up to an aggregate of \$4,000, for violations of *Labor Code* §226.

An employer who receives a written or oral request from a current or former employee to inspect records required to be maintained pursuant to *Labor Code* §226 must comply as soon as

practicable, but no later than 21 days from the date of the request. Employers may charge employees the actual cost of reproducing copies.

C. Hours Worked

Employees must be paid for all hours worked. California defines working time to include all time that an employee is subject to the control of an employer, including all time an employee is “suffered or permitted” to work, regardless of whether the employer required or requested the work. 8 *Cal. Code Regs.* §§11010-11150. Hours worked generally include: stand-by or on-call time; certain integral preparatory and post-work activities; training and meeting time; certain travel time during work hours; employer-requested medical visits; on-duty meal periods where the nature of the work precludes the employee from being relieved of all duty; rest periods; and work at home. An employee is generally entitled to payment for time worked, including overtime, even if the employer did not authorize the work time in advance.

D. Reimbursement For Expenses

Employers must reimburse their employees for all necessary expenditures or losses incurred in the discharge of their duties. *Labor Code* §2802. Common expenses include travel and automobile expenses, including a reasonable mileage reimbursement, and cell phone expenses if the employer requires the employee to carry a cell phone. The Internal Revenue Service’s standard mileage reimbursement rate for business travel is 56 cents per mile for 2014. Employees working from a home office are entitled to reimbursement of business expenses as well. *Labor Code* §2802 has been interpreted to require employers to indemnify an employee for legal costs incurred defending lawsuits arising from conduct within the course and scope of employment. For example, one employer was required to reimburse an employee for legal costs arising from the employee’s successful defense of a sexual harassment lawsuit by a co-worker.

E. Minimum Wages

California’s minimum wage is \$8.00 per hour through June 30, 2014. On July 1, 2014, the minimum wage will increase to \$9.00 per hour. Beginning January 1, 2016, the minimum wage will increase to \$10.00 per hour. It is important to be sure of the current minimum wage rate, which can be found in Title 8 of the California Code Regulations at Section 11000. Employers must post both the California state minimum wage poster as well as the federal Fair Labor Standards Act minimum wage poster, even though California’s minimum wage exceeds the federal minimum wage.

Employers may, with a voluntary written agreement, credit meals and lodging furnished to an employee against the employer’s minimum wage obligation to that employee. The amount of the credit is limited by the Wage Orders and the Labor Code.

Note: Certain cities including San Francisco, San Jose, Los Angeles and Hayward have municipal “living wage” ordinances that set the minimum wage even higher than the state and federal minimum wages. For example, San Francisco requires all employers with employees who perform at least two hours of work in a week within the geographic boundaries of the city to pay them a minimum wage of at least \$10.74 per hour in 2014. (San Francisco also requires employers to provide paid sick leave and contribute toward employee health insurance.)

1. Uniform Costs

The Wage Orders provide that if an employer requires a uniform or distinct style or color of clothing, the employer must pay for the garments and for their maintenance, unless they are wash-and-wear. You need not pay for common items of clothing, such as white shirts or black pants, that can be worn outside of work.

2. Tools And Equipment

When tools or equipment are required by the employer, or are necessary for the performance of a job, the Wage Orders require the employer to either provide the tools or pay the employee an hourly rate of at least twice the minimum wage.

3. Gratuities

Employers may require tipped employees to pool their gratuities among those employees who provide service to the tipping patron. (This includes tips provided by patrons to dancers working in industries covered by Wage Orders 5 and 10. *Labor Code* §350(e).) Tip pools may not include owners, managers, or supervisors, even if they provide direct service to the tipping patron. Employers must keep records of all gratuities received, directly or indirectly. *Labor Code* §353.

But you may not: 1) take gratuities away from employees; 2) use gratuities as a credit against the state minimum wage; or 3) deduct processing fees from gratuities paid via credit card. *Labor Code* §351. Service charges, such as those required of large parties, are not counted as tips.

4. Examination Costs

You may not require applicants to pay for medical or physical examinations that are required by the company's policies or that are required by law as a condition of employment. *Labor Code* §222.5.

F. Deductions

Deductions are generally only permitted if legally required, such as payroll taxes and wage garnishments, or if the employee gives advance written authorization (*e.g.*, for a regular installment on a loan, or for insurance premiums). *Labor Code* §224. An employer may not take deductions from an employee's paycheck for losses or breakage, such as cash shortages, caused by an employee's ordinary negligence.

On the other hand, employers may make deductions from wages for damages that result from an employee's gross negligence, dishonesty (*e.g.*, theft), or willful misconduct, but do so at their own risk. Employers that cannot prove that the employee was guilty of the claimed misconduct, risk a monetary penalty. In this context, an employee's action is very rarely found to be grossly negligent. Before making a deduction for theft, it is advisable for the employer to file a police report to demonstrate a good faith belief that the theft occurred.

G. Overtime

Federal law requires overtime when employees work over 40 hours in a week. In California, employers must also pay daily overtime, unless the employee is considered exempt from overtime. The various exemptions are discussed later.

For all non-exempt employees, California employers must pay overtime at one and one-half times the employee's regular rate of pay for: 1) all hours worked beyond eight in a day; 2) all hours worked beyond 40 in a work week; and 3) the first eight hours worked on the seventh consecutive day of work in a work week. Additionally, employers must pay twice the regular rate of pay for all hours worked beyond 12 in a day, and for work over eight hours on a seventh consecutive day in a work week. *Labor Code* §510.

1. Regular Rate For Overtime

The "regular rate" used for overtime calculations is not the same as the employee's straight-time rate. All forms of compensation must be included in computing the regular rate, including: hourly wages, salary, piece rates, commissions, and bonuses. Gifts, discretionary bonuses, and payments for hours not actually worked (*e.g.*, holidays and vacation) are not considered part of an employee's regular rate of pay. Computing the regular rate for overtime also depends on the manner in which an employee is normally paid.

a. Hourly Employees

An hourly employee's regular rate of pay is calculated by dividing the total compensation, including the hourly rate plus any commissions or performance bonuses, by the legal maximum number of regular hours (typically, 8 in a day or 40 in a workweek). When calculating overtime premiums, employees are owed half that rate for time-and-one-half hours and the entire rate for double-time hours, in addition to the straight-time pay.

b. Salaried Employees

A non-exempt salaried employee must be paid one and one-half times the regular rate for all overtime hours worked. This amount is in addition to the employee's regular salary. The mere fact that an employee is paid on a salary basis does not automatically make that employee exempt from the overtime laws.

A non-exempt full-time salaried employee's regular hourly rate is one-fortieth of the employee's weekly salary, regardless of how many hours the employee actually worked. *Labor Code* §§515(c)-(d). To determine the weekly rate, multiply the monthly salary by 12 and divide by 52. Divide again by 40 to get the hourly rate. California employers may not use the federal fluctuating work week method of calculating overtime for salaried employees.

c. Other Methods Of Pay

For an employee who is paid on a piece rate or similar basis, the regular rate of pay is calculated by dividing the employee's total earnings for the work week by the number of hours actually worked. The piece rate employee is then paid only one-half the regular rate as a premium on overtime hours paid at the time and one-half rate. Overtime on straight

commissions is calculated similarly. In no instance can the piece rate wage fall below the applicable minimum wage. Detailed examples of piece rate calculations can be found in Section 49.2 of the Division of Labor Standards Enforcement's Enforcement Policies and Interpretations Manual, available online at www.dir.ca.gov/dlse/DLSEManual/dlse_enfmanual.pdf.

2. Alternative Work Week Schedules

Employees in California may agree to work a ten hour per day, four day work week schedule, and the employer does not have to pay daily overtime for the ten hour work days. Many procedures must be followed to implement such an alternative schedule, however. The employer must initially make a written proposal to its employees for an alternative work week; such proposal should include anti-retaliation and accommodation provisions. The proposal must be disclosed to the employees, and scheduled notice meetings held for the purpose of discussing the proposed schedule.

Thereafter, following a 14-day cooling off period after the meeting, two-thirds of the employees in the affected unit must approve the schedule by secret ballot election. The results of the election must be reported to the Division of Labor Statistics and Research (DLSR) within 30 days of the results being finalized. The employees that are affected by this alternative work week may repeal it under certain conditions. Finally, employers must make reasonable efforts to accommodate any employee who voted in the election and is unable to work the alternative hours. A number of other rules must be followed in this process. The rules are set forth in *Labor Code* §511 and in the applicable Wage Order.

Labor Code §511 allows employers to include an eight-hour day in the menu of alternative workweek options employees can choose from. In addition, employees may move from one menu option to another on a weekly basis, provided the employer consents. This means an employee could, for example, work a 4/10 schedule one week, a 5/8 schedule the following week, and revert to a 4/10 schedule the week after that. *Labor Code* §511 now also clarifies that a "work unit" for alternative workweek purposes may consist of a single employee if other criteria are met.

Failure to comply with the alternative workweek election rules described above could expose an employer to significant liability. If the election is invalidated for failing to comply with established procedures and rules, an employee could make claims for non-payment of overtime, along with other civil claims and penalties. An employer seeking to implement an alternative work week schedule should keep meticulous records of the election, meetings, and proposals for an indefinite period to protect itself in case of an audit challenging the election.

The rules for alternative work weeks are somewhat different in the healthcare industry. Healthcare industry employers may institute special alternative work week schedules that permit a 12-hour shift and do not require the employer to pay daily overtime. The special 12-hour shift schedule is limited to a defined group of employees in the healthcare industry, such as those providing patient care and pharmacists. Employees engaged in providing meals, maintenance, cleaning, or other business functions are specifically excluded. The overtime pay scale is different as well. The healthcare employee does not earn time-and-one-half for hours worked over ten in a given work day, but instead leaps straight to double the rate of pay after 12 hours.

However, the time and one-half provision remains in effect for working more than 40 hours in a work week.

In order to qualify, healthcare employers must follow detailed election procedures, similar to those outlined above, including: a proposed written agreement; advance written disclosure and meetings; secret ballot elections; reasonable accommodation for some employees; and a report of the election results to the DLSR.

3. Make-Up Time

Labor Code §513 excuses an employer from overtime obligations when an employee submits a signed written request to make-up any hours that will be missed during the same work week due to a personal obligation of the employee. If the employer approves an employee's request for make-up time, the lost time can be made up only during the same week in which the time is initially lost. Employers will not incur overtime liability as long as no work day exceeds 11 hours and as long as the work week does not exceed 40 hours. Employers are prohibited from encouraging or otherwise soliciting an employee to make-up time off.

H. Exemptions From Overtime

Certain employees are exempt from overtime pay provisions based upon their job duties. Many of the California exemptions are patterned after the federal exemptions. However, the requirements for the California exemptions vary significantly from federal law, and where federal exemption criteria are more lenient, they do *not* apply in California.

1. White-Collar Exemptions

Employees working in executive, administrative, or professional positions are exempt from overtime provisions as long as they are primarily engaged in exempt duties, they customarily and regularly exercise discretion and independent judgment in performing those duties, and they receive a salary equal to twice the minimum wage. *Labor Code* §515(a). Each of the white collar exemptions must meet a "salary test," which requires that the employee make a fixed annual salary of at least \$33,280 based on the current minimum wage of \$8.00 per hour.

Based on the upcoming increases in the minimum wage, in July 2014, the minimum annual salary to meet the exemption will increase to \$37,400 and starting January 2016 it will increase to \$41,600. The salary must be paid without regard to the number of days or hours worked, and cannot be subject to any reduction because of quality or quantity of work performed.

This does not mean, however, that the salary of an exempt employee in California may not be docked. Deductions may be taken under the following circumstances: 1) for absences of one or more full days for personal reasons other than sickness, disability, or accident; 2) for absences of one or more full days caused by sickness, accident, or disability, if the employer maintains a plan which provides compensation for loss of salary for such reasons; 3) during the first or last weeks of work, the employer can pay a proportionate part of the employee's salary for time actually worked if the employee does not work the entire week; 4) to offset any amounts received by an employee as jury or witness fees or as military pay, but beyond these offsets no

deductions may be taken for absences caused by jury duty, attendance as a witness, or temporary military leave unless the employee is off for an entire week; and 5) for penalties imposed in good faith for violations of safety rules of major significance. Not paying salaried employees properly, or improperly docking their salary, jeopardizes the exempt status of those employees and exposes the employer to liability for overtime wages.

a. Executive Exemption

An executive is defined as any employee who:

- is involved in management of the enterprise or a customarily recognized department or subdivision;
- customarily and regularly directs the work of two or more other employees;
- has the authority to hire or fire other employees, or make meaningful recommendations as to hiring, firing, or other status decisions;
- customarily and regularly exercises discretion and independent judgment;
- is primarily engaged in exempt duties (i.e., spends at least 50% of the time performing exempt duties); and
- meets the salary test described above.

b. Administrative Exemption

A person employed in an *administrative* capacity is an employee whose primary duty consists of office or non-manual work that is directly related to management policies or general business operations (as opposed to “production” work) of the employer or the employer’s customers, and performs work that regularly requires the exercise of independent judgment and discretion. An administrative exemption exists for those whose functions involve the administration of a school system or educational establishment which is directly related to the academic instruction or training performed therein. The administrative employee also must meet one of the following tests:

- regularly and directly assists either a proprietor or another exempt executive or administrative employee; or
- performs under only general supervision and is engaged in work along specialized or technical grounds requiring special training, experience or knowledge; or
- executes, under only general supervision, special assignments and tasks;

As with the other white-collar exemptions, an administrative employee must be “primarily engaged in” exempt work, meaning that the employee performs exempt work at least 50% of the time, and must meet the salary test described above. The administrative exemption is particularly difficult to apply, and it is wise to seek legal counsel if you have questions about this exemption.

c. Professional Exemption

A person employed in a *professional* capacity is any employee who is licensed or certified by the State of California and is primarily engaged in the practice of one of the following recognized professions: law; medicine; dentistry; optometry; architecture; engineering; teaching, or accounting. With a few limited exceptions, the professional exemption does not apply to pharmacists or registered nurses. *Labor Code* §515(f).

The professional exemption may also apply to those primarily engaged in an occupation commonly recognized as a learned or artistic profession. Learned or artistic professions are those which generally involve:

- work requiring knowledge of an advanced type customarily acquired by a prolonged course of specialized instruction and study, as distinguished from a general education or apprenticeship and routine processes;
- work that is original and creative in character in a recognized field of artistic endeavor, the result of which depends primarily on the talent of the employee; and
- work that is predominantly intellectual and varied in character and that the product of such work cannot be standardized in relation to a given period of time.

2. Other Exemptions

a. Computer Professionals

A computer professional is an employee who is primarily engaged in work that is intellectual or creative and requires the exercise of discretion and independent judgment. The employee must also be primarily engaged in duties that consist of one or more of the following:

- the application of systems-analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;
- the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to, user or system design specifications; or
- the documentation, testing, creation, or modification of computer programs related to the design of software or hardware for computer operating systems.

The employee must also be highly skilled and proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering. Trainees and other employees who are not skilled enough to work independently and without close supervision do not qualify for the exemption. “Help Desk” troubleshooters also typically do not qualify for this exemption. These exclusions are described in *Labor Code* §515.5 and in the Wage Orders.

To qualify for this exemption, employees must perform work that qualifies for the exemption and be paid at least \$40.38 per hour, or an annual salary of \$84,130.53 (\$7,010.88 per

month). These rates are subject to adjustment by the Division of Labor Statistics and Research on October 1st each year to be effective January 1 of the following year; for 2014 the applicable rates increased 1.2% from the 2013 rates. For a history of the applicable minimum wages for this exemption, see <http://www.dir.ca.gov/dlse/LC515-5.pdf>.

b. Private Schoolteachers

Private school teachers at a private elementary or secondary academic institution (kindergarten or grades 1 to 12) may be exempt from overtime compensation requirements. The teacher must be primarily engaged in the duty of imparting knowledge to students by teaching, instructing, or lecturing. The teacher must also customarily and regularly exercise discretion and independent judgment in performing his or her duties, and must earn a monthly salary equivalent to no less than two times the state minimum wage for full-time employment. Finally, the teacher must have a baccalaureate or higher degree from an accredited institution of higher education or have a teaching credential from California or some other state.

Note that this is a limited exemption from overtime only. Other provisions of the Wage Orders still apply, including those requiring meal and rest periods. Some private school teachers may also fall within the professional exemption, which would exempt them from compliance with meal and rest period requirements.

c. Outside Salespersons

Any person, 18 years or older, who customarily and regularly works more than half the time away from the employer's place of business selling tangible or intangible items, or obtaining orders or contracts for products, services or use of facilities, is considered an outside salesperson and is exempt from both overtime and minimum wage. California courts closely scrutinize the duties of such employees to ensure they are truly engaged in selling as opposed to related duties such as delivery, inventory, and stocking.

d. Inside Salespersons

Inside salespersons are generally considered non-exempt employees under California law. However, under the Mercantile Industry Wage Order (Wage Order 7) and the Professional, Technical, and Clerical Occupation Wage Order (Wage Order 4), an inside commission sales employee primarily engaged in selling is exempt from overtime if the employee:

- earns at least one and one-half times the minimum wage for every hour actually worked; and
- derives *more than half* of his or her compensation from commissions. It is important that employers keep accurate time and pay records for any inside commission sales employee in order to determine whether this exemption applies.

Commission agreements must be in writing and signed by the employee. In general, the agreement must include information that sets forth the method by which the commissions shall be computed and paid. Note that this is a limited exemption from overtime only; other provisions of the Wage Orders still apply, including provisions requiring meal and rest periods.

There are multiple other positions that have been exempted from the overtime compensation requirements only, including certain motor carrier drivers, movie projectionists, broadcasting industry workers employed as announcers, news editors, or chief engineers at a radio or television station in a town that has a population of no more than 25,000, agricultural employees during any week in which more than half of the employee's time is spent performing the duties of an irrigator, taxicab drivers and certain airline employees, state and local government employees, student nurses, babysitters and personal attendants employed by a nonprofit organization.

I. Mandatory Breaks

1. Meal Periods

An employer must allow for an unpaid and duty-free meal period for at least thirty minutes whenever an employee is assigned to work a period of more than five hours. The employer and employee may mutually agree to waive the meal period if the employee's total work day does not exceed six hours. Any employee working more than ten hours in a day must be provided a second unpaid and duty free meal period of at least thirty minutes. *Labor Code* §512. Employees may agree in writing to take an on-duty and paid meal period if the nature of the job requires it, as long as the agreement allows the employee to revoke the agreement, in writing, at any time. In order to justify an on-duty meal period, the nature of the employees' jobs must prevent them from being relieved of all duties during a meal period. This is a difficult standard to meet, as plaintiffs' lawyers and the Division of Labor Standards Enforcement will look at various ways the employer could provide relief for its employees.

2. Rest Periods

The Wage Orders provide for a paid rest period for employees who work at least three and one-half hours. Employees are eligible for a paid and off-duty break of no less than ten minutes (net) for each four-hour period of work. The Wage Orders call for this rest period to occur, if practical, in the middle of each work period.

3. Recovery Periods

A recovery period is defined in the Cal-OSHA regulations as "a cool down period afforded an employee to prevent heat illness." All employees who work outside must be allowed to take cool-down periods in the shade for not less than five minutes at a time whenever employees feel the need to do so to protect themselves from overheating.

4. Penalties For Not Providing Meal, Rest, or Recovery Periods

If you fail to provide a required meal, rest, or recovery period, the employee is entitled to one hour's pay penalty for every day in which the meal, rest, or recovery period was not provided. Other monetary and criminal penalties could also apply. It is imperative to keep adequate employee time records in order to effectively defend claims that these breaks were not provided. You are required to keep time records of meal breaks taken by employees. You are not required to keep time records of when employees take rest or recovery breaks. This remains a fertile area for class action lawsuits.

5. Meal-Period Exemption For Certain Union Employees

Employees in certain occupations who are subject to a collective bargaining agreement that provides for meal periods and other terms are not subject to the requirement that meal periods be taken by the fifth hour of work. *Labor Code* §§512(e)-(f). The employees subject to this exception are those working in construction occupations; commercial drivers; private security guards; and employees of gas and electric utilities. Employees who are not covered by this exemption must be provided with meal periods or penalties will apply.

J. Maximum Hours

California *Labor Code* §551 provides that any non-exempt California employee is entitled to at least one day's rest in seven. Exceptions to this rule include: 1) employees working in an emergency situation; 2) employees of railroad-related common carriers; and 3) employees working fewer than six hours per day and fewer than thirty hours per week. Also, employees may work seven or more consecutive days so long as during each calendar month the employee receives a quantity of days off equivalent to one day's rest in seven.

K. Payment Of Wages

1. Equal Pay

Labor Code §1197.5 forbids sex discrimination in the compensation of employees. In order to avoid liability, men and women should be compensated equally for equal work in positions which require equal skill, effort, and responsibility, and are performed under similar working conditions. Employers should perform periodic audits of their own records to ensure compliance with equal pay provisions. Employers who violate §1197.5 are liable to the employee for the amount of the wages plus interest, plus an additional equal amount as damages.

2. Pay Periods

California requires most employees who are not exempt from overtime to be paid at least twice monthly on dates designated in advance by the employer. The employer is required to post a notice specifying the regular paydays and the time and place of payment. *Labor Code* §207. Work performed between the first and the fifteenth of the month must be paid for on regular paydays between the sixteenth and twenty-sixth of the month. Work performed between the sixteenth and the last day of the month must be paid for between the first and tenth of the following month. *Labor Code* §204. Employers may opt to pay wages more frequently. Exemptions to the payday rules apply to white-collar exempt employees and certain employees of automobile dealerships. *Labor Code* §§204(c) and 204.1.

3. Form Of Payment Of Wages

A bank check or other instrument used to pay employees must be negotiable "on demand, without discount, at some established place of business in the state." *Labor Code* §212. This is generally construed by the Labor Commissioner to require that the payroll check be drawn on a bank with an address within the State of California. Further, while the law allows an employer

to pay employees via direct deposit, the employer may not require direct deposit as a condition of employment. *Labor Code* §213.

4. Payment At Termination

Employees must be paid their final paychecks at the time of termination, meaning the paycheck must be presented when the discharge decision is announced. Employees who are paid through direct deposit are also entitled to receive their final pay at the time of termination, although this may be done via direct deposit on that day. *Labor Code* §213(d). Any accrued and unused vacation is considered earned wages and must also be paid at the time of termination at the final rate of pay.

Temporary services employers are now generally permitted to pay an employee whose assignment concludes no later than the end of the regular payday of the following calendar week. *Labor Code* §210.3. Special provisions for final wages also apply to employers in the motion picture industry (*Labor Code* §201.5), the oil drilling business (*Labor Code* §201.7), and venues that host live theatrical or concert events (*Labor Code* §201.9).

An employee who resigns must be paid within 72 hours of ceasing work unless the employee has given at least 72 hours of advance notice of quitting, in which case the final wages are due on the last day of work. Payment by mail is only allowable if the employee agrees, and even then it is advisable to get written acknowledgment of the request. *Labor Code* §202.

A willful failure to pay a terminated employee in a timely fashion usually subjects an employer to a “waiting time” penalty, which consists of a continuation of the employee’s wages on a day-by-day basis until the final paycheck is ready, up to a maximum of 30 calendar days’ wages. These penalties often dwarf the amount of late-paid wages.

VII. EMPLOYEE PRIVACY RIGHTS

A. Sources Of Privacy Rights

Article 1, Section 1, of the California Constitution provides all citizens of the State of California with the inalienable right to privacy. This constitutional right to privacy applies to both public and private employers. Particular California statutes also protect employees’ privacy rights. When an employee claims a violation of his or her privacy rights granted by the California Constitution, he or she must establish: 1) a legally protected privacy interest; 2) a reasonable expectation of privacy given the circumstances; and 3) conduct by the defendant constituting a serious invasion of privacy.

An employer may be able to defend itself by showing that the invasion of privacy is justified by a legitimate and substantive countervailing interest, and there are no feasible or effective alternatives that lessen the intrusion on the employee’s privacy rights.

B. Personal Relationships

1. Dating Relationships

Employers may establish policies which prohibit employees from participating in dating and sexual relationships that create a conflict of interest (*e.g.*, between a supervisor and a subordinate), to reduce exposure to sexual harassment claims and to prevent harm to employee morale that may result from perceived favoritism. Notice to employees of this policy is highly advisable. However, an employer may not discipline or otherwise penalize an employee for engaging in a private relationship where there is no genuine conflict of interest. Thus, where two employees wish to date and have no supervisory authority over one another, typically the relationship may not be prohibited, absent proof that the relationship actually interferes with the employees' ability to perform their jobs.

2. Marital Status

California prohibits discrimination based on an individual's marital status, which is broadly defined in the California Code Regulations. 2 *Cal. Code Regs.* §7292.1(a). There are three ways in which an employee or applicant may attempt to show discrimination based upon his or her marital status: 1) the fact that the applicant or employee is not married; 2) an applicant's or employee's "single" or "married" status; or 3) the employment or lack of employment of an applicant's or employee's spouse. However, employers do have the right, when employing a married couple, to refuse to place both spouses in the same department, division, or facility if the work involves potential conflicts of interest which are greater for married employees. Policies unconditionally prohibiting employees from being married to one another may violate the law, although most interpretations of this law still permit employers to prohibit a married couple from working in a supervisor/subordinate relationship.

C. Tape Recording And Video Surveillance

1. Tape Recording

Generally, it is a crime for any person, intentionally and without the consent of all parties to a confidential communication, to eavesdrop on or record the communication by means of any electronic, amplification, or recording device. This prohibition applies to personal conversations as well as telephonic communications. Put simply, the law generally prohibits people from tape recording conversations without the permission of everyone in the conversation. *Penal Code* §632.

On the other hand, employers may legally monitor and record business-related telephone conversations of employees who deal with the public, such as salespersons and customer service personnel. Prior notice to everyone involved in the conversations is required.

2. Video Surveillance

Video surveillance of public areas in the workplace is generally permissible. Employers may also conduct surveillance of specific workers when there is a basis for suspicion of prohibitive conduct. However, the key is to gauge the employee's reasonable expectation of

privacy in the area to be recorded. Employers may use undercover security agents posing as fellow employees or as customers, but any surveillance must be limited to non-private areas. Video surveillance in restrooms, locker rooms, or other similarly private areas is prohibited unless authorized by court order. *Labor Code* §435.

D. Medical Records

The California Confidentiality of Medical Information Act strictly limits an employer's use and disclosure of employee medical information. An employer must establish appropriate procedures to ensure the confidentiality of employee medical information and its protection from unauthorized use and disclosure. *Civil Code* §56.20(a). Such procedures may include instructions regarding confidentiality to employees handling files, or the use of security systems to restrict access to such files.

Further, the California Health and Safety Code precludes employers from testing applicants and employees for AIDS/HIV, as well as from making employment decisions based on such tests. *Health & Safety Code* §120980(f). The law subjects the employer to liability for unauthorized disclosure of these test results, and where an employer demands such a test and terminates the employee who refuses, the employer may be liable in a wrongful termination suit.

E. Drug Testing

Any applicant for employment may be drug tested without a showing of cause so long as the employer tests all applicants in the same job category. Even if the applicant puts off the drug test until after beginning work, this rule still applies. However, privacy laws prohibit an employer from requiring current employees to be tested for drug use unless the employee is working in a safety-sensitive position or the employer has reasonable suspicion that the employee has violated the employer's drug policy. Current employees are protected from generalized testing even if they experience a change in employment status, such as a promotion.

Random drug testing of current employees in safety sensitive positions is permissible, but advance notice of the random drug testing policy should be given.

F. Social Security Numbers

California has Social Security number privacy legislation intended to thwart identity theft. *Civil Code* §§1798.85 *et seq.* Pursuant to these laws, all persons and entities, including employers, are prohibited from:

- publicly posting or displaying an individual's Social Security number in any manner;
- printing an individual's Social Security number on any card required to access products or services provided by the employer—including insurance cards, employee identification cards, security badges, and similar identification tools;
- requiring an individual to transmit his or her Social Security number over the Internet, unless the connection is secure or the Social Security number is encrypted;
- requiring an individual to use his or her Social Security number to access an Internet

site, unless a password or unique personal identification number or other authentication device is also required to access the site; and

- printing an individual's Social Security number on any materials that are mailed to the individual, unless state or federal law requires the Social Security number to be on the document mailed (*e.g.*, mailing I-9 and W-2 forms). Notwithstanding this provision, applications and forms sent by mail may include Social Security numbers. A Social Security number that is permitted to be mailed cannot be sent on a postcard or other mailer not requiring an envelope, or where the number is visible on the envelope or without the envelope being opened.

While the employee cannot waive these rights, the law has two exceptions applicable to employers (*Civil Code* §1798.85(b)-(c)):

- it does *not* prevent the use of Social Security numbers for internal verification or administrative purposes; and
- it does *not* prevent the use, collection, or release of a Social Security number as required by state or federal law.

VIII. DISCRIMINATION

California's equal employment opportunity laws often are broader in scope than their federal counterparts. The primary source of these laws is the Fair Employment and Housing Act (FEHA), which is found in the Government Code starting at Section 12900. Even when state and federal provisions cover the same topics, state provisions may afford more expansive rights to employees.

For example, the FEHA not only prohibits discrimination on the basis of race, religious creed, color, national origin, ancestry, physical or mental disability, medical condition, marital status, sex, age and sexual orientation, but also discrimination on the basis that a person is *perceived* to have a protected characteristic, or on the basis that a person is *associated with* someone who has or is perceived to have a protected characteristic. *Government Code* §12926(m). The FEHA's protections for disabled employees are still broader than those provided by federal law, even after enactment of the Americans with Disabilities Act Amendments Act of 2008. Employers may not retaliate against employees for exercising their rights under the FEHA.

The FEHA generally applies to employers with five or more employees. *Government Code* §12926(d). The anti-harassment provisions are applicable to employers with one or more employees. *Government Code* §12940(j)(4)(A). The rights afforded by the FEHA may be enforced by the Department of Fair Employment and Housing (DFEH) and the Fair Employment and Housing Commission, or by a private lawsuit. Individuals wishing to file a private lawsuit alleging a violation of the FEHA must first exhaust their administrative remedies by filing a charge with the DFEH. The individual is not required to wait for the DFEH to investigate the charge, and may request an immediate right-to-sue letter.

A. Protected Categories

1. Age

California law prohibits discrimination on the basis of age. *Government Code* §§12940 and 12941. Like the federal Age Discrimination in Employment Act, the FEHA bars discrimination against individuals over the age of 40. *Government Code* §12926(b). But the FEHA provides more remedies than does federal law. For example, California law allows recovery for emotional distress and punitive damages, with no statutory limit on damage awards.

It is generally unlawful under the FEHA to do any of the following on the basis of a person's age:

- refuse to hire or employ the person;
- refuse to select the person for a training program leading to employment;
- bar or discharge the person from employment or from a training program leading to employment; or
- discriminate against the person in compensation or in the terms, conditions or privileges of employment.

California also prohibits the use of salary as a basis for differentiating between employees when terminating employment. *Government Code* §12941. An employee may succeed on a claim of age discrimination by proving that the employer used salary as a basis for termination and the employer's use of salary adversely affected older employees. While the statute limits itself to addressing salary, other differences between younger and older workers, such as promotions and benefits, may be challenged as age discrimination under the FEHA as well.

Notwithstanding the above, the FEHA does not make it unlawful for employers to promote within the existing staff, hire or promote on the basis of experience and training, rehire on the basis of seniority and prior service, or hire under specified established recruiting programs. You may also refuse to employ a person based on age, when required to do so by other laws (e.g., child labor laws). *Government Code* §12940(a)(5).

Finally, the FEHA prohibits mandatory retirement ages, even in bona fide private pension or retirement plans. Employees who wish to work beyond any retirement date and express this wish to the employer must be allowed to do so beyond the date provided for in their respective pension or retirement plans. *Government Code* §12942.

2. Disability

The coverage provided to disabled workers by the FEHA is broader than that provided by the federal Americans with Disabilities Act (ADA), even after the amendment of the federal statute. Employees and applicants with physical or mental disabilities are entitled to reasonable accommodations to perform the essential functions of the job they seek or hold. Employers must engage in a timely, good-faith interactive process in response to a request for reasonable

accommodation, and the failure to do so is an independent violation of the FEHA. *Government Code* §12940(n).

The FEHA defines a disabled person to include a person with a “limitation” upon a major life activity, as opposed to federal law which requires a “substantial limitation” on a major life activity. Whether a disability “limits” a major life activity is determined without regard to mitigating measures, such as medications, assistive devices, or reasonable accommodations, unless the mitigating measure itself limits a major life activity. *Government Code* §12926.1(c).

For example, an employee or applicant with bad eyesight that can be corrected to 20/20 with glasses would be considered “limited” in the major life activity of seeing. Employees with chronic conditions such as HIV/AIDS, hepatitis, epilepsy, seizure disorders, diabetes, clinical depression, bipolar disorder, multiple sclerosis, or heart disease may be considered disabled under the FEHA.

“Major life activities” are broadly defined under the FEHA to include “physical, mental, and social activities, and working.” *Government Code* §§12926(i),(k). Working is considered a “major life activity” under the FEHA whether the disabled employee is precluded from holding a particular job or a broad range of jobs. Thus, an individual who is prevented from performing a single job may qualify as disabled.

A disabled employee or applicant must be able to perform the essential functions of the job in question in order to qualify for protection. *Government Code* §§12940(a)(1) and (2). Also, as under the ADA, California law provides that written job descriptions, the amount of time spent on the function, and the employer’s judgment as to which functions are essential can be considered in determining whether particular job functions are essential. *Government Code* §12926(f)(2).

Other such factors include whether the reason for the position is to perform the job function, the number of employees available to perform the function, and whether the function requires specialized expertise. *Government Code* §12926(f)(1). Employers must provide reasonable accommodations to assist a disabled applicant or employee in performing the essential functions of the job, unless doing so would cause an undue hardship. *Government Code* §12940(m). The elimination of essential job functions is not a reasonable accommodation.

3. Race And Color

The FEHA prohibits employment discrimination based on race or color. Protection against race or color discrimination is not limited to “minority” groups, and can include discrimination based on the actual color of one’s skin, even by an individual of the same race. State law also prohibits discriminatory employment practices based on an individual’s association with people of a particular race. Thus, a plaintiff may claim discrimination based on interracial marriage or association.

4. Religion

California law provides that an employer may not discriminate in the terms, conditions, or privileges of employment because of an employee’s “religious creed.” The term “religious

creed” includes all aspects of religious belief, observance and practice. *Government Code* §12926(o). California law specifically prohibits discrimination against religious dress and grooming standards, and provides that it is not a reasonable accommodation of an employee’s religious dress or grooming, if an employer segregates the employee from other employees or from the public. Certain religious entities are exempt from this law.

Employers generally have a duty to reasonably accommodate the religious activities of employees unless the accommodation creates an undue hardship for the employer. Reasonable accommodations may include, but are not limited to: job restructuring; reassignment; modification of work practices; or allowing time off. An employer is generally not obligated to change work schedules to accommodate an employee’s religious practices if it would violate collectively bargained seniority rules, or if it would require excessive scheduling of overtime. You may be required to accommodate an employees’ observance of the Sabbath or other holy days, including travel time, if duties can be performed by other employees or at other times.

5. Sex And Pregnancy

As a general rule, California law prohibits discrimination based upon sex in the employment context. “Sex” includes biological differences and gender, so discrimination or other adverse employment actions based on gender stereotypes are illegal. Discrimination based on pregnancy, childbirth and related medical conditions (such as infertility) is also prohibited by law. Employers must grant pregnant employees unpaid disability leave of up to four months for the time they are disabled due to pregnancy, childbirth, or related medical conditions. *Government Code* §12945(b)(2). It is also unlawful to refuse to grant requests for temporary transfer or reasonable accommodation to pregnant employees. *Government Code* §12945(b). The California Family Rights Act (CFRA), which is discussed below, may provide additional leave time, with the result that employees disabled by pregnancy may be entitled to up to seven months of job-protected leave.

6. Marital Status

You may not discharge, refuse to hire, or discriminate against employees on the basis of marital status. *Government Code* §12940(a). Marital status is defined as an individual’s state of marriage, non-marriage, divorce or dissolution, separation, widowhood, annulment, or other marital state.

7. Sexual Orientation

California law prohibits discrimination based on actual or perceived sexual orientation. Sexual orientation is defined to include heterosexuality, homosexuality, and bisexuality. *Government Code* §12926(q).

8. Medical Condition

Employers may not discriminate against employees on the basis of a medical condition. “Medical condition” is defined as 1) any health impairment related to or associated with a record, history, or diagnosis of cancer, or 2) “genetic characteristics.” *Government Code* §12926(h). Employers are also prohibited from discriminating on the basis of an individual’s HIV/AIDS

status. These restrictions are in addition to the prohibitions against discrimination based upon disabilities.

9. Military And Veteran Status

Employers may not discharge, refuse to hire, or otherwise discriminate against an employee who is a member or veteran of the United States Armed Forces, United States Armed Forces Reserve, the United States National Guard, or the California National Guard, or for attendance at an ordered military duty or training. Nothing in the FEHA prohibits employers from using veteran status as a factor in employee selection or from giving special consideration to Vietnam veterans. *Government Code* §12940(a)(4).

B. Harassment

1. Basic Prohibitions Against Harassment

Employers may not unlawfully harass employees based upon any of the protected categories listed above, and are required to take all reasonable steps necessary to prevent discrimination and harassment from occurring. *Government Code* §12940(k). Harassment can be verbal, physical, or visual. California law is similar to the federal laws dealing with unlawful harassment, but is much broader than the federal law in several key areas, as it applies to all employers with one or more employees. *Government Code* §12940(j)(4)(A). The FEHA also specifically enumerates sexual orientation as a prohibited basis for harassment or discrimination.

California law further requires employers to post and distribute information notifying employees of the illegality of harassment. *Government Code* §12950. Additional training requirements are imposed on larger employers (discussed below).

2. Employer Liability For Harassment

An employer is liable for harassment by someone other than a supervisor or agent only if the employer knew or should have known of the harassment and failed to take immediate and appropriate corrective action. *Government Code* §12940(j)(1). The test for an employer's liability for harassment perpetuated by a supervisor is less clear. The term "supervisor" has been broadened in scope and is now defined by the individual's authority to hire, fire, discipline, or direct the work of employees. A person might not have the title "supervisor" and could nonetheless be found to fall within the definition as a result of conduct in exercising authority over other employees. *Government Code* §12926(r).

Harassment against non-employees is unlawful as well. In short, the FEHA makes a company liable for the harassment of an independent contractor by the company's managers, supervisors or employees.

3. Individual Liability For Harassment

California law provides that individual employees and managers have personal liability for their own harassing conduct in the workplace. Whether the employer or employee knew or should have known that the conduct was unlawful is irrelevant.

4. Required Supervisor Training

Employers with 50 or more employees must provide at least two hours of sexual harassment training to all supervisors once every two years. *Government Code* §12950.1. This training must include information and practical guidance regarding the federal and state laws concerning the prohibition and prevention of sexual harassment, and the remedies available to victims of sexual harassment in employment. The training must be conducted by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination, and prevention. Newly hired or promoted supervisors must be trained within six months of achieving their new position.

The penalty for non-compliance with this rule is an order from the California Fair Employment and Housing Commission to comply. This is not subject to the Labor Code Private Attorneys General statute, and failure to comply does not in and of itself lead to liability for sexual harassment, nor will the provision of training insulate an employer from sexual harassment liability. However, as a practical matter the failure to provide legally-required sexual harassment training will be viewed negatively by juries deciding claims of sexual harassment. The Department of Fair Employment and Housing typically asks employers to provide proof of compliance when responding to a charge filed by an employee.

C. Family And Medical Leave

Employees may be protected from discrimination under the California Family Rights Act (CFRA) and the federal Family and Medical Leave Act (FMLA). The CFRA is very similar to the FMLA. Under both laws, employers with 50 or more employees must provide up to 12 weeks of unpaid leave in connection with the birth of a child or serious health condition of the employee or the employee's immediate family member. The leave is not available until an employee has been employed for a minimum of 12 months. The employee is not eligible for leave unless the employee has worked at least 1,250 hours in the last 12 months and works at a location where there are at least 50 employees within a 75 mile radius of the location. *Government Code* §12945.1 *et seq.*; 2 *Cal. Code Regs.* §7297.0.

Registered domestic partners are eligible for leave under CFRA but not under the FMLA. (Same-sex partners or opposite-sex partners with at least one member over age 62 may register with the state as domestic partners.) Domestic partners may take a leave of absence for the serious health condition of a domestic partner, the serious health condition of a domestic partner's child, or for the birth, adoption, or foster care placement of a domestic partner's child. Because of the difference between state and federal law, certain employees may be entitled to 12 weeks of leave under CFRA to care for a domestic partner, and another 12 weeks of leave in the same year to care for a parent, child or other relative recognized under FMLA.

D. Pregnancy Disability Leave (PDL)

One of the primary differences between California law and the FMLA is the way pregnancy is treated. Under the FMLA, pregnant employees receive a maximum of 12 weeks of leave for time off needed before, during, and after the birth of the child. California law, however, provides time off under CFRA and for PDL that runs separately from FMLA leave and

can amount to as much as seven months. *Government Code* §12945.2(s); 2 *Cal. Code Regs.* §7291.13.

Female employees disabled by pregnancy, childbirth or related medical conditions are entitled to up to four months of leave. *Government Code* §12945(b)(2). Four months leave has been defined to mean time off for the number of days or hours the employee normally would work within 17.3 weeks. 2 *Cal. Code regs.* §7291.9(a)(1). A full-time employee who works 40 hours a week would be entitled to 693 hours of leave (40 hours x 17.3 weeks). Be aware, however, that some employees could be entitled to more than 693 hours of leave. PDL is available regardless of how long the employee has been employed, and it applies to any employer with five or more employees. *Government Code* §12926(d); 2 *Cal. Code Regs.* §7291.2(h). You must maintain and pay for health coverage of an employee who takes PDL for the duration of the leave, but an employee must continue to pay his or her portion of the premium. 2 *Cal. Code regs.* §7291.11(c).

A woman is only entitled to the actual amount of time off she needs due to an actual disability which renders her unable to perform her job. Most women will not be entitled to the full four months unless they have a medically-complicated pregnancy. Pregnant employees are also entitled to transfer temporarily to a less strenuous or less hazardous position for the duration of the pregnancy, on the advice of a physician, if the transfer can be reasonably accommodated. *Government Code* §12945(a)(3).

In addition to the four-month PDL, employees qualifying for CFRA leave may also take an additional 12 weeks of family leave following the birth, adoption or foster care placement of a child for “baby bonding.” Although PDL would normally run concurrently with FMLA leave, PDL does not run concurrently with CFRA. *Government Code* §12945.2(s); 2 *Cal. Code regs.* §§7291.12-13. The maximum statutory leave for California employees under CFRA and PDL is 29 1/3 workweeks.

An employer must reinstate the employee to the exact same position before she went on leave. 2 *Cal. Code Regs.* §7291.13. You are excused from reinstating the employee to the exact same position only if you can prove that the employee would not have been employed for reasons unrelated to the leave, such as a layoff or plant closure. 2 *Cal. Code Regs.* §7291.10(c)(1).

E. The Family Temporary Disability Insurance Act

The Family Temporary Disability Insurance Act (FTDI) affects all employers regardless of size and is fully funded by employee payroll tax contributions. Under FTDI, an employee may receive up to six weeks of State Disability Insurance (SDI) benefits, subject to a cap, for leave taken: 1) to care for a seriously ill child, spouse, parent, domestic partner, grandparent, grandchild, sibling, or parent-in-law; or 2) to bond with a minor child within one year of the birth of that child or placement of the child in connection with foster care or adoption. The program is administered by the Employment Development Department (EDD).

FTDI requires an employee to wait a period of seven consecutive days before receiving payments. *Unempl. Ins. Code* §3303(b). In addition, employers may require that the employee take up to two weeks of accrued but unused vacation time before receiving SDI payments.

Unempl. Ins. Code §3303.1(c). An employee is not eligible under FTDI if another family member is able and available to care for the spouse, parent, child or domestic partner, or if the employee is already receiving disability or other benefits, as defined by law.

FTDI does not provide employees with any entitlement to leave and it does not protect employees' jobs while they are on leave. FTDI does run concurrently with other state and federal leave laws that may subject an employer to reinstatement obligations. Employers must give a Notice of Rights (EDD Form DE 2511) to all new employees, and to all employees who become eligible for FTDI benefits. Employers are responsible for making the proper withholdings for their employees' contributions to FTDI.

F. Alcohol And Substance Abuse Treatment

Employers with 25 or more employees must reasonably accommodate employees who wish to voluntarily enter and participate in an alcohol or drug rehabilitation program, provided the accommodation does not impose an undue hardship on the employer. *Labor Code* §1025. The typical accommodation would involve time off from work, but paid time off is not required. However, the employee is entitled to use paid sick leave. *Labor Code* §1027. The employer must also take reasonable steps to safeguard the privacy of the employee's enrollment in a rehabilitation program. *Labor Code* §1026. Employers with five or more employees may have similar obligations under California disability discrimination laws, although the FEHA does not recognize substance abuse disorders resulting from the current unlawful use of controlled substances as a physical disability. *Government Code* §12926(k)(6).

IX. WORKPLACE SAFETY

A. Cal-OSHA

The California Occupational Safety & Health Act generally covers employers with one or more employees. Cal-OSHA standards are contained in the California Code of Regulations and in numerous provisions of the California Labor Code.

1. Antidiscrimination Provision

Labor Code §6310 prohibits employers from discriminating against employees for filing a complaint or otherwise exercising their rights under Cal-OSHA. An employer may not discharge an employee for refusing to work in violation of a safety standard or order where the employee or his or her fellow employees would face a real and apparent hazard in doing so. *Labor Code* §6311. Finally, employers may not discharge or discriminate against an employee if that employee files a complaint or causes a proceeding to be initiated against the employer for failure to comply with hazardous materials requirements.

2. General Safety Duty

California *Labor Code* §6400 states that "every employer shall furnish employment and a place of employment that is safe and healthful for the employees therein." To that end, *Labor Code* §6401.7 requires every employer have an effective Injury and Illness Prevention Program. This entails a written plan that includes proper procedures and the following: 1) management

commitment/assignment of responsibilities; 2) safety communications system with employees; 3) a system for assuring employee compliance with safe work practices; 4) scheduled inspections/evaluation systems; 5) accident investigation; 6) procedures for correcting unsafe/unhealthy conditions; and 7) recordkeeping and documentation. This is a prime area for potential employer liability as one violation of these requirements arguably makes every employee “aggrieved” under the Labor Code Private Attorneys General statute, potentially resulting in significant penalties for the employer. Model Injury and Illness Prevention Programs for high-hazard, non-high-hazard, and intermittent employers (as well as many other publications) are available from Cal-OSHA at <http://www.dir.ca.gov/dosh/PubOrder.asp>.

3. Ergonomics

Labor Code §6357 requires the Occupational Safety and Health Standards Board to implement standards for ergonomics in order to minimize the instances of employee injury from repetitive motion. These requirements are set forth in Title 8, California Code of Regulations section 5110 and apply when more than one employee has experienced a repetitive motion injury.

B. Recordkeeping And Posting Requirements

All California employers covered by the Cal-OSHA Act, except those who had no more than ten employees at any one time during the previous year, or were in designated low-hazard industries, such as the retail or service industries, are required to keep Cal-OSHA records. Employers must record all work-related deaths, lost-workday cases, illnesses including pesticide exposure, and injuries that involve loss of consciousness, restricted work activity, transfer to another job, or medical treatment other than first aid. Employers must file a written report within five days of obtaining knowledge of an occupational injury, illness, or death. An employer may be subject to substantial fines and/or up to one year imprisonment for knowingly failing to report a death or inducing another to fail to do so. An interactive educational module is available on Cal-OSHA’s website at http://www.dir.ca.gov/dosh/dosh_publications/RecKeepOverview.pdf.

Employers must report work-related or suspected work-related fatalities, catastrophes, and serious injuries or illnesses immediately – by phone or facsimile – to the nearest office of the Division of Occupational Safety and Health (DOSH). *Labor Code* §6409.1. “Immediately” means as soon as practically possible, but no longer than eight hours after the employer knew or with diligent inquiry would have known of the death or serious injury or illness. Failure to do so subjects an employer to a penalty of no less than \$5,000 per violation.

A serious injury or illness is one that requires hospitalization for more than 24 hours for other than medical observation, or in which a part of the body is lost or permanent disfigurement occurs. Work-related serious injury or illness does not include an accident on a public street or highway, or any injury, illness, or death caused by committing a Penal Code violation (other than a violation of Penal Code Section 385, which prohibits the operation of heavy equipment adjacent to high-voltage wires).

All citations issued by Cal-OSHA must be prominently posted by employers for three days or until the unsafe condition is abated, whichever is longer. Abatement forms are required to be posted for three days in cases of serious Cal-OSHA violations. Also, employers must

provide warning about the hazards of any substance present in the employer's establishment. This means the employer must label each container of hazardous substances, and must have an effective hazard communication policy. Employers must maintain and regularly make available to employees a Material Safety and Data Sheet concerning substances in the workplace.

X. CONCLUSION

The labor and employment arena in California is heavily regulated compared with most other jurisdictions in the country. More importantly, it is ever-changing. We have tried to provide a review of the major aspects of the most important current laws, but in this area, as with most others, it is always best to check with qualified legal counsel before proceeding with any course of action.

For more information, visit our website at www.laborlawyers.com or contact any of our California offices:

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