



# EMPLOYMENT LAW UPDATE

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## CALIFORNIA LABOR AND EMPLOYMENT LAW SUMMARY

There are significant differences between California labor and employment laws and those of most other states, and federal law. Employers must be aware of the differences and adjust their policies accordingly when administering a workforce that includes employees in California. The following outline is a brief summary of some of those differences and how they can affect an employer's operations in California.

### WAGE / HOUR LAWS

#### Minimum Wage

Beginning in 2008, the minimum hourly wage in California is \$8.00. The federal minimum wage is \$7.25.

#### Daily Overtime

Employees must receive overtime pay, at the rate of one and a half times their regular rate of pay for work in excess of eight hours in any given workday and for work in excess of 40 hours in one work week. Employees are also entitled to overtime, at one-and-a-half times their regular rate of pay, for the first eight hours on the seventh day of work in any one work week. Any work in excess of 12 hours in one workday, or eight hours on the seventh workday in any one work week, must be compensated at twice the employee's regular rate of pay.

#### Overtime Exemptions

Certain "executive," "administrative," and "professional" employees are exempt from overtime pay. For these exemptions to apply, the employees must:

1. Be "**primarily engaged in**" the duties that meet the requirements of the particular exemption, customarily; and
2. **regularly exercise discretion and independent judgment in carrying out those duties**; and
3. earn a monthly **salary** equivalent to **no less than twice the California minimum wage** for full-time employment (40 hours per week).

The exemptions are more limited than those available under federal law, the Fair Labor Standards Act (FLSA). Federal law only requires that an employee's "**primary duties**" meet the test for each exemption. California uses a quantitative analysis that requires an employee to spend more than half the workweek (i.e., be "primarily engaged in") on the duties that meet the applicable test. California has also



adopted an overtime exemption for computer software and design professionals earning a high hourly rate. The comparable federal exemption covers computer professionals earning far less.

## Alternative Workweek Schedules

Hourly employees can vote to have an alternative work week that allows for 10 hours per day of work within a 40-hour work week without the payment of daily overtime if the employer obtains the consent of two-thirds of the hourly employees in the department or work unit. Specific requirements apply to the manner in which an alternative workweek schedule may be implemented and maintained.

## Meal and Rest Periods

Employers are required to “**provide**” meal periods and rest breaks to employees and it is the employer’s affirmative obligation to ensure that employees take them when they are supposed to. The interpretation of these laws is presently under review by the California Supreme Court. Employers are also required to keep records of meal periods. An employee is entitled to an unpaid, uninterrupted meal period of not less than 30 minutes before five hours of work is completed, although this is one of the issues under review, and must be free to leave the premises. Employees are entitled to a second meal period of 30 minutes if they work more than 10 hours in a day. An employee may voluntarily choose not to take the first meal period if his work schedule for that day is six hours or less. The employee can waive the second meal period if the total hours worked in that workday is not more than 12. Employees are also entitled to a 10-minute paid rest break for every four hours of work. The pay premium for any violation of the meal period and rest break requirements is one hour of pay for each day when the employee missed a meal or rest period.

## Vacation Policies

An employer may not have a “use-it-or-lose-it” policy. Accrued vacation time is a form of earned wages and cannot be forfeited. Employees must be allowed to carry over their accrued vacation. An employer may set a cap on the accrual of vacation time. If an employee quits or is terminated all unused accrued vacation must be paid based on the rate of pay when the employment ends. The failure to pay all accrued but unused vacation time can be costly. Since an employee’s right to be paid for such unused vacation time does not arise until the termination of employment, the employer’s liability for the amount of unused vacation is not limited by any statute of limitations. In addition since vacation pay is regarded as wages the failure to pay accrued vacation at the time of termination can lead to waiting time penalties of up to 30 days pay.

## Deductions From Wages

The circumstances in which an employer may deduct damages or debts owed by an employee from wages is severely restricted. Deductions from an employee’s wages are not permitted to compensate the employer for loss or damage caused by an employee’s simple negligence. Deductions in an amount sufficient to compensate for loss or damage resulting from an employee’s gross negligence, willful misconduct or dishonesty are permitted. The burden of proof is on the employer to establish that such deduction is appropriate. An employer may not deduct any amount from an employee’s final paycheck to

recover an unpaid debt (such as a loan or cash advance) unless the employee specifically agrees to the deduction in writing at the time of termination.

## Itemized Wage Statement and Paycheck Requirements

The California Labor Code requires specific information on employees' paychecks and itemized wage statements (pay stubs). Violations of seemingly minor technical requirements can expose employers to extraordinary damages, especially with the growing popularity of class action lawsuits. The Labor Code requires the following information be printed on the pay stub:

- Gross wages earned
- Total number of actual hours worked (not required for salaried exempt employees)
- The number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis
- All deductions (all deductions made on written orders of the employee may be aggregated and shown as one item)
- Net wages earned
- The inclusive dates of the period for which the employee is paid
- The name of the employee
- Only the last four digits of the employee's Social Security number or an employee ID number. It is unlawful to include an employee's nine-digit Social Security number.
- The name and address of the legal entity that is the employer
- All applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee

The Labor Code also requires that the name and address of a business in the state of California where the check can be cashed on demand without a discount be printed on the paycheck. Pay checks must be drawn on banks with at least one branch in California.

## Final Paycheck

In California, all wages, including accrued but unused vacation, are due immediately upon an involuntary termination or layoff. Employees who quit with more than 72 hours notice must be paid on the last day of work. For employees who quit with fewer than 72 hours of notice, wages and unused vacation must be paid within 72 hours after notice is given.

## Wage and Hour Class Actions

The wage and hour provisions of the federal Fair Labor Standards Act ("FLSA") are enforced by collective action, not a class action. The crucial distinction is that a collective action is on behalf of employees who affirmatively "opt in" to a lawsuit. In California one or more employees can file a class action to enforce California's wage and hour laws on behalf of **all** purportedly affected employees, and all of those employees will be part of the class unless they affirmatively request exclusion, or "opt out." These class actions are costly to litigate and because of the aggregation of allegedly unpaid wages and penalties involved, the potential liability is great. Plaintiffs' lawyers who prevail on any part of the action can recover attorneys' fees and costs.

## Private Attorney General Act

Under the Private Attorney General Act of 2004 employees claiming violations of wage and hour laws can bring civil actions against their employers for penalties rather than having to rely upon state agencies.

## LEAVES OF ABSENCE

### Pregnancy Disability Leave

Employers with five or more employees must provide a Pregnancy Disability Leave (PDL) of up to four months for employees disabled by pregnancy and pregnancy-related conditions. PDL applies whether an employer is covered by the federal Family Medical Leave Act ("FMLA") or its California equivalent, the California Family Rights Act ("CFRA"). PDL does not run concurrently with CFRA. Thus, an employee could take the maximum four months of PDL and then take another leave of up to 12 weeks under CFRA.

### Paid Family Leave

Under Paid Family Leave (PFL), employees can receive benefits to replace a portion of wages lost when they are on leave from work to care for a sick family member or to bond with a new child. PFL is funded through employee contributions and is administered by the state. PFL does not create an additional right to a leave of absence. It is a benefit that runs concurrently with FMLA and CFRA. Employers are required to advise employees of their PFL rights by posting the state notice advising employees of these rights, and they must provide newly hired employees with the state-published pamphlet setting forth these rights.

### School Issues and Activities

An employer must allow the parent or guardian of a child who has been suspended from school to take time off if needed to appear at the school in connection with that suspension. Employers with 25 or more employees must also allow parents to take up to 40 hours off per year to participate in activities of at a child's school or day care facility.

### Volunteer Civil Service

Employers must allow employees who are volunteer fire fighters, reserve peace officers or emergency rescue personnel to take time off to perform emergency rescue duty.

### Time Off To Vote

For statewide elections, an employee may, without loss of pay and with prior notice to the employer, take off up to two hours of working time to vote at the beginning or end of the regular working shift.

## Participation in Judicial Proceedings

Employers are required to allow employees who are victims of certain felonies or who have an immediate family member (including a domestic partner) who is the victim of such a crime to take time off to attend judicial proceedings. Employers are also required to allow victims of domestic violence or sexual assault to take time off to seek court assistance or for treatment. Employees must also be allowed to take time off to serve on a jury or to appear as a witness in a judicial proceeding. This applies to employers with 25 or more employees.

## Sick Leave

Employers are not required to provide sick leave. Employers that do must allow employees to use up to half of their sick leave to care for a sick child, spouse or domestic partner. Employees may take paid sick leave for their own illness or to provide care for a sick child, parent, sibling, grandparent, grandchild, spouse, domestic partner or, if the employee is not married or does not have a domestic partner, a person designated by the employee beforehand.

## FAIR EMPLOYMENT PRACTICES

### Discrimination and Harassment

In California, unlike the federal anti-discrimination laws in Title VII of the Civil Rights Act of 1964, there are no caps on the compensatory or punitive damages a plaintiff employee may recover and the State anti-discrimination statutes have been drafted and interpreted to provide employees more protection than under Title VII.

#### Protected Classes

The California Fair Employment and Housing Act (“FEHA”), which covers employers with five or more employees, prohibits discrimination based on sex, age, disability, AIDS or HIV-positive status, marital status, medical condition (cancer), genetic characteristics, race or national origin, pregnancy and religion (or lack of one). FEHA also prohibits differential treatment based on an employee’s “actual or perceived” gender or sexual orientation. This means that the employer cannot discriminate against an employee because he or she is gay, straight or transgender or based on someone’s mistaken belief about the employee’s sexual orientation. Employees may dress according to their “self-identified gender” so long as they meet reasonable workplace standards of dress and grooming. Employers are also required to make unpaid time and location accommodations for an employee who is breast feeding.

#### Harassment

Harassment based on any protected class is specifically prohibited and California law requires employers to “take all reasonable steps necessary to prevent and correct harassment and discrimination.” Employers are strictly liable for hostile environment harassment by a supervisor. “Supervisor” is very broadly defined in the statute and can include employees with very little actual authority. Individuals can be held personally liable for harassment.

### Third-Party Harassment

Employers can be liable when non-employees, such as vendors and customers, harass their employees where the employer knew or has been given notice of severe and pervasive conduct and has failed to take steps to prevent the harassment.

### Policies and Training as a Defense

Under Title VII, the employer's policies against harassment and the employee's failure to use the company's procedures to complain of harassment will provide employers with a defense to liability. In California, although an employer cannot completely escape liability, it can reduce it if it can prove they took reasonable steps to correct and prevent the harassment. An employer can establish this defense by setting forth evidence that it "took effective steps to encourage victims to come forward with complaints of unwelcome sexual conduct, and to respond effectively to their complaints and to preserve confidentiality." Written policies and training can serve as such evidence.

### Harassment Training

California requires that all employers that do business in the state and have 50 or more employees provide at least two hours of classroom or other interactive harassment prevention training to its California-based supervisors. There is no requirement that the 50 employees work at the same location or all reside in California. The training must be provided every two years or within six months of an employee assuming a supervisory position.

**Ezra Brutzkus Gubner LLP** offers its clients advice and counsel in all areas of labor and employment law. **Richard L. Mann** has 30 years of experience representing employers around the nation in all aspects of labor and employment law including discrimination, wrongful termination and wage-hour disputes and traditional labor relations. Mr. Mann has represented employers in a variety of industries including apparel, hospitality, manufacturing, transportation, entertainment, packaging and various service industries.

### Disability Discrimination

FEHA defines disability more broadly than the federal Americans with Disabilities Act (ADA). Under the ADA, an employee must show that he or she suffers from a physical or mental impairment that "substantially limits" a major life activity and mitigating measures may prevent a finding of disability. Under FEHA, the employee only needs to show that the physical or mental disability "limits" (not substantially limits) a major life activity. Under FEHA, it is the employee's burden to show that he or she can perform the essential functions of the job. Finally, under FEHA, an employee can establish that he or she is limited in the major life activity of "working" even if he or she is only limited from performing a particular job as opposed to a broad range of jobs.

### Age Discrimination

Under FEHA, it is presumptively unlawful for an employer to use salary as the basis for selecting employees for layoff. The federal Age Discrimination in Employment Act ("ADEA"), by contrast, allows employers to take action based on "reasonable factors other than age."

## Reasonable Accommodation for Drug/Alcohol Rehabilitation

Employers with 25 or more employees must reasonably accommodate any employee who voluntarily enters an alcohol or drug rehabilitation program, provided the reasonable accommodation does not impose an undue hardship on the employer.

## Domestic Partners Insurance

The “California Insurance Equality Act,” requires that all health care service plans and health insurance policies, as well as all other insurance policies regulated by the California Department of Insurance, provide benefits to registered domestic partners of employees that are equal to those offered to spouses. Insurers are required to make available to employers group policies that would comply with this requirement. An employer would, in theory, only be able to purchase a plan that provides equal coverage for registered domestic partners. These requirements would not affect employers that are self-insured. Employers that do provide benefits for domestic partners, such as medical coverage, may require proof of registered domestic partnership status or termination of that status but only if similar proof is also requested for spouses.

## EMPLOYEE RIGHTS

### California Family Rights Act

The CFRA applies to domestic partners on the same terms as it does to spouses. Thus, an employee may take a CFRA leave to care for a domestic partner. Because such a leave is not available under the FMLA, it would not count against the employee’s entitlement to leave under FMLA and he or she would also be able to take FMLA leave for another qualifying event (e.g., to care for a parent or child with a serious health condition). A domestic partner may therefore be able to take up to 24 weeks of leave while a spouse would only be eligible for 12 weeks. Registered domestic partners are also qualified beneficiaries under Cal-COBRA (see discussion below).

### Right of Privacy

The right of privacy is included in the California constitution and employees are presumed to have a reasonable expectation of privacy in the workplace. To overcome this expectation the employer must provide advance notice of what employees can and cannot expect to remain private in the workplace. This applies to all work areas, lockers, e-mails, voice mails, etc.

### Drug Testing

Based on the right of privacy California courts have substantially restricted an employer’s right to drug test employees. An employer may require a suspicion-less drug test as a condition of employment only after a job has been offered, but before the employee goes on the payroll. An employer can test for drugs or alcohol based on reasonable suspicion. However, this is extremely risky. Random drug testing is only allowed for employees in specific, narrowly defined job classifications that are highly regulated or safety-sensitive, e.g., truck drivers, who are subject to specific federal and state drug testing regulations.

## **BUSINESS OPERATIONS**

### **Unfair Competition: Business and Professions Code Section 17200**

Section 17200 of the Business and Professions Code prohibits any unlawful, unfair or fraudulent business act or practice. A business practice is considered unlawful if it violates other state laws, such as wage and hour regulations. California courts have held that an employee can recover unpaid wages, such as overtime, under this theory. Plaintiffs sue under section 17200 because it provides a longer statute of limitations (four years) than a claim under the Labor Code (three years).

### **Covenants Not To Compete**

In California covenants not to compete are generally unenforceable even when they are narrowly drafted. They will be upheld only where a person sells a business including the goodwill; a partner agrees not to conduct a like business in connection with the dissolution of that partnership; a member of a limited liability company agrees not to conduct a like business in connection with the dissolution of that limited liability company; or where a restrictive covenant is necessary to protect a company's trade secrets. California courts will give effect to choice of law provisions in employment contracts only to the extent that the other provisions of the contract are valid under California law. Thus, for instance, an employee who is terminated for refusing to sign an employment agreement containing an illegal covenant not to compete can maintain a claim for wrongful termination in violation of public policy, even though that covenant would be enforceable under the laws of the state specified by the choice of law provision.

### **Independent Contractors**

There is a statutory presumption of employee status, and the employer bears the burden of proving otherwise. The California Labor Code defines an independent contractor as "...any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished." California courts have held that this definition establishes the principal test, the "right of control." Other factors the courts consider include: (1) The principal's right to terminate the relationship at will;(2) Whether the individual performing services is engaged in a distinct occupation or business;(3) Whether the type of occupation is one that is performed without supervision;(4) The skill required in the particular occupation;(5) Whether the principal supplies the instrumentalities or tools to do the work and the place to work;(6) The length of time for which the services are to be performed;(7) Whether payment is by time or job;(8) Whether the work is part of the regular business of the principal; and (9) Whether the parties believed they were creating an employer employee or principal-independent contractor relationship. The California Supreme Court has held that the individual factors should not be "applied mechanically as separate tests; they are intertwined and their weights depends often on particular combinations." The weight of the individual factors also depends on the context in which the analysis is being applied.

## Garment Industry Workers

A person or entity that contracts with another to perform garment manufacturing is deemed to have guaranteed payment of the minimum wage and overtime to the contractor's employees and will be liable to the employee for those wages if the contractor fails to properly pay its employees.

## Cal-WARN

California has adopted its own version of the federal Workers Adjustment and Retraining Notification Act ("WARN"). Cal-WARN applies to any "industrial or commercial facility" that employs at least 75 full or part-time employees (as opposed to 100 full-time employees under federal law). Cal-WARN requires notice to all employees. Notice to a union will not suffice.

## Cal-COBRA

The California Continuation Benefits Replacement Act of 1997 ("Cal-COBRA") is an expansion of the federal Consolidated Omnibus Budget Reconciliation Act ("COBRA") coverage. It requires that insurance carriers and Health Maintenance Organizations ("HMO"s) provide COBRA-like coverage to employees of smaller companies (two to 19 employees) in California who are not subject to federal COBRA provisions. The coverage period under Cal-COBRA is 36 months. It also extends the COBRA coverage for an additional 18 months.



LEGAL STRENGTH  
MEETS BUSINESS SENSE