Employment & Labor Law Solutions Worldwide

Golden Rules in the Golden State:

California's Differences in Employment Law

NOTE: This is not a do-it-yourself guide to resolving employment disputes or handling employment litigation or conducting a self-audit of your company's practices as there are sometimes exceptions to the statutes for particular industries such as common carriers subject to the Railway Labor Act, or health care or other providers and additional requirements for government employers or government contractors. This is also not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual differences which inevitably arise in any employment-related issue. While comprehensive, this outline is not all-inclusive but rather designed as helpful list in understanding and "flagging" some of the key differences in California Employment law. All citations are to California Codes unless otherwise specified. Please contact your Littler attorney for specific legal advice.

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I. HIRING

A. Background Checks

1. Preemployment Drug Testing

Such testing is permissible if the employer uses methods that are no more intrusive than necessary to ensure an effective test process and accurate test results. At a minimum, all initial positive tests should be confirmed by a certified laboratory, and applicants given an opportunity to explain, in confidence, any reason that a positive test result should be disregarded, such as information that the individual has a prescription for the drug detected. Testees are entitled to a copy of their positive test results unless they affirmatively elect otherwise pursuant to the Investigative Consumer Reporting Agencies Act. Employers intending to test applicants must establish preemployment drug testing policies and apply them uniformly, without targeting certain candidates for testing. Cal. Const. art. 1, § 1 (right to privacy); *Loder v. City of Glendale*, 14 Cal. 4th 846 (1997).

a. Medical Marijuana

Despite the Compassionate Use Act (Health & Safety Code § 11362.5) that permits medical marijuana use for certain California citizens, employers are not required to hire a job applicant who tests positive but claims to be using marijuana for medical reasons. *Ross v. RagingWire Telecomms., Inc.*, 42 Cal. 4th 920 (2008); *see also* Cal. Code Regs. tit. 2, § 11071 (The Fair Employment and Housing Act does not prohibit discrimination against marijuana users.).

b. Recreational Marijuana

California's Ballot Proposition 64, passed in November 2016, makes recreational use of marijuana legal. However, employers are not required to "permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growth of marijuana in the workplace." Health & Safety Code § 11362.45(f). Employers may still prohibit the use of marijuana by employees or prospective employees.

2. Consumer Reports for Employment Purposes

Current California law limits when employers can lawfully use consumer credit reports and/or investigative consumer reports and imposes notice and disclosure obligations on employers that intend to do so.

California's Consumer Credit Reporting Agencies Act (CCRAA), like its federal counterpart, the Fair Credit Reporting Act, is triggered when an employer orders a consumer credit report from a vendor (commonly known as "consumer reporting agencies") for employment purposes. Both statutes generally require: (1) advance consent from the individual to order the credit report; (2) notice to the individual of the intended use of the report; and (3) notice to the individual if the report's contents negatively impact his or her employment opportunities (commonly known as "adverse action letters").

California Labor Code Section 1024.5 imposes an additional notice obligation on employers that use consumer credit reports to screen job applicants and employees. Specifically, before ordering a consumer credit report concerning a job applicant or employee, the employer must notify the individual in writing of the basis under Labor Code section 1024.5 for permissibly using the consumer credit report (*e.g.*, because the individual is applying for or holds a managerial position, etc.).

Labor Code section 1024.5 limits when private- and public-sector employers, except for financial institutions, lawfully can use consumer credit reports in connection with hiring and personnel decisions. Specifically, employers are permitted to use consumer credit reports only if the individual is applying for, or works (or will work) in, the following positions:

- a managerial position (as the term elsewhere is defined by California law);
- a position in the state Department of Justice;
- a sworn peace officer or law enforcement position;
- a position for which the employer is required by law to consider credit history information;
- a position that affords regular access to bank or credit card account information, Social Security numbers, and dates of birth, provided, however, that the access to this information does not merely involve routine solicitation and processing of credit card applications in a retail establishment;
- a position where the individual is or will be a named signatory on the bank or credit card account of the employer and/or authorized to transfer money or authorized to enter into financial contracts on the employer's behalf;
- a position that affords access to confidential or proprietary information; or
- a position that affords regular access during the workday to the employer's, a customer's or a client's cash totaling at least $10,000.

Civil Code section 1785.31 provides a remedy for "negligent" and "willful" violations of the CCRAA. An individual who suffers damages as a result of the violation can recover actual damages, including attorney's fees and court costs, as well as punitive damages up to a maximum amount of $5,000 for willful violations.

California also regulates an employer's use of *investigative* consumer reports, which are consumer reports that include information, obtained through any means, about an individual's character, general reputation, personal characteristics, or mode of living. Under the Investigative Consumer Reporting Agencies Act (ICRAA), an employer may obtain an investigative consumer report to evaluate an employee or applicant for employment, promotion, reassignment, or retention. Consent and detailed notice are required, as set out in the statute, and a copy of the report must be provided to the applicant if requested. Civ. Code §§ 1786 *et seq.*

3. Criminal Record History Information

a. Arrests, Detentions, and Convictions

Generally speaking, an employer may not consider, and may not ask an applicant to disclose, information about:

- an arrest or detention that did not result in conviction;
- information concerning referral to, and participation in, any pretrial or post-trial diversion program;
- criminal records that have been expunged, sealed or dismissed (including misdemeanor convictions for which probation has been completed and the case dismissed);
- an arrest, detention, processing, diversion or court disposition that took place in juvenile court; or
- a non-felony conviction for possession of marijuana that is two or more years old.

An employer cannot seek this information from any other source or use it as a factor in determining any condition of employment of an applicant or employee. Lab. Code §§ 432.7, 432.8; Cal. Code Regs. tit. 2, § 11017.1.

Employers are exempt from these requirements in the following circumstances: (1) the prospective employer is required by law to obtain that information; (2) the job position requires the applicant to possess or use a firearm in the course of his or her employment; (3) an individual who has been convicted of a crime is prohibited by law from holding the position sought by the applicant, regardless of whether that crime has been judicially dismissed, expunged, statutorily eradicated or ordered sealed; or (4) the employer is prohibited by law from hiring an applicant who has been convicted of a crime. Lab. Code § 432.7.

In addition, employers are prohibited generally from using information disclosed on the state sex offender registry website for employment purposes. Penal Code § 290.46(l)(2).

b. "Ban-the-Box" Laws

California recently amended its "ban-the-box" statute, which previously applied only to public-sector employers. As of January 1, 2018, however, all employers in California with 5 or more employees are prohibited from asking an applicant to disclose conviction history information. Such inquiries are not permissible until after the employer has made a conditional offer of employment. At that point, the employer cannot reject an applicant solely, or in part, because of his or her conviction history until the employer performs an individualized assessment. For further information, see Littler's Insight, *California Statewide Ban-the-Box Law Signed By Governor*, (Oct. 16, 2017). *See* Gov't Code § 12952.

Employers should also be aware that cities or other municipalities may have enacted their own ban-the-box laws, such as Los Angeles and San Francisco, which are discussed in **§ III**.

c. Use of Criminal History Causing Adverse Impact

Effective July 1, 2017, a California employer is prohibited from considering other forms of criminal history (other than those listed above) in employment decisions if doing so results in an adverse impact on individuals within a protected class. If an individual is able to establish adverse impact, the burden shifts to the employer to establish that its policy is nonetheless justifiable because it is job-related and consistent with business necessity. The criminal conviction consideration policy or practice needs to bear a demonstrable relationship to successful performance on the job and measure the person's fitness for the specific position. The employer is required to conduct an individualized assessment of the circumstances and qualifications of the applicants excluded by the conviction screen. An individualized assessment must involve:

- notice to the adversely impacted employees or applicants, before any adverse action is taken, that they have been screened out because of a criminal conviction;
- a reasonable opportunity for the individual to demonstrate that the exclusion should not be applied due to his or her particular circumstances; and
- consideration by the employer as to whether the additional information provided by the individual or otherwise obtained by the employer warrants an exception to the exclusion and shows that the policy as applied to the employees or applicants is not job-related and consistent with business necessity. Cal. Code Regs. tit. 2, § 11017.1.

For further discussion, see Littler's Insight, *California Employers Are Subject to New Requirements When Using Criminal History Information*, (Feb. 21, 2017).

B. Salary History Inquiries

A new law, effective January 1, 2018, prohibits employers statewide from inquiring into a job applicant's wage history. Lab. Code § 432.3. The restrictions apply to all employers. No employer may rely on prior salary history as a factor in deciding whether to offer employment or what salary to offer an applicant. An employer cannot—orally or in writing, directly or indirectly—seek this type of information about a candidate. Voluntary disclosures by an applicant may be permitted. For further information, see Littler's ASAP, *New California Law Prohibits Salary History Inquiries*, (Oct. 13, 2017). A similar law was passed in San Francisco.

C. Preemployment Statements

Employers are prohibited from inducing an applicant or employee to move to, from, or within California for employment by misrepresenting: (1) the kind, character or existence of such work; (2) the length of time such work will last; (3) the compensation for such work; (4) the sanitary or housing conditions relating to or surrounding the work; or (5) the existence or nonexistence of any strike, lockout or other labor dispute. Lab. Code § 970. Relatedly, employers may not engage in blacklisting, which is the intentional prevention of the future employment of an employee by the former employer. Lab. Code § 1050.

D. Fingerprinting & Photographs

A prospective employer may require an applicant to provide fingerprints or a photograph for the employer's own use. Employers are prohibited from requiring applicants or employees to furnish either fingerprints or photographs, however, if this information will be provided to a third party and the information could be used to the applicant's or employee's detriment. Moreover, the employer, not the applicant or the employee, must pay the cost of photographing. Lab. Code §§ 401, 1051.

E. Permitted Inquiries

As noted earlier, California restricts the criminal history and consumer credit information that employers may ask about and rely on when making employment decisions. Nonetheless, certain inquiries are allowed. As for arrests, for example, an employer may ask an applicant or an employee about an arrest for which he or she is out on bail or on personal recognizance pending trial, but may not use that information as the sole basis for an adverse employment decision. Employers may also ask about convictions that have not been judicially dismissed or sealed. Lab. Code § 432.7.

F. Independent Contractors

1. Independent Contractor Tests

California governmental agencies may not agree with Federal IRS test for determining whether workers are employees or independent contractors. Moreover, different laws may be involved in a particular situation, depending on the question in hand. It is possible that the same individual may be considered an employee for purposes of one law and an independent contractor under another law. For additional information from the Department of Industrial Relations, see http://www.dir.ca.gov/dlse/FAQ_IndependentContractor.htm.

2. Independent Contractor Misclassification

Any entity that "willfully misclassifies" an individual as an "independent contractor," when that individual is determined to have actually been an "employee," faces stiff civil and other penalties. Lab. Code §§ 226.8, 2753. The law also prohibits employers from charging a fee to "misclassified" independent contractors or making deductions from their compensation for any purpose, such as space rental or equipment maintenance.

The California Labor and Workforce Development Agency can fine an entity that "willfully misclassifies" an "employee" not less than $5,000 and up to $15,000 per violation. Further, if that entity is found to have engaged in a "pattern or practice" of misclassification, those fines are ratcheted up to a minimum of $10,000 per violation, with a cap of $25,000 per violation. These penalties are in addition to existing penalties, interest and taxes that may be imposed at the state level for misclassifying contractors. Joint and several liability may apply to consultants (excluding practicing lawyers) who advise employers on independent contractor engagements.

In addition to these fines, the law also requires a one-year public prominent posting (on a website or at a worksite) of notice that the employer was found to have willfully misclassified an independent contractor.

While the Labor Commissioner enforces these laws, aggrieved employees could seek to enforce the law through the Private Attorneys General Act. Individual employees, however, do not otherwise have a private right of action to recover penalties under Labor Code section 226.8. *Noe v. Superior Court (Levy Premium Foodservice Ltd.)*, 237 Cal. App. 4th 316 (2015).

3. Independent Contactor Workplace Safety

When an employee of an independent contractor is injured due to the failure of the independent contractor to comply with workplace safety requirements, liability for the injury is with the employee's employer, not the entity engaging the services of the contractor. *Seabright Ins. Co. v. US Airways*, 52 Cal. 4th 590 (2011).

G. Certain Prohibited Terms for Written Contracts

No employer can require any applicant or employee to enter into a written agreement containing any term or condition that the employer knows is prohibited by law. Lab. Code § 432.5.

In addition, as of January 1, 2017, employers cannot require employees who primarily live and work in California to agree to certain terms as a condition of employment. Specifically, Labor Code section 925 makes it unlawful to require an employee to agree to: (1) adjudicate a claim outside of California that arose in California; or (2) deprive the employee of a substantive protection of California law concerning a controversy that arose in the state. This code provision reflects the legislature's attempt to rein in the use of choice-of-law and choice-of-venue provisions by employers, as well as arbitration agreements. Lab. Code § 925. For further discussion of that provision, see Littler's Insight, *New California Law Prohibits Choice of Law and Venue in Employment Contracts*, (Oct. 3, 2016).

H. Implied Contracts

The presumption of at-will employment that arises under Labor Code section 2922 is not a guarantee. At-will language should be expressly written in any offer, application and/or handbook. Such terms should include integration language and require that any modifications be in writing and signed by a company officer. Even then there are statutory limitations that may affect at-will discharges, such as prohibitions against discrimination and retaliation.

Employees challenging an at-will dismissal might also pursue wrongful discharge actions, which can include breach of implied contract to discharge only for good cause, breach of implied covenant of good faith and fair dealing, and termination in violation of public policy.

A public policy wrongful discharge claim requires that the public policy be: (1) embodied in statute or constitutional provision; (2) intended for the benefit of the public; (3) fundamental and substantial; and (4) articulated at the time of termination. *Stevenson v. Superior Court (Huntington Memorial Hospital)*, 16 Cal. 4th 880 (1997).

I. Special Notice Requirements for New Hires

California employers are obligated to deliver a number of notices to new employees, including, for example, information about workers' compensation and unemployment insurance benefits. Summarized below are a few less obvious notice requirements.

1. Child Support Garnishment

The Employment Development Department (EDD) must be notified when hiring a child support obligor, in order to facilitate the garnishment of wages and receipt of child support from employee. Civ. Code §§ 1714.4, 1714.41.

2. Wage Theft Prevention Act Notice

As discussed in more detail below at **§ O.1**, Labor Code section 2810.5 requires employers to give new employees and, in other circumstances, current employees a particularized notice about their wages and other employment-related information. The Labor Commissioner has provided a template notice for employers to use, which lays out the necessary information. The template Notice to Employee under section 2810.5, as well as other information, is available at http://www.dir.ca.gov/dlse/Governor_signs_Wage_Theft_Protection_Act_of_2011.html.

The required notice must be provided to each individual in the language the employer normally uses to communicate employment information to the employee. Template notices are available from the Department of Industrial Relations in English, Vietnamese and Spanish.

3. Leave for Victims of Domestic Violence, Sexual Assault or Stalking

Employers with 25 or more employees must inform each new employee upon hire (and other employees upon request), in writing, that California offers certain rights and protections to victims of domestic violence, sexual assault, or stalking. Employers may not discriminate against such employees, for example, and must provide them with reasonable accommodations, including leave, for specified purposes. The model notice is available from the Labor Commissioner at http://www.dir.ca.gov/dlse/BeforeAnEmployeeStarts.html. If an employer elects not to use the state-approved form, the notice provided must be substantially similar in content to that form. *See* Lab. Code § 230.1.

4. Sexual Harassment & Transgender Rights Notices

The California Fair Employment and Housing Act (FEHA) imposes several obligations on covered employees, including three notice obligations. First, they must distribute to new hires either the state-approved brochure on sexual harassment (Form DFEH-185) or an alternative writing that complies with the law. Second, covered employers must develop and disclose a harassment, discrimination, and retaliation prevention policy. Cal. Code Regs. tit. 2, § 11023. Third, as of January 1, 2018, employers must post notice regarding transgender rights. The model notice is available at https://www.dfeh.ca.gov/resources/posters-and-brochures-and-fact-sheets/poster-and-brochure-tab-list/.

II. EEO: DISCRIMINATION/HARASSMENT

A. Protected Categories

1. The Fair Employment And Housing Act (FEHA)

The FEHA applies to employers with five or more employees and includes additional categories, such as marital status, gender identity or expression, and sexual orientation. It also covers employees who are “perceived to be within any protected classification.” Gov’t Code §§ 12900-12996.

a. Disability

California law also includes a broader definition of mental or physical disability than the federal ADA—so many more employees are probably covered and an individual analysis must be done. *Colmenares v. Braemer Country Club*, 29 Cal. 4th 1019 (2003). The interactive process may be required even for those who actually may not be disabled but who are “regarded as” disabled. *Gelfo v. Lockheed Martin Corp.*, 140 Cal. App. 4th 34 (2006).

b. Gender

The definition of the protected category of “sex” includes gender, pregnancy, childbirth, and medical conditions related to pregnancy or childbirth. Gender identity and gender expression are also covered, as is transgender status. Gender expression is defined as a person’s gender-related appearance and behavior, whether or not stereotypically associated with the person’s assigned sex at birth. Gov’t Code § 12940; Lab. Code § 4600. New regulations regarding sex discrimination against transgender employees took effect on July 1, 2017. Cal. Code Regs. tit. 2, §§ 11030, 11031, 11034.

“Sex” also includes breastfeeding or medical conditions related to breastfeeding. Gov’t Code § 12926.

c. Religion

Religion is included under the FEHA’s protections. The definition of religion covers all “aspects of religious belief, observance, and practice, including religious dress and grooming practices.” Gov’t Code §§ 12926, 12940.

d. Genetic Information

Discrimination in employment on the basis of genetic information (including information known about an employee’s family members) is banned by the FEHA and the Unruh Civil Rights Act. Civ. Code § 51; Gov’t Code §§ 12921, 12926.

2. California Constitution Art. 1, § 8

The California Constitution also prohibits discrimination based on sex, race, creed, color, or national or ethnic origin.

3. Additional Statutes

Numerous other state laws prohibit discrimination, retaliation, or termination on other bases:

- lawful off-duty conduct (Lab. Code § 96(k));
- prior workers' compensation claims (Lab. Code § 132a);
- jury duty or witness duty, or time off for victims of crime, domestic violence, or sexual assault (Lab. Code §§ 230, 230.1, 230.2);
- volunteer firefighters, reserve peace officers, and emergency rescue personnel (Lab. Code § 230.3);
- employees taking time off to appear at school for disciplinary reasons related to child (Lab. Code § 230.7);
- political activity (Lab. Code § 1101 *et seq*.);
- wage garnishments (Lab. Code § 2929);
- reporting a work-related fatality, injury, or illness (Lab. Code § 6310); or
- membership in the military or naval forces of the state or United States (Military & Veterans Code § 394).

4. Restriction on English-Only Rules

"English-only" rules are unlawful in California unless justified by business necessity and explained to employees. Gov't Code § 12951.

B. Sexual Harassment

1. Scope of Liability for Harassment

Some key pointers to remember concerning the scope of liability under California law include:

- An employer faces strict liability for the conduct of managers and supervisors, regardless of whether it had a policy or did not know of harassment. *State Dep't of Health Servs. v. Superior Court (McGinnis)*, 31 Cal. 4th 1026 (2003); *Carrisales v. Department of Corr.*, 21 Cal. 4th 1132 (1999); *see* Gov't Code § 12940(j)(1).
- Even where strict liability applies, the doctrine of avoidable consequences may limit recovery. The doctrine provides that a plaintiff may not obtain compensation for damages that he or she could have avoided by reasonable effort. *State Dep't of Health Servs. v. Superior Court (McGinnis)*, 31 Cal. 4th 1026 (2003).

- Employers may be liable for nonemployees' conduct. Gov't Code § 12940(j)(1).
- The law also imposes personal liability for co-workers and supervisors. *Reno v. Baird*, 18 Cal. 4th 640 (1998); Gov't Code § 12940(j)(3).
- For purposes of the definition of harassment "because of sex" under the FEHA, the conduct need not be motivated by sexual desire. Gov't Code § 12940(j)(4)(C). "There is no legal requirement that hostile acts be overtly sex- or gender-specific in content, whether marked by language, by sex or gender stereotypes, or by sexual overtures." *EEOC v. National Educ. Ass'n*, 422 F.3d 840 (9th Cir. 2005).
- The FEHA's ban on all forms of harassment extends to employers with only one employee. It also covers unpaid interns, volunteers, and independent contractors. Gov't Code § 12940(j).

2. Antiharassment Training Required

a. Mandatory Supervisor Training

Sexual harassment prevention training is required for all employers employing 50 or more employees, including full and part-time employees, temporary workers and those hired under contract. All supervisors are required to participate in two hours of interactive training, which must cover certain topics and taught by a qualified presenter. It is required for all supervisors every two years and within six months of assuming a supervisory role. As of January 1, 2018, this training also must address harassment based on gender identity, gender expression, and sexual orientation. Gov't Code § 12950.1.

b. Antiharassment Education for All Employees

The FEHA requires all employers to take "reasonable steps to prevent discrimination and harassment from occurring." Employers must ensure a workplace free of sexual harassment by:

- posting the workplace discrimination and harassment poster;
- distributing a copy of the DFEH-185 brochure on sexual harassment to all employees; and
- developing and implementing a written harassment, discrimination, and retaliation prevention policy. Gov't Code § 12940(k); Cal. Code Regs. tit. 2, § 11023.

c. Requirements in Certain Industries

California recently enacted additional training requirements applicable to farm labor contractors, local government agency officials, and janitorial employers. Lab. Code § 1684 (farm laborers), §§ 1423-24, 1428 (janitors); Gov't Code §§ 53237, 53237.1, 53237.2 (local officials). For further discussion, see Littler's Insight, *The Continuing Expansion of Sexual Harassment Training Requirements in California*, (Nov. 11, 2016).

C. Retaliation

The FEHA also makes it an unlawful employment practice for an employer to discharge, harass, or otherwise discriminate against any person because he or she has opposed any prohibited practices or because the person has filed a complaint, testified, or assisted in any proceeding. Gov't Code § 12940(h). In one case, a sale manager's refusal to follow a supervisor's order, which she reasonably believed to be discriminatory, constituted protected activity under the FEHA, shielding her from retaliation. *Yanowitz v. L'Oreal*, 36 Cal. 4th 1028 (2005) (finding that employee engaged in protected activity for refusal to fire a subordinate that was not sufficiently sexually attractive or "hot," even though she never explicitly explained her refusal to comply.)

III. BENEFITS

A. Cal-COBRA

Cal-COBRA requires extension of federal COBRA to a maximum of 36 months for those who lose coverage due to termination of employment, and requires HMOs and insurers of small plans with 2 to 19 employees (below the 20 employee federal COBRA threshold) to offer continuation coverage. Health & Safety Code §§ 1366.20 *et seq*.

B. California Insurance Equality Act

This law requires insurance coverage for domestic partners of employees. California domestic partnerships provide the equivalent of state-level spousal rights to same-sex couples within the state and recognize a legal union. The California Insurance Equality Act prohibits insurance providers from issuing policies that treat registered domestic partners and spouses differently. (This has not been repealed despite that same-sex couples are allowed to marry in California.) The law applies to all group health insurance policies issued, amended, delivered or renewed in California on or after January 2, 2005 (or January 1, 2005 for all other insurance policies). Coverage for domestic partners and spouses must be provided under the same terms and conditions. Insurance companies may require proof of domestic partnership only if proof of marriage is required. Health & Safety Code § 1374.58; Ins. Code §§ 381.5, 10121.7.

The law does not, however, apply to self-insured plans under which employers reimburse medical expenses of covered individuals. These plans are governed by the federal ERISA law.

C. Same-Sex Marriage & Benefits

On June 26, 2015, the Supreme Court held in *Obergefell v. Hodges* that the U.S. Constitution requires all states to: (1) permit marriage between same-sex couples; and (2) recognize marriages performed in other states, including those between same-sex couples. 135 S. Ct. 2584. While California had previously recognized same-sex marriages, the Supreme Court decision extended protections to all same-sex spouses across the country. All employers must treat same-sex marriages the same way they treat opposite-sex marriages, for all purposes—including leave benefits, retirement plans, and other benefits.

D. California's Health Insurance Premium Payment (HIPP) Program

Employers that offer health insurance and employ more than 20 employees are required to give terminating workers a special notification about the state-sponsored HIPP program. This notice, entitled "Notice to Terminating Employees," is in addition to the COBRA notice and applies to both private and public employers. Lab. Code § 2807. The HIPP Notice to Terminating Employees (Form DHCS 9061) is available from the CA Department of Health Services at http://www.dhcs.ca.gov/services/Pages/HIPPOnlineForms.aspx.

E. Affordable Care Act Conformation

Effective October 1, 2013, the Affordable Care Act Conformation law requires that insurers limit enrollment in health care plans sold in the individual and small employer marketplaces to specified open enrollment periods for policy years on or after January 1, 2014. It prohibits insurers from imposing any preexisting condition exclusions upon any individual or conditioning the issuance or offering of individual plans on any health status-related factors. The law also requires a health insurer to consider the claims experience of all individuals insured in its non-grandfathered individual and small employer health benefits plans to be part of a single risk pool, and requires the insurer to establish a specified index rate for that market. The insurer may vary premiums based on specified factors only, and insurers can use only age, geographic region, and family size for establishing rates. Insurers cannot market their grandfathered plans to dependents of the policy holders, and must issue an annual notice to policy holders enrolled in grandfathered plans. Finally, the law modifies the exceptions from the guarantee issue requirement and the manner in which an insurer determines premium rates for a small employer health benefit plan. *See* Ins. Code §§ 10198.6 *et seq*., 10113.95, 10119.2, 10965 *et seq*.

F. Los Angeles Employers

1. Los Angeles Fair Chance Initiative (Criminal History Inquiries)

Under the Fair Chance Initiative ("Initiative"), a ban-the-box law effective in January 2017, employers with ten or more employees located or doing business in Los Angeles are prohibited from inquiring about or requiring the disclosure of an applicant's criminal history unless and until a conditional job offer has been made. This prohibition broadly includes: asking the applicant or employee to self-disclose criminal history on an application or during an interview; searching the Internet for information about the candidate's criminal record; or ordering a criminal background report from a third-party consumer reporting agency, the FBI, the California Department of Justice, or any other source. L.A., Cal., Mun. Code § 189.01 to 189.01.

An employer cannot take an adverse action against an applicant to whom a conditional offer of employment has been made, based on an applicant's criminal history, unless the employer performs a written assessment that effectively links the specific aspects of the applicant's criminal history with risks inherent in the duties of the employment position the applicant seeks. Before taking any adverse action, an employer must provide the applicant with a fair chance process, including written notification of the proposed adverse action, a copy of the written assessment performed as part of the fair chance process, and any other information or documentation supporting the proposed adverse action. The "fair chance process" is an opportunity for an applicant to provide information or documentation to an employer regarding the accuracy of his or her criminal history or criminal history report. It also allows an applicant to point out information that should be considered in the employer's assessment, such as evidence of rehabilitation or other mitigating factors.

For further discussion of how this law operates, see Littler's Insight, *City of Los Angeles Mayor to Sign Long-Awaited "Ban the Box" Law*, (Dec. 9, 2016).

2. City of Los Angeles Minimum Wage

For *larger employers* (with 26 or more employees), the applicable minimum wage rates are:

July 1, 2017	$12.00
July 1, 2018	$13.25
July 1, 2019	$14.25
July 1, 2020	$15.00

For *smaller employers* (with 25 or fewer employees), the applicable minimum wage rates are:

July 1, 2017	$10.50
July 1, 2018	$12.00
July 1, 2019	$13.25
July 1, 2020	$14.25
July 1, 2021	$15.00

Thereafter, the minimum wage will increase based on the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W) for the Los Angeles metropolitan area (Los Angeles-Riverside-Orange County, CA), which is published by the Bureau of Labor Statistics. L.A., Cal., Mun. Code §§ 1857.00 *et seq*.

3. Los Angeles Paid Sick Leave

Los Angeles has implemented a paid sick leave ordinance, which is generally applicable to all employees who: (1) are entitled to the minimum wage; and (2) work at least two hours of work per week, and 30 days per year, in the city. Employees accrue one hour of leave per 30 hours worked. Employers may cap usage of earned leave time at 72 hours per year. The earned sick leave ordinance also imposes notice and record-keeping requirements. L.A., Cal., Mun. Code § 187.01 *et seq*. For more details, see Littler's ASAP, *City of Los Angeles Updates Paid Sick Leave Rules and FAQs*, (Mar. 27, 2017), and Littler's Insight, *City of Los Angeles Doubles Employees' Sick Leave Entitlement Effective July 1, 2016*, (June 14, 2016).

G. San Diego Employers

1. San Diego Paid Sick Leave Ordinance

San Diego has enacted a paid sick leave ordinance, which is generally applicable to all employees who work at least two hours in the city over one or more weeks. Employees accrue one hour of leave per 30 hours worked. Employers may cap usage of earned leave time at

48 hours per year. The earned sick leave ordinance also imposes notice and record-keeping requirements. San Diego, Cal., Mun. Code §§ 39.0101 *et seq*. For more details, see Littler's ASAP, *San Diego Sick Leave Amendments: Cure for or Cause of Employer Ills?*, (Aug. 16, 2016).

2. San Diego Minimum Wage

As of January 1, 2017, the minimum wage in San Diego is $11.50. Beginning on January 1, 2019, the minimum wage will increase in an amount corresponding to the prior year's increase (if any) in the cost of living. San Diego, Cal., Mun. Code §§ 39.0107 *et seq*.

3. San Diego Equal Benefits Ordinance

The Equal Benefits Ordinance requires contractors doing business with the City of San Diego to offer workers in a domestic partnership the same benefits given to married employees. The ordinance applies to any contract entered into, awarded, amended, renewed, or extended on or after January 1, 2011, with certain exceptions. It requires that the city contract only with contractors who provide equal benefits to employees with spouses and employees with domestic partners. It covers all benefits offered by an employer, including all remuneration other than wages, salary, bonuses, commissions, etc., including bereavement leave, family medical leave, medical, dental, and vision benefits, membership or membership discounts, moving expenses, travel and relocation benefits, retirement plans, and any other employment or fringe benefit. San Diego, Cal., Mun. Code §§ 22.4301 *et seq*.

H. San Francisco Employers

1. San Francisco Fair Chance Ordinance (Criminal History Inquiries)

San Francisco's Fair Chance Ordinance applies to employers with 20 or more employees worldwide, who are located or do business in San Francisco. *See* S.F., Cal., Police Code §§ 4901 to 4919. These employers are prohibited from inquiring about, requiring disclosure of, or basing adverse action on:

- arrests that did not lead to a conviction, except under circumstances identified in the law as an unresolved arrest;
- a conviction that has been judicially dismissed, expunged, voided, invalidated, or otherwise rendered inoperative;
- a conviction or any other determination or adjudication in the juvenile justice system, or information regarding a matter considered in or processed through the juvenile justice system;
- participation in or completion of a diversion or deferral of judgment program;
- a conviction that is more than seven years old, the date of conviction being the date of sentencing; or

- information pertaining to an offense other than a felony or misdemeanor, such as an infraction.

These restrictions protect potential applicants, applicants, and employees. Accordingly, employment applications cannot ask for the facts or details of any unresolved arrest, conviction history, or other matter that is "off limits" under Article 49 of San Francisco's Police Code.

With respect to advertising vacancies, employers cannot "produce or disseminate any solicitation or advertisement that is reasonably likely to reach persons who are reasonably likely to seek employment in the City, and that expresses, directly or indirectly, that any person with an Arrest or Conviction will not be considered for employment or may not apply for employment." Instead, employers must "state in all solicitations or advertisements for employees that are reasonably likely to reach persons who are reasonably likely to seek employment in the City that the Employer will consider for employment qualified applicants with criminal histories in a manner consistent with the requirements of this Article."

The ordinance prohibits employers from asking about an applicant's conviction history or unresolved arrests until after the employer has conducted a live interview with the applicant, or has made a conditional employment offer. The same is true for criminal background checks.

Procedure for Conducting Background Check. An employer cannot conduct a background check on an applicant until after the first live interview with the applicant or after extending a conditional offer of employment. Prior to obtaining a copy of a background check report, the employer must provide notice to the applicant or employee that such a report is being sought, and must also provide the applicant with a notice of rights under the ordinance.

In making an employment decision based on an applicant's conviction history, an employer must conduct an individualized assessment, considering only directly-related convictions, the time that has elapsed since the conviction or unresolved arrest, and any evidence of inaccuracy, evidence of rehabilitation, or other mitigating factors. If the employer will be taking adverse action as a result of the applicant's criminal history, the employer must first provide the applicant with a copy of the background check report, notice of the prospective adverse action, and the specific basis for the action. The employer also must defer the adverse action for an unspecified reasonable period of time if, within seven days of the date that the notice is provided, the applicant gives notice, orally or in writing, of evidence of inaccuracy, evidence of rehabilitation, or any other mitigating factors. During the deferral period, the employer must reconsider the prospective adverse action in light of the information, and if it decides to proceed with the adverse action, the employer also must provide final notice to the applicant.

For additional information, see Littler's Insight, *San Francisco's OLSE Issues "FAQs" On Fair Chance Ordinance*, (Dec. 17, 2014), as well as the San Francisco Human Rights Commission's Frequently Asked Questions, which are available at http://sfgov.org/olse/modules/showdocument.aspx?documentid=12136.

Public Contractors. Similar restrictions apply to certain employers that contract or subcontract with the City of San Francisco. *See* S.F., Cal., Admin. Code § 12T.1 *et seq*.

2. San Francisco Salary History Ordinance

San Francisco Ordinance No. 170350—effective July 1, 2018—prohibits inquiries into a candidate's salary history for any applicant who will work within the city's boundaries. No inquiries may be made in any manner, including on a job application or during an interview, or from any source, including a prior employer. Employers may not consider salary history when deciding whether to hire the candidate or when determining his or her rate of pay. If an applicant voluntarily, and without prompting, shares his or her salary history, the prospective employer may consider it and may verify that data with a prior employer. The new law also prevents employers from releasing salary history information about a current or former employee to any prospective employer, without written authorization from the individual. For details, see Littler's ASAP, *Another San Francisco Treat: Mayor Lee Signs Salary History Ban*, (July 20, 2017).

3. San Francisco Health Care Security Ordinance

Under the Health Care Security Ordinance, employers with 20 or more employees must payments on behalf of all covered employees for health care benefits. Employers can contribute these sums toward the city's health benefit program or may put it towards employee health insurance. Employers with 100 or more employees must spend $2.83 per hour payable, per covered employee. Employers with between 20 and 99 employees will have to spend at least $1.89 per hour, per employee. These expenditures must be made for each employee within 30 days following the end of each calendar quarter. Exemptions apply, including for employees who are managers, supervisors, or confidential employees if they earn at or above an annual salary of $97,693 (or $46.97/hour) in 2018. For further details, including an updated mandatory poster for 2018, visit http://sfgov.org/olse/HEALTH-CARE-SECURITY-ORDINANCE-HCSO.

4. San Francisco Minimum Wage Ordinance

a. San Francisco Minimum Wage

Effective July 1, 2017, San Francisco's minimum wage is $14.00 per hour. It is scheduled to increase to $15.00 as of July 1, 2018. Further annual increases will be based on adjustments to the Consumer Price Index. S.F., Cal., Admin. Code § 12R.1 *et seq*.

All employers, regardless of where they are located, must pay their employees who perform work in San Francisco the San Francisco minimum wage. Any worker who performs at least two hours of work in a particular week for an employer within the geographic boundaries of the City is entitled to be paid the San Francisco minimum wage. All workers in San Francisco—whether or not they are legally authorized to work in the United States—are protected. The City's Office of Labor Standards Enforcement (OLSE) will process a wage claim without regard to a worker's immigrant status. Workers filing a claim with City will not be questioned about their immigration status. For more information, visit http://sfgov.org/olse/minimum-wage-ordinance-mwo.

b. Enforcement of Minimum Wage Laws by the OLSE

In 2011, the city amended the minimum wage ordinance to enhance its enforcement. That amendment increased penalties for employers that violate various provisions, including the prohibition against retaliation. Penalties also apply for failure to post applicable rates or to provide the employer's name, address, and telephone number to employees. The ordinance authorizes the OLSE to require employers to post notice to employees upon commencement of an investigation and to publicly post employer non-compliance. It further requires OLSE to establish community outreach programs. *See* S.F., Cal., Admin. Code §§ 12R.14 to 12R.25.

5. San Francisco Paid Sick Leave Ordinance

San Francisco has enacted a paid sick leave ordinance, which is generally applicable to all employees who perform work in the city, though exceptions apply. Employees accrue one hour of leave per 30 hours worked in the city, and employers may not impose caps on the usage of earned time. The earned sick leave ordinance also imposes notice and record-keeping requirements. S.F., Cal., Admin. Code §§ 12W.1 *et seq*.

For further discussion of the San Francisco sick leave law, including amendments that took effect on January 1, 2017, see Littler's Insight, *Voters Approve Paid Sick Leave Changes in San Diego and San Francisco*, (June 14, 2016).

6. San Francisco Paid Parental Leave Ordinance ("Baby Bonding")

San Francisco has enacted a paid parental leave (SFPPL) ordinance, which requires private employers (with at least one employee in the city) to provide supplemental compensation to employees who use California paid family leave (FTDI) benefits for new child bonding. Along with other requirements, to be covered by the SFPPL ordinance, an employee must perform at least eight hours of work per week for an employer in San Francisco, and at least 40% of the employee's total weekly hours for the employer must be worked in San Francisco.

This new law took effect on January 1, 2017 for employers with 50 or more employees. Employers with 35 or more employees were phased in on July 1, 2017. As of January 1, 2018, the SFPPL ordinance applies to smaller employers with 20 or more employees. It does *not* apply to employers with less than 20 employees.

Under the SFPPL ordinance, the amount of supplemental compensation an employer would pay is the difference between the employee's current normal gross weekly wage and state FTDI benefits received. An employee receiving California FTDI benefits cannot receive San Francisco supplemental compensation if the amount of California FTDI benefits and SFPPL compensation combined would exceed the employee's normal gross weekly wage.

More information is available from the OLSE—including Frequently Asked Questions, an employer webinar and guide, an updated workplace poster for 2018, and other resources—at http://sfgov.org/olse/paid-parental-leave-ordinance. For further discussion, see these Littler publications: (1) *Local and State Developments Impact San Francisco Paid Parental Leave Obligations*, (Feb. 13, 2017); (2) *Bonding by the Bay: San Francisco Mandates Paid Parental Leave*, (Apr. 21, 2016); and (3) *San Francisco Amends Paid Parental Leave Law to Adapt to State Law Changes and to Clarify Requirements*, (Sept. 21, 2016).

7. San Francisco Commuter Benefits Ordinance

The San Francisco Commuter Benefits Ordinance requires businesses with locations in San Francisco and 20 or more employees nationwide to offer one of the following employee benefits:

1. Pretax Benefits—a monthly pre-tax deduction, up to $255/month, to pay for transit or vanpool expenses;

2. Employer-Paid Benefits—a monthly subsidy for transit, bike, vanpool, or carpool expenses equivalent to the price of the San Francisco Muni Fast Pass (including BART travel); or

3. Employer-Provided Shuttle Service—a company-funded bus or van between employee home and business locations.

For more information, visit http://www.sfenvironment.org/article/businessesemployees/san-francisco-commuter-benefits-ordinance-overview.

8. Bay Area Commuter Benefits Program (CBP)

Covered San Francisco Bay Area employers without an already-existing and compliant commuter benefits plan had until September 30, 2014 to select at least one of four commuter benefit options, notify employees of how to take advantage of the benefits, and register with the Bay Area Commuter Benefits Program (CBP).

The CBP applies to any public, private, or non-profit entity (person, corporation, partnership, business firm, government agency, special purpose agency, educational institution, health care facility, etc.) that employs an average of 50 or more full-time employees per week within the City, excluding seasonal/temporary employees.

Once it is determined that an employer is covered, the employer, or a Transit Management Association (TMA) of which the employer is a member, must offer at least one of the following commuter benefits:

1. Pre-tax option: allow employees to elect to exclude commuting costs incurred for transit passes or vanpool charges, or bicycle commuting, from their taxable wages;

2. Employer-paid benefit: offer employees a subsidy equal to the monthly cost of commuting via public transit or vanpool, or $75, whichever is lower. Employers may also choose to provide a subsidy for bicycle commuting costs;

3. Employer-provided transit: furnish to employees at no cost, or low cost as determined by the Air Pollution Control Officer (APCO), a vanpool, bus or similar multi-passenger vehicle operated by or for the employer; or

4. Alternative commuter benefit: provide a pre-approved alternative employer-provided commuter benefit that is as effective in reducing single occupant vehicles as Options 1-3.

Using appropriate means such as email messages, paper memos, in-house newsletters or bulletins, or conventional or electronic bulletin boards, the employer must:

1. Notify all covered employees that the employer is subject to the requirements of the CBP;

2. Inform covered employees which commuter benefit options the employer will offer;

3. Provide information about how a covered employee may apply for and receive the commuter benefit;

4. Provide a point of contact within the organization from whom employees should obtain further information about the commuter benefit; and

5. Provide commuter benefit information as part of the employee benefits package given to all newly hired employees.

The employer must provide this information to covered employees when the commuter benefit is first made available, and at least once per year thereafter. An Employer Guide to the CFB is available at http://assets.511.org/pdf/nextgen/commuter-benefits/Employer_Guide.pdf. Additional information is also available at https://commuterbenefits.511.org/ and at http://www.sfenvironment.org/article/businessesemployees/san-francisco-commuter-benefits-ordinance-overview.

9. San Francisco Retail Workers' Bill of Rights

Two ordinances comprise the Retail Workers' Bill of Rights (RWBOR), which became operative on July 3, 2015. *See* S.F., Cal., Police Code §§ 3300F.1 *et seq*., §§ 3300G.1 *et seq*. The RWBOR applies to any person or entity that owns or operates a "formula retail establishment" with 20 or more employees in the city. In turn, a "formula retail establishment" is defined to include a business that falls under the Planning Code's definition of "formula retail use" and that has at least 40 retail sites worldwide.

Some of the more notable requirements of the RWBOR include:

- Employers must first offer, in writing, any additional hours of work to current part-time employees before hiring new employees or using subcontractors (including janitorial or security services contractors), temporary services, or a staffing agency to do work, but only if the part-time employees are qualified to do the additional work and the additional work is the same or similar to work the employees have performed for the employer already. Employers are not required to provide employees with additional hours of work that would cause the employee to work more than 35 hours in the workweek.

- Prior to the start of employment, employers must provide new employees with a "good faith estimate," in writing, of the employee's expected minimum number of scheduled shifts per month, as well as the days and hours of those shifts.

- Employers must provide their employees with at least two weeks' notice of their work schedules by either: (a) posting the work schedule; or (b) transmitting the work schedule by electronic means.

- Employers must provide notice to employees of any change to the employee's schedule, and if the employer changes or cancels an employee's previously-scheduled shift, the employer must provide the affected employee with a specified amount of "predictability pay" of up to four hours of pay.

- If the employer's business changes ownership, the new owners must retain the existing employees (excluding the supervisory, managerial, or confidential employees) for at least 90 days from sale or other transfer of the business.

10. San Francisco Family Friendly Workplace Ordinance

Effective January 1, 2014, San Francisco's "Family Friendly Workplace Ordinance" prohibits caregiver discrimination and gives employees a right to request "flexible" or "predictable working arrangements" to assist with caregiving responsibilities for children, family members with serious health conditions, or parents 65 years or older. S.F., Cal., Admin. Code §§ 12Z.1 *et seq*. The ordinance applies to all employees in the City and County of San Francisco who work for employers with 20 or more employees in the city. The ordinance applies to employees who have worked for a covered employer for at least six months and regularly work at least eight hours per week.

The ordinance defines a "flexible working arrangement" as a work arrangement that assists employees with caregiving responsibilities, and includes changes in start and end times, a reduction in the number of hours an employee is required to work, job-sharing, working from home, telecommuting, changes in work duties or part-year employment. A "predictable working arrangement" is defined as changes in terms and conditions of employment that give employees scheduling predictability to assist employees with caregiving responsibilities. The ordinance allows employees to request changes in the number of hours they work, the times they work, where they work, and their work assignments.

More information is available from the OLSE, including Frequently Asked Questions and other resources, at http://sfgov.org/olse/family-friendly-workplace-ordinance-ffwo.

I. Pregnancy Disability Leave

The FEHA requires employers of five or more employees to grant eligible female employees who are disabled by pregnancy, childbirth, or related medical conditions a leave of absence for a reasonable period not to exceed four months. There is no minimum service requirement by the employee. Leave may be unpaid, depending on an employer's policies. The employee may use any accrued vacation, sick leave, or other accrued PTO during the leave. California Family

Temporary Disability Insurance (FTDI) wage replacement benefits (discussed below at **§ III.K**) may also be available during pregnancy disability leave (PDL). *See* Cal. Code Regs. tit. 2, § 11050.

1. Disabled by Pregnancy

The PDL regulations expand the circumstances under which a woman may be viewed as "disabled by pregnancy." The law defines as "disabilities" that may require employers to provide leave, a job transfer, or reasonable accommodation certain medical conditions related to pregnancy, that could be temporary in nature. These conditions include: severe morning sickness; gestational diabetes; pregnancy-induced hypertension; preeclampsia; and post-partum depression. The regulations also clarify that a woman may be disabled by pregnancy if she needs time off for: prenatal or postnatal care; bed rest; childbirth; loss or end of pregnancy; or recovery from childbirth or loss or end of pregnancy. *See* Cal. Code Regs. tit. 2, § 11035.

2. Length of Leave and Reinstatement Requirements

When addressing leave situations, California employers have historically measured family and medical leaves in weeks and pregnancy disability leaves in months or working days. According to the PDL regulations, four months is equivalent to 17.33 weeks and is per pregnancy, not per year. For employees who work more or less than 40 hours per week, or who work on variable work schedules, the number of working days that constitutes four months is calculated on a pro rata or proportional basis. If an employee's schedule varies from month to month, the employer should use the monthly average hours worked for the four months prior to the employee's leave to determine the total number of hours available. In keeping with California state law protections against discrimination for transgender workers, the term "eligible female employee" includes transgender employees disabled by pregnancy. Cal. Code Regs. tit. 2, §§ 11035(g), 11042.

Upon granting PDL, an employer must provide the employee with a written guarantee of reinstatement if requested. An employee must be returned to her original job, unless an employer can prove by a preponderance of the evidence that the employee would not otherwise have been employed in her same position at the time reinstatement is requested for legitimate business reasons unrelated to the employee taking pregnancy disability leave or transfer (such as a layoff pursuant to a plant closure).

If the employee cannot be returned to her original position, she must be given a comparable position for which she is qualified on her scheduled reinstatement date or within 60 calendar days of that date. During this 60-calendar day period, the employer has an *affirmative* obligation to provide notice to the employee of available positions in person, by letter, telephone or e-mail, or by links to postings on the employer's website if there is a section devoted to job openings.

In addition, an employee returning from PDL does not have any greater right to reinstatement to a comparable position or to other benefits and conditions of employment than an employee who has been continuously employed in another position that is being eliminated. Cal. Code Regs. tit. 2, § 11043.

3. Benefits Continuation

An employer has special obligations when an employee takes baby bonding leave under the California Family Rights Act (CFRA) immediately after using PDL. The CFRA regulations and the FEHA regulations together create an obligation to continue group health coverage for up to a maximum of seven months for a woman who takes both a pregnancy disability leave and a leave protected by the CFRA and/or federal Family and Medical Leave Act (FMLA). This computation results in a maximum of four months plus 12 weeks of benefits coverage, for a total of roughly 29.33 weeks of coverage. As under the CFRA, an employer may recover the cost of premiums from an employee who does not return after leave, under certain circumstances.

During PDL, the employee must accrue seniority and participate in employee benefit plans—including, but not limited to, life, short-term and long-term disability or accident insurance, pension and retirement plans, stock options, and supplemental unemployment benefit plans—to the same extent and under the same conditions as would apply to any other unpaid disability leave granted by the employer for any reason other than a pregnancy disability. Gov't Code § 12945.2; Cal. Code Regs. tit. 2, §§ 11044, 11046, 11092.

J. FMLA vs. California Family Rights Act

- *Eligibility.* Eligibility requirements for the CFRA are similar to the FMLA (50 employees within 75 miles, 1250 hours within 12 months), with 12 weeks of unpaid leave available. Gov't Code § 12945.2.

- *Baby Bonding.* The CFRA specifically does not cover pregnancy so an employee is entitled to take up to 12 weeks of bonding time after the baby is born in addition to the 4 months of PDL. For bonding time, the CFRA states the basic minimum duration of such leave is two weeks; however, an employer is required to grant a request for such leave in increments of at least one day, but not less than two weeks, on any two occasions. Gov't Code § 12945.2; Cal. Code Regs. tit. 2, §§ 7297.0 *et seq*.

- *Domestic Partners.* The CFRA covers domestic partners and domestic partner's children. Cal. Code Regs. tit. 2, § 7297.0(p); Fam. Code § 297.5(a).

- *Use of Leave.* Employers cannot require use of sick leave when care is for the serious medical condition of a parent, spouse, domestic partner, or child, but the employee and employer can mutually agree to use this time. Cal. Code Regs. tit. 2, § 7297.5.

- *Continued Health Insurance Coverage.* Where a pregnant employee takes 12 workweeks of PDL/FMLA, she must be provided with continued coverage. She is entitled to an additional 12 workweeks of leave under the CFRA, and she is entitled to continued coverage under COBRA. Gov't Code §§ 12945.2(f)(1), (2); 1945.2, Cal. Code Regs. tit. 2, § 7297.5(c), (d).

K. Paid Family Leave: FTDI

An employee taking CFRA and/or FMLA leave to bond with a new child or to care for a family member with a serious health condition (including a grandparent, grandchild, sibling, or parent-in-law) may be eligible to receive state wage replacement benefits to supplement unpaid leave. California's FTDI program applies to employers of one or more persons whose employees participate in SDI. It provides up to six weeks of paid family leave benefits (55% of an employee's usual wages, up to a statutory maximum) every 12 months. Paid family leave benefits are administered through the EDD, and employees apply directly to the EDD for benefits. Employees may qualify for paid family leave benefits regardless of their length of service with the employer or the number of hours the employee worked in the year preceding the leave. Unemp. Ins. Code §§ 2655, 3300 *et seq*.; Cal. Code Regs. tit. 2, § 11092.

An employer may require an employee to use up to two weeks of accrued vacation leave or paid time off (PTO) prior to receiving paid family leave benefits. Currently, there is a seven-day waiting period during which an employee does not receive paid family leave benefits, and vacation or PTO will be applied.

Effective January 1, 2018, the benefit amount will increase to 60% of an employee's usual wages, and 70% of usual wages for employees with income under a certain level. In addition, the seven-day waiting period for benefits will no longer be in effect. Cal. A.B. 908 (Apr. 11, 2016).

These benefits are not taxable by California. Rev. & Tax Code § 17083. Additional information is available at http://www.edd.ca.gov/Disability/Paid_Family_Leave.htm.

L. New Parent Leave

As of January 1, 2018, certain California employees will be entitled to new parent leave. The New Parent Leave Act (NPLA) applies to employees that: (1) meet the same service requirements as found in the FMLA and the CFRA (*i.e.*, 12 months on the job, with at least 1,250 work hours in the last year); (2) work for an employer with 20 or more workers; (3) work at a jobsite with at least 20 employees within 75 miles of each other; and (4) are ineligible for leave under both the FMLA and the CFRA. Such employees are entitled to take 12 weeks of unpaid, job-protected leave to bond with a new child within one year of birth, adoption, or foster care placement. While NPLA leave is unpaid, employees may utilize any type of earned paid time off—including "accrued vacation pay, paid sick time, other accrued paid time off, or other paid or unpaid time off negotiated with the employer"—during their parenting leave. Gov't Code § 12945.6. Retaliation is prohibited, and group health benefits continuation is mandatory.

M. Sick Leave

1. Paid Sick Leave

In 2014, California enacted the Healthy Workplaces, Healthy Families Act (HWHFA), requiring private employers to provide paid sick and safe time to eligible employees. Lab. Code §§ 245 *et seq*. A covered employee is one who works in California for the same employer for 30 or more days within a year from the start of employment, and includes part-time, per diem, and temporary employees. Currently, the HWHFA does not cover: (a) employees covered by a valid collective bargaining agreement that provides paid leave and has other required provisions; (b) employees in the "construction industry" covered by a valid collective bargaining agreement; (c) providers of in-home supportive services; and (d) individuals employed by an air carrier as a flight deck or cabin crew member (provided they receive compensated time off). Beginning in July 2018, however, in-home supportive services workers will also be eligible to accrue and use paid sick time.

Under the law, employees accrue sick and safe time at a rate of one hour of paid leave per every 30 hours worked. An employer may use a different accrual method so long as accrual occurs on a regular basis so that an employee has accumulated no less than 24 hours of accrued paid time off by the 120th calendar day of employment of each calendar year, or in each 12-month period. Employees who are exempt administrative, executive, or professional employees accrue sick time based on the employee's normal work week or a 40-hour work week, whichever is less. Employers may elect to frontload their employees' paid sick and safe time. Employers also may cap accrual at 48 hours (or six days' worth). Accrued but unused time carries over into the next year of employment, subject to that cap.

An employee can use accrued paid sick and safe time beginning on the 90th day of employment, after which the employee may use paid sick and safe time as it accrues. An employer can limit an employee's use of paid sick days to 24 hours or three days in each year of employment, calendar year, or 12-month period. The HWHFA does not require an employer to provide compensation to an employee for accrued, unused paid sick days upon termination, resignation, retirement, or other separation from employment.

Employers must post a workplace notice about the HWHFA, provide individual notice at hire, and provide information each time wages are paid. Employers also have record-keeping obligations under the HWHFA. An employer must keep, for at least three years, records documenting the hours worked and paid sick days accrued and used by each covered employee.

Finally, the HWHFA prohibits discrimination and retaliation against employees who seek to use accrued leave or participate in complaints for violations of the law.

2. "Kin Care"

Under the California kin care law, which is distinct from the HWHFA, any covered employer that provides sick leave for employees via an internal policy must permit an employee to use one-half of that leave in any calendar year to care for a family member. Employers may not have an absence control policy that counts authorized sick leave as time off under the policy. The kin care law does not extend the maximum period of leave to which an employee is entitled under the CFRA or the FMLA. Lab. Code §§ 233-34.

N. Other Leaves

1. Crime Victims/Domestic Violence

Employers that employ 25 or more employees may not discharge or in any manner discriminate or retaliate against an employee who is a victim or domestic violence or sexual assault for taking time off from work to attend to matters related to the crime, including judicial proceedings. Lab.

Code § 230.1. Additionally, an employee whose immediate family member (or registered domestic partner, or child of a registered domestic partner) is a victim of a crime may take time off work to attend judicial proceedings related to that crime. Lab. Code § 230.2.

2. Civic/Jury Duty

All employers are obligated to provide jury-duty and witness-duty leaves. Lab. Code § 230.

3. Drug or Alcohol Rehabilitation

Employers that employ 25 or more employees must make a reasonable accommodation for employees to participate in a drug or alcohol rehabilitation program. Lab. Code §§ 1025, 1026, 1028.

4. Election Leave

All employers must provide for two hours of paid leave to vote, as well as further unpaid, reasonable time as needed. Elec. Code §§ 14000-02. Employers may not discharge or suspend an employee for serving as an election officer. Elec. Code § 12312.

5. Literacy Leave

Employers that employ 25 or more employees must provide for reasonable accommodation and assistance, including unpaid time off, if an employee reveals a literacy problem and intends to enroll in an adult literacy program. Lab. Code §§ 1041-44.

6. Military Leave

All employees who are members of the U.S. reserves, National Guard or naval militia are entitled to an unpaid leave of absence for military duty or training, drills, encampment, naval cruises, special exercises or similar activity. The leave period is 17 calendar days per year, including travel time to and from such duty. Employers may not discharge any military person because he or she is required to perform military service. The law also prohibits hindering or preventing a military person from performing any ordered service. (Note that under federal USERRA, the leave may be longer. 38 U.S.C. §§ 4312(a)(2), (c).) In addition, private employers must grant up to 15 days of unpaid temporary leave annually, including travel time, to employees in the state military reserve for training. Mil. & Vet. Code §§ 394.5, 395, 395.9.

7. Military Leave for Spouses

Employers that employ 25 or more employees must provide up to 10 days of unpaid leave for a "qualified" employee (one who works an average of 20 hours a week) if the employee's military spouse or registered domestic partner is on a leave from deployment in a combat zone with the active duty, reserve military or National Guard during a period of military conflict. The law also makes it unlawful for an employer to retaliate against a qualified employee for requesting or taking this leave. Mil. & Vet. Code § 395.10.

8. Parents' Leave for Children in School

Employers that employ 25 or more employees at the same location must allow up to 40 hours per year for parents to visit or volunteer in school or day care, or to address a child care or school emergency. Lab. Code § 230.8. Moreover, all employers must provide leave for parents to attend to school disciplinary matters; there is no limit to how frequently an employee must be provided such leave. Lab. Code § 230.7; Educ. Code § 48900.1.

9. Workers' Compensation

Employees unable to work due to an injury that occurs at work are entitled to leave. Lab. Code §§ 3200 *et seq*.

10. Volunteer Emergency Responders

Employers may not discharge or discriminate against employees who take time off to serve in their duties as volunteer emergency responders (*i.e.*, firefighters, reserve peace officers, rescue personnel). In addition, employers with 50 or more employees must grant such employees leave, up to 14 days a year in total, for training purposes. Lab. Code §§ 230.3, 230.4.

11. Organ or Bone Marrow Donation

Employers with more than 15 employees must provide 5 days of paid leave to employees to donate bone marrow in any one year period. Employers must provide a total of 30 business days of paid leave to donate an organ to a person in any one year period, and leave can be intermittent. These leaves do not count against any FMLA/CFRA time. Employers may exhaust five days of vacation/sick time for bone marrow leave, and may exhaust up to two weeks of vacation/sick time for organ donor leave. Benefits must be retained at the same level during the leave. Employers must restore employees returning from leave to the same or an equivalent position. Lab. Code §§ 1508-12.

O. Wage & Hour Issues

1. Wage Theft Prevention Act: Notice Requirements

The California Wage Theft Prevention Act (WTPA) requires employers to provide employees a written notice, in the language the employer normally uses to communicate employment-related information to employees, containing the following information:

- rate(s) of pay and basis thereof (by the hour, shift, day, week, salary, piece, commission, or otherwise, including any rates for overtime, as applicable);
- allowances, if any, claimed as part of the minimum wage, including meal or lodging allowances;
- regular payday;
- employer's name, including any "doing business as" names used by the employer;

- physical address of the employer's main office or principal place of business, and a mailing address, if different;

- employer's telephone number;

- name, address, and telephone number of employer's workers' compensation insurance carrier;

- any other information the Labor Commissioner deems material and necessary; and

- the employee's rights and obligations under the California paid sick leave law.

The template Notice to Employee under section 2810.5 lays out the requested information and is available at https://www.dir.ca.gov/dlse/DLSE-Forms-Wage.htm. Lab. Code § 2810.5.

If any employer changes any information set forth in the notice, it must inform employees of the changes within seven calendar days after the changes take place, unless: (1) all changes are reflected on a timely wage statement; or (2) notice of all of the changes is provided in another writing required by law within seven days of the changes.

The WTPA does not apply to an employee who is exempt from the payment of overtime wages or who is covered by a collective bargaining agreement who qualifies for the union exemption.

2. Local Predictive Scheduling Ordinances

Employers should be aware that several localities—including Berkeley, Emeryville, San Francisco, and San Jose—have enacted predictive or "secure" scheduling ordinances. These ordinances may require, for example, that employers offer available hours to existing staff before hiring more workers, provide a good faith estimate of hours to employees at hire, publish employee schedules two weeks' in advance, and compensate employees for changes to the schedule. San Francisco's scheduling-related laws are discussed at **§ III.H**.

3. Equal Pay & Wage Transparency

While equal pay and wage transparency statutes are a hot topic nationwide, California has had such laws on the books for years. An employer (public or private) cannot pay any of its employees at a wage rate less than that paid to employees of the opposite sex, or another race or ethnicity, for substantially similar work, unless the employer demonstrates reasons for the wage differential. Prior salary cannot, by itself, justify any disparity in compensation. Acceptable factors for a wage differential include: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; and/or (4) a *bona fide* factor other than sex, such as education, training, or experience. Lab. Code § 1197.5.

The equal pay law also prohibits employers from preventing employees from disclosing their own wages, discussing the wages of others, or inquiring as to other employees' wages. Lab. Code § 1197.5; *see also* Lab. Code § 232.

P. Minimum Wage And Overtime

1. State Minimum Wage

The minimum wage in California in 2018 is $10.50 per hour for most nonexempt employees, and $11.00 for employees of larger employers. Lab. Code §§ 1182.12, 1197; IWC Wage Orders § 4. However, there are multiyear changes to the minimum wage scheduled (depending on an employer's size) and, beginning January 1, 2024, the minimum wage will be annually adjusted.

Effective Date	Minimum Wage: Larger Employers (26 or More Employees)	Minimum Wage: Smaller Employers (25 or Fewer Employees)
January 1, 2018	$11.00	$10.50
January 1, 2019	$12.00	$11.00
January 1, 2020	$13.00	$12.00
January 1, 2021	$14.00	$13.00
January 1, 2022	$15.00	$14.00
January 1, 2023	$15.00	$15.00

For more information, visit http://www.dir.ca.gov/dlse/FAQ_MinimumWage.htm. For discussion of the two-tier system, see Littler's ASAP, *Why Learning How to Count to 26 Just Became Important: Recent Changes to California and Local Minimum Wage Laws*, (Jan. 5, 2017).

2. Local Minimum Wage Ordinances

California law permits local governments to regulate employees' compensation. Many local jurisdictions have used this authority only to establish minimum wage rates for employers doing construction work or providing services to the municipality, though an increasing number have used this authority to establish minimum wage requirements of general application. The local minimum wage ordinances often include their own notice, record-keeping, and wage statement requirements, so employers with operations in those localities must be aware of their overlapping state and local compliance obligations. Such ordinances exist, for example in Berkeley, Cupertino, El Cerrito, Emeryville, Los Altos, Los Angeles (city and county), Malibu, Milpitas, Mountain View, Oakland, Palo Alto, Pasadena, Richmond, San Diego, San Francisco (city and county), San Jose, San Leandro, San Mateo, Santa Clara, Santa Monica, and Sunnyvale.

3. One Day's Rest in Seven

Every person employed in any occupation of labor is entitled to one day's rest in seven. Lab. Code §§ 551-52. Exemptions are identified in Labor Code section 554 for emergencies, agriculture, movement of trains, and other particular situations.

4. Overtime Requirements

a. General Rules

Employers must pay time and one-half for all hours worked over eight in one day, 40 in a single workweek, and for the first eight hours on the seventh day of work in a single workweek. Effective January 1, 2014, under California's Domestic Workers Bill of Rights, domestic work employees employed as "personal attendants" (such as nannies) must receive overtime compensation at the employee's regular rate for hours worked in excess of nine hours in any workday or 45 hours in a workweek.

Double-time compensation is generally required for all hours worked over 12 in one day and over eight hours on the seventh consecutive day of work in a single workweek. Lab. Code § 510; IWC Wage Orders § 3.

b. Regular Rate

Overtime is calculated as a multiple of an employee's regular rate of pay. An employee's regular rate is calculated on an hourly basis, which requires converting all monthly salaries, commissions, and noncash wages into an hourly figure. The regular rate is calculated before any deductions are taken from an employee's wages. In no case may the regular rate be less than the applicable minimum wage.

Under California law, overtime due a nonexempt salaried employee is calculated as one-fortieth of the employee's weekly salary. Lab. Code § 515(d) This calculation (total compensation divided by 40) usually results in a higher regular rate of pay than under federal law. Federal law provides that a salary can be divided by the total hours actually worked in the week to arrive at the regular rate, and overtime is calculated differently. 29 C.F.R. § 778.109.

c. Restrictions

Employers cannot have a rule that says they will not pay for any unapproved overtime that is worked. Overtime must be compensated.

d. Out-of-State Employees

California's Supreme Court has found that California's overtime laws apply to nonresident employees who were temporarily working in California for a California-based employer, if they worked at least a full day in the state. *Sullivan v. Oracle*, 51 Cal. 4th 1191 (2011).

e. White-Collar Exemptions

The most common overtime exemptions are for white-collar employees: executive, administrative and professional employees, along with outside salespersons. Some IWC Wage Orders provide limited exemptions for employees in particular industries and occupations. Each of the exemptions has their own requirements, but generally the duties of the job are key. To qualify as exempt, an employee must regularly exercise independent judgment and discretion and must primarily engage in exempt duties (that is, 51% of the day needs to be spent on exempt level duties). The employee must also earn, each workweek, a salary that is at least two times the state minimum wage for full-time employment, defined as 40 hours per week.

(1) Inside Sales Exemption

Under IWC Wage Order § 4 (professional) or Wage Order § 7 (retail) section 3, inside sales employees may be exempt if they are primarily engaged in sale, their earnings exceed one-and-one-half times the minimum wage, and more than one-half of their compensation represents commissions compliant with the Labor Code.

(2) Computer Professional Exemption

An employee in the computer software field may be exempt from overtime requirements if, among other things, he or she is paid on an hourly basis a rate of not less $42.35 or an annual salary of not less than $88,231.36 for full time employment, and paid not less than $7,352.62 per month. Lab. Code § 515.5. This rate is adjusted annually.

(3) Licensed Physicians and Surgeons

A licensed physician or surgeon must earn an hourly rate of not less than $77.15 per hour to qualify for the licensed physician exemption. Lab. Code § 515.6. This rate is adjusted annually.

f. Compensatory Time Off v. Makeup Time

Comp Time. Although the labor code includes a provision authorizing use of "comp time" in lieu of paying overtime compensation, this mechanism is not available to private-sector employers subject to the FLSA in California because it will violate the FLSA. The FLSA permits the use of comp time for state and local government employees only. 29 U.S.C. § 207(o); 29 C.F.R. 553.22.

Makeup Time. Makeup time provides a limited exception to the daily overtime requirement when an employee submits a written request to "makeup" time lost due to a personal obligation. The following conditions must be satisfied for this exception to apply: (1) the employee must submit a written request to makeup time lost due to a personal obligation; (2) the makeup time must be used in the workweek in which the time was lost; and (3) the makeup time, when added to the employee's other hours of work, may not exceed 11 hours in any workday or 40 hours in the workweek. Although employers may inform employees that they may use make-up time, employers are prohibited from soliciting or encouraging employees to make a request for makeup hours. Lab. Code § 513.

In most instances, an employee must submit a separate request for each use of makeup time. The wage orders provide, however, that an employee may submit a signed request to work makeup time for up to four weeks if the time will be missed due to a recurring personal obligation. IWC Wage Orders § 3; IWC Wage Order No. 17, § 8.

g. Alternative Work Schedules

An alternative work schedule is any schedule of more than eight hours in a day, which does not include payment of daily overtime. Lab. Code § 500(c). Alternative work schedules are possible, but it is a bit tricky to comply with the requirements for implement such a schedule, which include defining a work unit, voting by secret ballot after a waiting period, reporting to the Division of Labor Statistics and Research and providing a vote to revoke the option. Employers are also not allowed to reduce an employee's regular rate of pay as a result of the adoption, repeal or nullification of an alternative workweek schedule. Lab. Code § 511; various DLSE opinion letters.

5. Hours Worked

The Wage Orders generally define hours worked more broadly than federal law. Under federal law, hours worked includes all time that an employee is suffered or permitted to work. Under California law, hours worked means the time during which an employee is subject to the control of an employer, and includes the time the employee is suffered or permitted to work. IWC Wage Orders § 2. As noted below, California considers more time as "compensable" and requires compensation to employees for reporting time, on-call time, split shifts, and travel time.

a. Meal Periods

Under California law, an employer may not employ a person for more than five hours without providing a meal period of at least 30 minutes. A second 30-minute meal period is required for employees who work more than ten hours in a day. A first meal period must be provided no later than the fifth hour of work; a second meal period must be provided no later than the end of the tenth hour of work. An employer cannot require an employee to work during a meal period required by state law. One hour of additional wages is owed at the employee's regular rate for each workday during which a meal period was not provided. Lab. Code §§ 226.7, 512; IWC Wage Orders.

The California Supreme Court's 2012 decision in *Brinker Restaurant Corp. v. Superior Court* limits an employer's obligation to "provide" meal periods and does not require an employer to "ensure" the meal periods are taken. 53 Cal. 4th 1004 (2012). "[A]n employer's obligation is to relieve its employee of all duty, with the employee thereafter at liberty to use the meal period for whatever purpose he or she desires, but the employer need not ensure that no work is done." An employer cannot coerce, create incentives for, or encourage employees to skip meal periods. Further, the employer must take the active step of "afford[ing] an off-duty meal-period," which means "actually relieving an employee of all duty" and "relinquish[ing] control over their activities" without "pressuring employees to perform their duties in ways that omit breaks."

If an employer permits an employee to work for five hours it must either: (1) provide an off-duty meal period; (2) agree to a mutually-agreed upon waiver if the employee will work six or fewer hours; or (3) obtain the employee's written agreement to an on-duty meal period if circumstances permit. With respect to the third option, an "on duty" meal period is permitted only when the nature of the work prevents an employee from being relieved of all duty. Additionally, a written agreement between an employer and employee is required for on duty meal periods, and such agreement must state that the employee can revoke the agreement in writing at any time.

An employer that provides an employee the opportunity to take a timely, off-duty meal period must still pay the employee the employee's regular wage for the meal period if the employer knew or reasonably should have known that the employee worked through the meal period.

Employers must also be cautious with respect to on-premises meal periods: "When an employer directs, commands, or restrains an employee from leaving the work place during his or her lunch hour and thus prevents the employee from using the time effectively for his or her own purposes, that employee remains subject to the employer's control" and the employee must be paid. *Bono Enters., Inc. v. Bradshaw*, 32 Cal. App. 4th 968 (1995). According to the Division of Labor

Standards Enforcement (DLSE), employees "not paid for meal periods during which they were prohibited from leaving the employer's premises, notwithstanding the fact that they were relieved from all duty during those meal periods, are entitled to compensation for their unpaid meal periods." DLSE Op. Ltr. No. 2001.01.12. Time records should record meal periods.

b. Rest Breaks

An employer must "authorize and permit" employees to take a ten-minute rest break for each four hours or substantial portion thereof worked. A rest period is not required when the employee's total daily work time is less than three and a half hours. An employer cannot require an employee to work during a rest break required by state law. IWC Wage Orders; *see Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012).

Breaks should occur in the middle of each work period "insofar as practicable" and need not be provided before a meal period is provided. Lab. Code § 226.7. The California Court of Appeal examined rest period timing during an eight-hour shift and discussed whether two ten-minute rest periods could be combined and provided before a meal period. *Rodriguez v. E.M.E., Inc.*, 246 Cal. App. 4th 1027 (2016). The court held the phrase "insofar as practicable" means that employers must follow the specified break schedule unless they have "an adequate justification why such a schedule is not capable of being put into practice, or is not feasible as a practical schedule." It concluded that "a departure from the preferred schedule is permissible only when the departure (1) will not unduly affect employee welfare and (2) is tailored to alleviate a material burden that would be imposed on the employer by implementing the preferred schedule." In short, employers may not deviate from the schedule merely for their convenience.

The number of rest periods for an employee depends on how many hours he or she works:

Hours Worked	**Number of Breaks**
Less than 3.5 hours	0
3.5 to 6 hours	1
6 to 10 hours	2
10 to 14 hours	3

Rest breaks are paid. Employers must pay one hour of additional wages at the regular rate for each workday during which one-or-more rest periods were not provided.

Although some caselaw and regulatory guidance concerning rest periods could be interpreted as permitting a policy that requires rest periods to be taken on an employer's premises, it is recommended that employees be allowed to leave. State law prohibits on-call rest periods because "employees must not only be relieved of work duties, but also be freed from employer control over how they spend their time." *Augustus v. ABM Sec. Servs.*, 2 Cal. 5th 257 (2016). As a result, the rest period does not include time going to or from break areas, or time spent with a pager or otherwise subject to employer contact. No waivers are allowed—and no working through break and "leave early" policies are permitted. For further details, visit www.dir.ca.gov/dlse/FAQ_RestPeriods.htm.

c. Recovery Periods

All employees who work outside must be "allowed and encouraged" 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 avoid overheating. Since August 2005, the Division of Occupational Safety and Health (DOSH) has required that employers must provide access to shade to all employees who work outside and must arrange for access to nearby shade when the temperature exceeds 85 degrees. There is no limitation on how often employees can take such cool-down periods and no indication in the regulations as to when an employer could deny additional cool-down periods as excessive. *See* Cal. Code Regs. tit. 8, § 3395.

An employee cannot be required to work during a recovery period. Employers will be liable for one hour of premium pay for missed recovery periods. Lab. Code § 226.7.

d. Lactation Accommodation

A reasonable amount of break time must be provided for lactating mothers. This time may run concurrently with mandated paid rest breaks. Additional time may be necessary to accommodate employee needs and is unpaid. Employers must make reasonable efforts to provide appropriate, private space for mothers to express milk, other than the bathroom. Lab. Code §§ 1030-33.

e. Travel Time

All travel is work time, except the commute between home and work. If an employee is required to report to the employer's business premises before traveling to an off-premises work site, all of the time from the moment of reporting until the employee is released to proceed directly to his or her home is required to be paid. DLSE Op. Ltr. No. 1994.02.16; *see Morillion v. Royal Packing Co.*, 22 Cal. 4th 575 (2000). Traveling out of town by car, bus, train or airplane is also compensable, including waiting to board, check luggage, buy a ticket, etc. When an employee takes a break from travel to eat, sleep, or participate in other personal activities, such time is not compensable. The employer may establish a different pay rate for hours spent traveling, not less than the minimum wage. DLSE, Enforcement Policies and Procedures Manual §§ 46.2, 46.3, 46.3.1, 46.3.2; DLSE Op. Ltr. No. 2002.02.21.[1]

f. Reporting Time Pay

Employees who report to work on a scheduled work day but are not put to work or are given less than half their usual or scheduled day's work must be paid for half the usual or scheduled day's work, but in no event for less than two hours nor more than four hours, at their regular rate of pay. If employees are required to report to work a second time in a scheduled workday and work for less than two hours, they must be paid for two hours at their regular rate of pay. IWC Wage Orders § 5(A), (B).

For further details, visit http://www.dir.ca.gov/dlse/FAQ_ReportingTimePay.htm.

[1] The DLSE Enforcement Policies and Procedures Manual, and the DLSE Opinion Letters, are available through http://www.dir.ca.gov/dlse/DLSE-Publications.htm.

(1) IWC Exceptions

Reporting time pay requirements do not apply when: (1) the employer's operations cannot begin or continue due to threats to employees or property, or when civil authorities recommend that work not begin or continue; (2) public utilities fail to supply electricity, water or gas, or there is a failure in the public utilities or sewer system; or (3) the interruption of work is caused by an Act of God or other cause not within the employer's control. IWC Wage Orders Nos. 1-15, § 5(C).

(2) Other Exceptions

Reporting pay requirements do not apply in the following additional circumstances: (1) if the employee is not fit to work; (2) if the employee has not reported to work on time and is fired or sent home as a disciplinary action; and (3) if an unexpected or unusual occurrence during off hours makes it impossible for the employer to open for business and the employer has made every reasonable effort to notify employees not to report to work. Exceptions also include an employee with a regularly scheduled shift of less than two hours and an employee who is called in to work at a time other than his or scheduled shift while on paid standby. DLSE, Enforcement Policies and Procedures Manual §§ 45.1.1, 45.1.3.

(3) Reporting Time Pay as Wages

Reporting time pay constitutes wages. *Murphy v. Kenneth Cole*, 40 Cal. 4th 1094 (2007). The failure to pay all reporting time pay due at termination of employment may be the basis for awarding waiting time penalties under Labor Code section 203. DLSE, Enforcement Policies and Procedures Manual §§ 2.4.1.1, 4.3.4.1, 45.1.1.1.

g. Split Shifts

An employee, who works two distinct work periods separated by more than a *bona fide* meal period, must be paid an amount at least equal to the minimum wage times the number of hours worked in the day plus one hour. IWC Wage Orders §§ 2(Q), 4(C).

h. On-Call Time

Generally, on-call time is not compensable if the employee can use the time spent on-call primarily for his or her own benefit. The DLSE and the courts consider the following factors in making this determination: (1) geographical restrictions on the employee's movement; (2) required response time; (3) nature of the employment relationship; and (4) other limitations on the employee's ability to use the time for his or her own benefit.

Q. Wage Payment Obligations

1. Methods of Wage Payment

Wages must be paid by check, in cash, or by direct deposit. Lab. Code §§ 212, 213. If paychecks are used, they must be payable in cash on demand, without discount, at an established place of business in the state, the name and address of which must be written on the check. At the time of issuance, and for at least 30 days, the funds must be fully available and accessible to the employee. Lab. Code § 212(a).

Direct deposit is permissible if voluntarily authorized by the employee. The deposit must be into bank account, savings and loan association or credit union of the employee's choice with a place of business in the state. Lab. Code § 213(d).

The Labor Code does not specifically mention payroll/debit cards. The DLSE has approved payroll card programs that are voluntary, provided that wages are deposited into a financial institution with a place of business in California (an electronic payment network for the receipt of wages in California is sufficient—a branch office in the state is not required). The programs approved by the DLSE also gave employees the option of receiving their wages through direct deposit. The DLSE opined that the employee must have access to full wages on payday, the wages must be payable at an established place of business in the state, and there must be sufficient funds available for employee access for at least 30 days as required by Labor Code section 212(a). DLSE Op. Ltr. No. 2008.07.07. The DLSE also has approved payment using convenience checks drawn on a payroll card account provided certain conditions are satisfied. DLSE Op. Ltr. No. 2008.07.07-2.

2. Timing of Payment

a. Regular Wages

Most employees must be paid twice each calendar month on days designated in advance by the employer. Wages for work performed between the 1st and 15th of the month must be paid between the 16th and 26th day of the month during which the work was performed. Wages for work performed between the 16th and the last day of the month must be paid between the 1st and 10th day of the following month. These requirements are deemed satisfied if wages are paid on a weekly, biweekly or semimonthly basis not more than seven calendar days following the close of the pay period. Lab. Code § 204.

Payment of overtime earned in one payroll period must be paid no later than the next regular payday. Lab. Code § 204.

b. Final Wages

A terminated employee must be paid final wages, including accrued vacation/PTO, immediately at the time of termination. Lab. Code § 201. If an employee resigns, his or her wages are due and payable no later than 72 hours after the resignation. If, however, the employee has given at least 72 hours' notice of his or her intention to resign, the final payment is due on the employee's last scheduled workday. Lab. Code § 202.

3. Itemized Wage Statements

a. General Requirements

An employer must provide its employees with an itemized wage statement semi-monthly or at the time of each wage payment. The following information must be on the itemized statement:

(1) gross wages earned; (2) total hours worked (not required for salaried employees); (3) the number of piece rate units earned and any applicable piece rate if the employee is paid on a piece rate basis; (4) all deductions; (5) net wages earned; (6) the inclusive dates of the period for which the employee is being paid; (7) the name of the employee and only the last four digits of his or her social security number or an employee identification number other than a Social Security number; (8) the name and address of the legal entity that is the employer; and (9) all applicable hourly rates in effect during the pay period, and the corresponding number of hours worked at each hourly rate by the employee; and (10) the amount of paid sick leave available to the employee, or paid time off an employer provides in lieu of sick leave. Additional items are required for employees paid on a piece-rate basis. Lab. Code §§ 226(a), 226.2.

b. Wage Statement Requirements for Staffing Firms

Staffing firms must include additional information on employee pay stubs. Staffing firms must include their clients' names and addresses on employee pay stubs, along with employee pay rates and the number of hours worked for each client during the pay period. Staffing firms can provide the client name and address as part of the wage theft notice at the time of hire or, if that information is not known at that time, in a timely wage statement or in a separate notice within seven days of an assignment. Lab. Code § 2810.5(a)(3). Further details are available at http://www.dir.ca.gov/dlse/FAQs-NoticeToEmployee.html.

c. Methods of Delivery

The itemized statement may be a detachable part of the employee's paycheck or provided separately. Lab. Code § 226(a). Itemized statement may be delivered electronically (*e.g.*, by e-mail) if: (1) each employee retains the right to receive a written paper statement; (2) employees are able to easily access the information and convert the electronic statement into hard copies at no expense; (3) the employer complies with the Labor Code record-keeping requirements; (4) the employer retains payroll records for at least three years and the records are accessible by employees and former employees; and (5) the electronic wage statement system incorporates proper safeguards to ensure the confidentiality of the employee's personal information. DLSE Op. Ltr. No. 2006.07.06.

d. Penalties for Wage Statement Violations

An employee suffering injury because of an employer's knowing and intentional violation of the wage statement requirements is entitled to recover either the greater of all actual damages or a specified sum, not exceeding an aggregate penalty of $4,000. He or she also is entitled to an award of costs and reasonable attorney's fees. Lab. Code § 226(e)(1).

An employee is deemed to "suffer injury" if the employer: (1) fails to provide a wage statement; (2) fails to provide a wage statement showing the name of the employee and the last four digits of his or her social security number or employee identification number; or (3) fails to provide accurate and complete information and the employee cannot promptly and easily determine certain information from the wage statement alone (such as the amount of gross or net wages, deductions made, and the name and address of employer). Lab. Code § 226(e)(2).

4. Deductions From Wages

a. General Rule

Employers may not make a deduction from an employee's wages unless the deduction: (1) is required by federal or state law, such as income taxes or garnishments; (2) is expressly authorized in writing by the employee to cover insurance premiums, hospital or medical dues, or other deductions not amounting to a rebate of the employee's wages; or (3) is authorized by a collective bargaining agreement or wage agreement to cover health and welfare or pension plan contributions. Lab. Code § 224.

b. Deductions for Breakage or Loss

Employers may make deductions for damage resulting from an employee's gross negligence, recklessness or willful misconduct. Lab. Code § 2865. An employer must bear the burden of losses that result from an employee's ordinary negligence. Because the employer has the burden of providing that the employee was guilty of the requisite degree of misconduct, deductions for breakage or loss are particularly risky.

c. Deduction of Debts at Termination

Employers may not deduct the balance of a debt owed by the employee to the employer from the employee's final wages even if the employee has signed a written agreement permitting the deduction. *Barnhill v. Robert Sanders & Co.*, 125 Cal. App. 3d 1 (1981). The employer may deduct the periodic amount regularly deducted pursuant to the employee's authorization from final wages.

5. Failure to Pay Wages and Penalties

An employer that fails to pay the required minimum wage must pay restitution to the employee in the amount of unpaid wages in addition to a penalty or penalties. Lab. Code §§ 1197, 1197.1.

An employer that willfully fails to pay a final court judgment or final order issued by the Labor Commissioner for wages due to an employee *who has been terminated* or *who quits* within 90 days of the date that final resolution may be charged with a misdemeanor, provided the employer had the ability to pay the amount of the judgment or order. In addition, civil penalties may be assessed. If the total amount of wages due is less than $1,000, the employer may be subject to a fine of $1,000 to $10,000, or imprisonment in county jail for up to six months. If the total amount of wages due is more than $1,000, the employer may face a fine of $10,000 to $20,000, imprisonment for six months to a year, or both. The civil and criminal penalties available under this provision accrue for each offense. If an employer fails to pay wages to more than one employee, the total amount of wages due to all employees will be aggregated for purposes of determining the level of the fine and the term of imprisonment. Lab. Code § 1197.2.

6. Expense Reimbursement

a. General Requirements

Employers are required to reimburse employees for "all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties." Lab. Code § 2802. If certain conditions are satisfied, an employer may fulfill its obligation to reimburse employee expenses by including the reimbursement in the employee's wage payments. *See Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal. 4th 554 (2007). The obligation to reimburse expenses cannot be waived. Lab. Code § 2804.

b. Cell Phone Service

In *Cochran v. Schwan's Home Service*, the California Court of Appeal held that, if employees must make work-related calls on a personal cellphone, section 2802 requires an employer to reimburse them a reasonable percentage of their phone bill. The court's rationale strongly suggests that an employer must reimburse an employee any time the employee is required to provide a benefit to the employer that could fall into the category of "operating expenses." Because of the differences in phone plans and work-related scenarios, calculating reimbursement is left to the trial court and parties in each particular case. 228 Cal. App. 4th 1137 (2014).

c. Uniforms

When uniforms are required to be worn as a condition of employment, the uniforms must be provided and maintained by the employer. IWC Wage Orders, Nos. 1-15, § 9, and No. 16, § 8. "Uniforms" are defined to include wearing apparel and accessories of distinctive design or color.

d. Tools & Equipment

When tools and equipment are required by the employer or are necessary to the performance of a job, such tools and equipment must be provided and maintained by the employer. IWC Wage Orders, Nos. 1-15, § 9, and No. 16, § 8. This provision applies to nonexempt employees only. Nonexempt employees whose wages are at least twice the minimum wage may be required to provide and maintain hand tools and equipment customarily required by the trade or craft. This exception does not apply to employees who are covered exclusively by Wage Order 17 (miscellaneous employees). Employers should consult knowledgeable counsel before utilizing this exception as it may be held to conflict with the Labor Code.

e. Mileage

The mileage reimbursement rate established by Internal Revenue Service is presumed to be reasonable by the DLSE. DLSE Op. Ltr. Nos. 1994.08.14, 1993.02.22-3, 1991.02.25-1.

7. Vacation Pay

Employers are not required to provide their employees with vacation benefits, but if an employer decides to do so it must comply with a number of requirements. Vacation is a deferred form of wages that vests as labor is performed. Lab. Code § 227.3. Paid time off or floating holidays that can be used for any purpose are treated the same by California law. Employers can cash out accrued, but unused, vacation annually. Employees cannot insist on cash in lieu of taking vacation, with exceptions for required payment at termination.

For more information, visit http://www.dir.ca.gov/dlse/FAQ_Vacation.htm.

a. Accrual Caps

In general, vacation compensation is considered to accrue in increments on a daily basis, and an employer cannot defer the accrual of vacation compensation to the end of a month or the end of a year to avoid the pro rata accrual of vacation benefits. Subject to these limitations, an employer can generally determine the rate at which employees accrue vacation compensation and whether employees are to accrue any vacation compensation at all. The amount of vacation that an employee can use at any one time, and when vacation can be used, are also subject to the approval of the employer.

Consistent with these principles, a "reasonable" cap on vacation accrual is permitted. Vacation will resume accruing after employees use vacation and their time falls below the cap. A "reasonable" cap is still a matter of debate, but employees must be given a fair opportunity to take vacation at reasonable periods of time so that they can stay below the cap and continue vacation accruals.

b. "Use It Or Lose It" Requirements & Pay Out at Termination

For non-ERISA based welfare plans, vacation carries forward to the following year. An employer's vacation policy cannot require forfeiture of vested vacation time upon termination. Lab. Code. § 227.3. Thus, accrued, unused vacation must be paid to employees upon separation at their final rate of pay, unless a collective bargaining agreement specifies otherwise. The amount of vacation pay owed to a terminated employee is calculated using a daily rate of accrual.

If an employer fails to pay vacation at termination, the employee will be entitled to waiting time penalties up to 30 days at his or her daily rate. Lab. Code § 203.

c. Exempt Employee Use of Vacation Time for Absences

Employers can deduct a salaried exempt employee's accrued vacation for partial-day absences that are covered by the FMLA or CFRA without disqualifying the employee's exempt status.

Although federal law permits employers to deduct an exempt employee's accrued vacation for other types of partial-day absences without jeopardizing their status, California law is unsettled. *Conley v. Pacific Gas & Elec. Co.*, 131 Cal. App. 4th 260 (2005) (holding that California law does not preclude a policy that allows employers to deduct for partial-day absences of 4 hours or more). The California Supreme Court has yet to rule on the issue. Under both California and federal law, employers must allow exempt employees who have exhausted their vacation leave to take non-FMLA/CFRA partial day absences without a corresponding loss in pay.

8. Incentive Compensation

a. Bonuses

A bonus is money promised to an employee in addition to his or her regular compensation. DLSE Enforcement Policies and Interpretations Manual § 35.1.

(1) Entitlement to Bonuses

An employee's entitlement to a bonus is a matter of contract. *Neisendorf v. Levi Strauss & Co.*, 143 Cal. App. 4th 509 (2006).

(2) May Be Conditioned on Continued Employment

If an employer has expressly qualified the promise of a bonus on continued employment, an employee who voluntarily leaves his or her employment before the bonus calculation date will not be entitled to receive the bonus. *Lucien v. All States Trucking*, 116 Cal. App. 3d 972, 975 (1981). However, if an employee is terminated before completion of all of the terms of the bonus agreement, and there is no valid cause for the termination, the employee may be entitled to recover at least a pro-rata share of the promised bonus. DLSE Op. Ltr. No. 1987.06.03.

b. Commissions

A commission is compensation paid to a person for services rendered in the sale of the employer's property or services and is calculated as a percentage of the price of the product or service sold. Lab. Code § 204.1. Commissions are wages for purposes of the Labor Code. Lab. Code § 201.

(1) Entitlement to Commissions

Terms of commission payments are generally left to the employment agreement. To be valid, the agreement may not be unconscionable and there must be a relationship between when the commission is earned and the work performed to earn it. *Compare American Software, Inc. v. Ali*, 46 Cal. App. 4th 1386 (1996) (contract that terminated plaintiff's right to receive commissions on payments received on her accounts 30 days after severance of her employment was not unconscionable, in part because employee was responsible for servicing buyers after sale was made) *with Ellis v. McKinnon Broad. Co.*, 18 Cal. App. 4th 1796 (1993) (contract providing that no commissions will be paid on fees received after employee's termination was held unconscionable). In the absence of an agreement governing entitlement to commissions, the "procuring cause" rule applies. *Wise v. Reeve Elecs., Inc.*, 183 Cal. App. 2d 4 (1960) (explaining that an agent who brings about a deal is entitled to commissions even if the principal ultimately completes the final act of negotiation).

(2) Payment of Commissions

Commissions must be paid twice during each calendar month on days designated in advance by the employer as regular paydays. Lab. Code § 204. If, however, commissions are not calculable until after the end of the designated earning period, the commissions are not due and payable until the agreed calculation becomes ascertainable. DLSE Op. Ltr. Nos. 2002.12.09-2, 2003.04.30.

(3) Forfeitures Are Prohibited

Although reasonable conditions may be placed on the earning of commissions, once commissions are vested they may not be forfeited. DLSE Op. Ltr. No. 2003.04.30.

c. Net-Profit-Based Incentive Plans

An employer may offer its employees supplementary incentive compensation based on profits that remain after legitimate expenses have been subtracted from revenues—if the plan does not unlawfully compromise the employer's wage payment obligations. In determining whether the employer's obligations are compromised, the courts will look to a variety of factors including whether the plan rewards cooperative effort or penalizes individual employees, dollar-for-dollar, for business losses, and whether the calculation impacts regular or supplemental wages. *Prachasaisoradej v. Ralphs Grocery Co., Inc.*, 42 Cal. 4th 217 (2007).

R. Record-keeping Obligations

1. General IWC Wage & Hour Records

Generally speaking, employers subject to a wage order must maintain the following payroll records, for each employee: (1) full name and address; (2) occupation; (3) Social Security number; (4) birth date, if under 18 and designation as a minor; (5) time records showing when the employee began and ended each work period; (6) meal periods (including starting and ending time); (7) split shift intervals; (8) total daily hours worked; (9) total wages paid each period (including value of board, lodging, or other compensation furnished to the employee); (10) total hours worked in a pay period and applicable rates; and (11) for piece-rate workers, piece rates or an explanation of incentive plan formula (employer must retain an accurate production record). IWC Wage Orders § 7. A copy of wage statements provided to employees, or a record of deductions taken from wages, must also be maintained for three years. Lab. Code §§ 226(a), 1174.

In addition, an employer may not prevent an employee from maintaining a personal record of his or her hours worked.

2. Other Benefit-Related Records

California employers are obligated to keep other types of records pertaining to benefits. For example, employers covered by the paid sick leave law must maintain records documenting the hours worked and paid sick days accrued and used by each employee. *See* Lab. Code § 247.5. Local ordinances may also impose such requirements.

3. Employee Access to Wage & Hour Records

An employer must provide payroll information or copies of that information to current and former employees within 21 days of an oral or written request. Lab. Code § 226(c).

S. Posting Requirements

Employers must post a copy of the applicable Wage Order and a notice that advises employees of paydays. A summary of the provisions of the Wage Order and a notice as to how to contact the DLSE must be printed on the first page of each Wage Order. Lab. Code §§ 207, 1183.

IV. SAFETY

A. California Occupational Safety and Health Act (Cal-OSHA)

1. Injury and Illness Prevention Program (IIPP)

The IIPP requires employers to design a written formalized workplace safety program. The IIPP provides for minimum requirements and procedures to be included in an employer's program, as identified in the regulations. Cal. Code Regs. tit. 8, § 3203.

2. Outdoor Heat Illness Prevention

Employers that operate outdoor places of employment must provide access to shade and water in sufficient quantity at the beginning of the shift. Frequent drinking of water shall be encouraged. The regulation also requires training for, among other things, risk factors for heat illness and the importance of drinking water. Cal. Code Regs. tit. 8, § 3395.

3. Repetitive Motion Injuries (RMI) Prevention (Ergonomics)

California law requires an employer to design a program to minimize RMI when two or more employees, performing identical work activities, have been diagnosed by a physician with an RMI. The minimum requirements of the program are identified in the regulations. Lab. Code § 6357; Cal. Code Regs. tit. 8, § 5110.

4. Cleaning Product Right to Know Act of 2017

A new law effective January 1, 2018 affects manufacturers of certain consumer products (air care, automotive, cleaning, or polish or floor maintenance products) as well as employers that may have these products in their workplaces. Employers that are required to maintain and provide safety data sheets must also make available information prepared by manufacturers about the products specified in this statute. Lab. Code § 6398.5.

5. Criminal Liability

Criminal liability can be imposed on individual managers, as well as corporations and LLCs, for failing to disclose serious concealed dangers. Those with knowledge must notify DOSH, and warn employees in writing immediately if there is imminent risk of great bodily harm or death, or in the absence of such risk, within 15 days after receiving actual knowledge of the serious concealed danger. Penal Code § 387.

6. Enforcement Authority

DOSH administers and enforces California's health and safety laws. Substantial penalties can apply for employer violations, ranging from up to $12,471 for non-serious violations, up to between $8,908 and $124,709 for certain willful or repeated violations. *See* Lab. Code §§ 6427, 6429, 6431.

Under the Labor Code, as amended in 2011, a rebuttal presumption arises that a "serious violation" exists when DOSH demonstrates "that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation." Lab. Code § 6432(a). Before issuing a citation for a serious violation, DOSH must make "a reasonable attempt to determine and consider" certain factors, including the employer's training relevant to preventing employee exposure to the hazard at issue, procedures for discovering and correcting the hazard, and other information the employer wishes to provide, including information about why a presumption should not apply. Lab. Code § 6432(b)(1).

Moreover, as of January 1, 2017, DOSH now uses a broader definition of "repeat violation" for purposes of setting penalties. Penalties for repeat violations may be imposed on employers that commit substantially similar violations within a five-year period, anywhere in the state.

For more details, see Littler's Insight, *Cal/OSHA Amendment Significantly Expands its Definition of "Repeat" Violations*, (Dec. 12, 2016).

7. Requirements Similar to Fed-OSHA

Cal-OSHA includes requirements for other written compliance programs, including an Emergency Action Plan, Fire Prevention Plan, and Hazard Communication Standard. Additional regulations cover specific industries and/or mirror the Fed-OSHA requirements. Record-keeping obligations also apply.

These topics are beyond the scope of this overview. That being said, Cal-OSHA covers almost every employer and place of employment in the state. For further information, visit http://www.dir.ca.gov/DOSH/dosh1.html.

B. Drug Testing

1. Random Drug Testing

California courts have condoned suspicionless drug testing of current employees only for safety-sensitive or security-sensitive positions. *Smith v. Fresno Irrigation Dist.*, 72 Cal. App. 4th 147 (1999).

San Francisco prohibits, under all circumstances, the random or company-wide testing of current employees, using blood, urine, or encephalographic testing. It also bans employers from imposing or requesting testing as a condition of continued employment. Testing is allowed if: (1) an employee appears impaired on the job; (2) any such impairment, given his or her position, "presents a clear and present danger to the physical safety of the employee, another employee," or the public; and (3) the employer grants the employee, at its expense, an opportunity to have the sample re-tested and to explain the results. S.F., Cal., Police Code art. 33A.

C. Workers' Compensation

1. Workers' Compensation Act

The Workers' Compensation Act provides for a no-fault and self-executing system that provides medical care, temporary and permanent disability indemnity, and death benefits. Lab. Code § 3200 *et seq*. There is a presumption of compensability for injuries that arise out of and in the course of employment. Lab. Code §§ 3600-01. There are additional penalties for unreasonable delay in provision of benefits (Lab. Code § 5814), for discrimination or retaliation (Lab. Code § 132a), and for serious and willful misconduct (Lab. Code § 4553).

2. Workers' Compensation Notices

Workers' compensation notices posted by employers must include the website address and contact information that employees may use to obtain further information about the claims process and an injured employee's rights and obligations, including the location and telephone number of the nearest information and assistance officer. Lab. Code § 138.4.

V. PRIVACY

A. California Constitution

The state constitution protects the right to privacy. Cal. Const. art. 1, § 1.

B. Medical Privacy

1. California Confidentiality of Medical Information Act

This act restricts dissemination of medical information in the custody of health care providers, and strictly limits an employer's use and disclosure of employee medical information. Civ. Code § 56 *et seq*.

2. Marijuana

The state authorizes the use of marijuana to treat illnesses. These laws, however, do not insulate drug users from federal law making such behavior criminal. Employers can refuse to accommodate the use of marijuana by affirming that this conduct remains illegal under federal law. *Gonzales v. Raich*, 545 U.S. 1 (2005). And while recreational marijuana is also allowed in California, employers may prohibit the use of marijuana by employees or prospective employees.

C. Work Eligibility Status

By California law, the state and localities are prohibited from requiring a private-sector employer to use an electronic employment verification system (such as the federal E-Verify system), except when required by federal law or as a condition of receiving federal funds. An employer may ***voluntarily*** use E-Verify to check the employment authorization status of a person who has been offered employment. Lab. Code §§ 2811 *et seq*.

D. Off-Duty Conduct

Employers cannot take adverse employment actions against employees because of their "lawful conduct occurring during nonworking hours away from the employer's premises." Lab. Code § 96(k). This provision creates no substantive rights but provides an administrative remedy for preexisting rights. *Grinzi v. San Diego Hospice Corp.*, 120 Cal. App. 4th 72 (2004).

E. Social Media Passwords

California employers are prohibited from requiring or requesting an employee or applicant to disclose a user name or password for accessing personal social media. Employers are also prohibited from discharging, disciplining, threatening to discharge or discipline, or otherwise retaliating against an employee or applicant for not complying with a request by the employer that violates these provisions. Lab. Code § 980.

F. Security Breach of Personal Data

Businesses must provide prompt notice to California residents of any breach of security involving unencrypted personal data. Civ. Code § 1798.29.

G. Social Security Numbers (SSN)

Employers are prohibited from: (1) publicly posting or displaying an individual's SSN; (2) printing an individual's SSN on any card required to access products or services; (3) requiring an individual to transmit his or her SSN over the Internet unless the connection is secure or the SSN is encrypted; (4) requiring an individual to use his or her SSN to access an internet website unless a password or unique personal identification number is also required to access the website; and (5) printing an individual's SSN on any material that is mailed to the individual, unless applicable state or federal law requires the SSN to be on the document being mailed. Civ. Code §§ 1798.85 *et seq*. Some exceptions apply.

VI. GENERAL HR REQUIREMENTS

A. Documentation Signed by Employee

Employers are required to provide employees with a copy of any document that employee has signed, upon request. Lab. Code § 432.

B. Personnel File

An employer must permit an employee (current or former) to view his or her personnel file related to his or her performance or any grievance concerning the employee, within 30 days from receiving a written request. Examinations need to be conducted at reasonable times and reasonable intervals. There are exceptions, including during pendency of a lawsuit filed by the current or former employee relating to a personnel matter. Lab. Code §§ 226, 1198.5.

C. Disclosing Wages

Employers cannot require employees to refrain from disclosing their own wages, discussing the wages of others, or inquiring as to other employees' wages. Lab. Code § 1197.5; *see also* Lab. Code § 232.

D. Discipline or Discharge from Shopper's Report

If employee is disciplined or discharged as result of shopper's report, they must be given a copy of the report. Lab. Code § 2930.

E. Subpoenaed Employment Records

Persons subpoenaing employment records must provide notification to the subject employee of such efforts and provide specified time to object to the subpoena. Civ. Proc. Code § 1985.6.

F. Minors

Minors may not work in any occupation declared particularly hazardous for the employment of minors between 16 and 18 years of age, or declared detrimental to their health or well-being, by 29 C.F.R. 570, Subpart E. Lab. Code § 1290 *et seq*. Minors are also limited in the days, hours and time that they can work. Lab. Code §§ 1391, 1391.1, 1391.2; Educ. Code § 49116. An employee who is over 18, but under 21, cannot sell and serve alcoholic beverages as a waiter/waitress unless the employer is also a restaurant—but in any event, he or she still cannot be a bartender. Bus. & Prof. Code §§ 25663, 25667.

G. Whistleblowing

California law prohibits an employer from making, adopting, or enforcing any rule, regulation, or policy that prevents "an employee from disclosing information to a government or law enforcement agency, to a person with authority over the employee, or to another employee who has authority to investigate, discover, or correct the violation or noncompliance," if the employee has reasonable cause to believe that the information discloses a violation of, or noncompliance with, a state or federal statute or a local, state, or federal rule or regulation.

It is also unlawful to retaliate against an employee because the employer believes that the employee disclosed or may disclose such information under these circumstances. Additionally, employers may not retaliate against an employee for disclosing, or refusing to participate in an activity that would result in a violation of, or noncompliance with, a rule or regulation, or for having exercised any of these rights in a former job. The law also protects employees who are family members of an individual who has engaged in protected whistleblowing activity. Lab. Code § 1102.5; *see also* Gov't Code §§ 905.2, 8547.3, 8547.15, 19683. In addition to other penalties, employers (that are corporations or LLCs) are liable for a penalty of up to $10,000 for each violation. Lab. Code § 1102.5(f).

H. Record-keeping Duties

California employers are obligated to keep and maintain many types of records. Such records must cover, for example: all types of wage and hour issues, paid sick leave, personnel records, applicant data, mandatory harassment training, unemployment classifications, workers' compensation claims, and a variety of workplace safety topics. Local ordinances may also impose such requirements.

I. Workplace Postings

All employers must meet workplace posting obligations. Workplace postings are usually available at no cost from the relevant agency. The mandatory posters differ somewhat by industry and generally cover a wide variety of topics (benefits, human trafficking, wage orders, etc.). A list of required posters and other information is available from the Department of Industrial Relations at http://www.dir.ca.gov/wpnodb.html. "All in one" posters are also available from the California Chamber of Commerce (http://store.calchamber.com/default.aspx) and various other companies.

Employers should be aware that local ordinances sometimes also include posting requirements, including, for example, the paid leave laws in Los Angeles, San Diego, and San Francisco.

VII. TERMINATION

A. Cal-WARN

Cal-WARN applies to employers with 75 or more employees within the preceding 12 months. Employees are covered if they worked for the employer at least six of the 12 months before the date on which notice is required. Employers must provide notice of a mass layoff, relocation, or termination of operations to employees, the EDD, the local workforce investment board, and the chief elected official of each city and county government in which the event occurs. Notice must be given 60 days before the mass layoff (50 or more persons), relocation, or termination (including substantial cessation of operations). Limited exceptions exist. Lab. Code §§ 1400 *et seq*. For details, visit http://www.edd.ca.gov/Jobs_and_Training/Layoff_Services_WARN.htm.

In a recent decision, a California appellate court ruled that an employer had to give notice in the event of a temporary three-week furlough, even though furloughs would not qualify as "layoffs" under federal WARN. For more information on that decision, see Littler's ASAP, *Temporary Furloughs May Trigger California WARN Act Notice Obligations*, (Dec. 5, 2017).

B. Releases

1. Special Language

A general release cannot extend to claims that the releaser "does not know or suspect to exist" at the time of the release if that information would have materially affected the settlement. Express language must be included to cover the release of such claims. Civ. Code § 1542.

2. Business Expenses

A waiver of the right to be indemnified for business expenses is probably unenforceable. Lab. Code § 2802. However, the California Supreme Court has stated that the right to indemnity does not have to be specifically excluded from a release in order for the release to be valid otherwise. *Edwards v. Arthur Andersen, LLP*, 44 Cal. 4th 937 (2008).

3. Wage Claims

A waiver of a claim for wages in exchange for payment of less than the full wage is unenforceable. Lab. Code § 206.5; *but see Perez v. Uline, Inc.*, 157 Cal. App. 4th 953 (2007) (upholding, without discussion, a private release of a California overtime claim).

4. Unemployment Compensation

Any waiver by any person of any benefit or right provided under the unemployment insurance code is invalid. Unemp. Ins. Code § 1342.

VIII. POST-TERMINATION

A. Noncompete Agreements

Generally, noncompete agreements are unenforceable—"every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." Bus. & Prof. Code § 16600. Limited exceptions may apply for sale of goodwill in a business and for dissolution or disassociation of a partnership or limited liability company. Companies may protect legitimate trade secrets through a confidentiality agreement, but those will be scrutinized very carefully. Even offering a noncompete can be potentially actionable as against public policy. Choice-of-law provisions or choice-of-forum clauses for other states will not save the agreement if the employee or dispute is in California. *See also* Lab. Code § 925.

B. Nonsolicitation Agreements

Agreements against employee raiding may be enforceable. *VL Sys., Inc. v. Unisen, Inc.*, 152 Cal. App. 4th 708 (2007); *Loral Corp. v. Moyes*, 175 Cal. App. 3d 268 (1985); *see Aetna Maint. Co. v. West*, 29 Cal. 2d 198 (1952) (defining what it means to "solicit"). Note that employee nonsolicitation provisions will be invalid under the statute if not reasonably limited geographically. *Cap Gemini Am. v. Judd*, 597 N.E.2d 1272, 1287 (Ind. Ct. App. 1st Dist. 1992) (applying California law).

Customer nonsolicitation clauses, as opposed to employee nonsolicitation clauses, are void and unenforceable unless it is shown that the employer possesses legitimate trade secrets that it is attempting to protect through the use of the restrictive clause. *Thompson v. Impaxx, Inc.*, 113 Cal. App. 4th 1425 (2003).

IX. OTHER NIGHTMARES

A. Private Attorney Generals Act (PAGA)

Under the California Labor Code Private Attorneys General Act of 2004 (PAGA), the civil penalties established for violations of the Labor Code can be pursued by private litigants (current or former employees) as well as by the Labor Commissioner. Lab. Code §§ 2699 *et seq*. Claims may be brought as a class action or as a representative action. *Arias v. Superior Court (Angelo Dairy)*, 46 Cal. 4th 969, 986 (2009). There are numerous procedural requirements to PAGA claims, including, for example, that the aggrieved employee must first notify both the employer and the Labor and Workforce Development Agency of the alleged violations. PAGA penalty claims generally are subject to a one-year statute of limitations period, Civ. Proc. Code § 340(a), although related claims (such as for unfair competition or wage violations) may have longer limitations periods. *Thomas v. Home Depot USA Inc.*, 527 F. Supp. 2d 1003 (N.D. Cal. 2007).

PAGA also adds a separate civil penalty for the violation of any provision of the Labor Code for which there was not previously a stated penalty. Penalties accrue for each employee per pay period in which a Labor Code violation occurs. A $100 penalty applies to an initial violation, and a $200 penalty applies to each subsequent violation. Employees can recover 25% of the penalties on behalf of themselves and others, and the state gets the other 75% of the award.

B. Drafting Enforceable Arbitration Agreements

1. Class Action Waivers in Arbitration Agreements

California courts generally are inclined to uphold limitations on arbitration agreements, invalidating those deemed unfair (unconscionable) to employees. *See, e.g.*, *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109 (2013). This approach, however, can run up against the Federal Arbitration Act (FAA) and U.S. Supreme Court decisions.

According to the U.S. Supreme Court, section 2 of the FAA "was designed to promote arbitration" and "embod[ies] a national policy favoring arbitration." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). The court explained that "[t]he principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms." *Concepcion*, 563 U.S. at 344; *see also CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012) ("[The FAA] requires courts to enforce agreements to arbitrate according to their terms."). The Supreme Court recently reiterated this principle in *Kindred Nursing Centers L.P. v. Clark*, stating that the FAA "preempts any state rule discriminating on its face against arbitration." 137 S. Ct. 1421, 1426 (2017). The court further reasoned that the FAA "displaces any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have defining features of arbitration agreements." *Id.* For discussion of the *Kindred Nursing* opinion, see Littler's Insight, *Supreme Court Emphatically Defends Arbitration Agreements from State Interference*, (May 18, 2017) (noting that the decision might undermine the PAGA, as well as California Labor Code section 925, which seeks to rein in the use of arbitration agreements).

With that backdrop in mind, employers should be aware of a developing issue concerning the validity of class action waivers in arbitration agreements. Such provisions require employees to forego class actions and proceed only individually if they raise disputes in arbitration. The California Supreme Court has acknowledged that a state's refusal to enforce a class action waiver on grounds of state public policy or unconscionability is preempted by the FAA. *Iskanian v. CLS Transp. of L.A.*, 59 Cal. 4th 348 (2014).

There is currently a split in the federal appellate courts, moreover, as to whether class action waivers violate the National Labor Relations Act (NLRA). The split stems from the National Labor Relations Board's (NLRB) decision in *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012). In that case, the NLRB considered whether an employer violated the NLRA when it required an employee to sign an agreement precluding class or collective claims concerning wages, hours, or other working conditions. The NLRB determined that the requirement of a class action waiver, as a *condition of employment*, is an unfair labor practice and violates Section 7 of the NLRA[2] because it impermissibly interferes with employees' rights to engage in concerted activity for their mutual aid or protection.

At least two federal appellate courts—including the U.S. Court of Appeals for the Ninth Circuit, which covers California—have agreed with the NLRB's decision in *D.R. Horton*. But other courts (including the Second, Fifth, and Eighth Circuits) have rejected that position and upheld class action waivers in arbitration agreements. The U.S. Supreme Court agreed to take the question and heard oral arguments in its recent October 2017 term. Pending the court's decision, the issue remains unsettled. For a more detailed summary of the split, see Littler's ASAP, *Supreme Court Will Review Three Cases Involving the Lawfulness of Class and Collective Action Waivers*, (Jan. 13, 2017).

2. Including Sufficient Detail in Arbitration Agreements

California courts have refused to enforce arbitration provisions where the language was not sufficiently specific or did not seem intended to create a binding contract. In *Mayers v. Volt Management Corp.*, for example, the plaintiff brought discrimination claims under the FEHA against his former employer. 2012 Cal. App. LEXIS 263 (Feb. 27, 2012). The employer moved to compel arbitration pursuant to provisions in the plaintiff's employment application, employment agreement, and employee handbook. The trial court denied the employer's petition, finding the arbitration agreement was procedurally and substantively unconscionable. The appellate court agreed and found that the employer's failure to identify the particular set of AAA rules that governed the arbitration agreement made the agreement procedurally unsound. In addition, under California law, a FEHA defendant may recover attorneys' fees only where the plaintiff's action was frivolous or brought in bad faith. But the arbitration agreement allowed the arbitrator to award the prevailing party attorneys' fees without limitation, which led the court to find the agreement substantively unconscionable.

More recently, in *Esparza v. Sand & Sea, Inc.*, a California appellate court upheld denial of the employer's motion to compel arbitration, which was based on an arbitration policy included in a handbook. 2 Cal. App. 5th 781 (2016). The court found the policy language insufficient because the handbook indicated that it did not intend to be a contract or to create any legally enforceable

[2] Section 7 of the NLRA provides, among other things, that employees shall have the right to "engage in [] concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. § 157.

obligations. Further, while the employee's signed acknowledgement form demonstrated that the employee had received and promised to read the handbook, it did not represent any mutual agreement to arbitrate. For more information about the *Esparza* case, see Littler's Insight, *California Court of Appeal Rules Arbitration Agreement In Employee Handbook Is Not Enforceable*, (Sept. 8, 2016).

C. Immigration Enforcement Issues

A California law operative January 1, 2018 imposes new requirements for public and private employers regarding immigration worksite enforcement actions by the federal Immigration and Customs Enforcement ("ICE"). Under this new law, employers may not voluntarily permit ICE official to enter nonpublic areas of a workplace. Access is required if otherwise required by federal law or if the immigration agent has a judicial warrant. The law also requires employers to provide specified notices to current employees and any authorized representative regarding ICE inspection of employment records and expressly prohibits employers from re-verifying a current employee's employment eligibility when not otherwise required by federal law. For more information, see Littler's ASAP, *New Law Governs Immigrant Worksite Enforcement Actions in California*, (Oct. 19, 2017).