

DOING BUSINESS IN CALIFORNIA: A GUIDE FOR EMPLOYERS

 Fox Rothschild ^{LLP}
ATTORNEYS AT LAW



Introduction

The allure of doing business in California is undeniable. It is the world's fifth (and moving towards fourth) largest economy and a market of more than 39 million people. For employers, however, California presents unique challenges because its laws differ significantly from those of other states and the federal government. California employment laws are the most far-reaching in the nation, usually providing workers significantly greater levels of protection than those offered elsewhere. These differences can create traps for the unwary employer.

Wage and Hour Laws

Currently, wage and hour class actions and actions brought under the Private Attorneys General Act of 2004 (PAGA) are a major concern for employers in California. They are costly to litigate, and the potential liability can be staggering. They are popular with plaintiffs' lawyers not just because they are easier to maintain in California but also because California's wage and hour laws are more generous to employees than those of other states. For example, California courts have rejected the concept of *de minimus* time, so even the loss of a few minutes can trigger a legal claim and multiple levels of penalties. The following are some aspects of wage and hour laws that are specific to California:

Application to Employees Based Outside California

In 2011, state and federal appellate courts concluded that employees based outside of California, who come to California to work for full days or weeks, must be paid overtime according to California law for their time in California. However, the California Supreme Court said that "one cannot necessarily assume that" this ruling applies equally to other California wage and hour requirements, which leaves the ruling open to question and interpretation.



Minimum Wage

As of January 2023, the minimum hourly wage in California for all businesses regardless of size is \$15.50. It was supposed to be \$15, but was increased due to inflation. An increasing number of cities are setting their own minimum wages, including Alameda, Belmont, Berkeley, Burlingame, Cupertino, Daly City, East Palo Alto, El Cerrito, Emeryville, Foster City, Fremont, Half Moon Bay, Hayward, Long Beach, Los Altos, Los Angeles (City), Los Angeles County (unincorporated areas), Malibu, Menlo Park, Milpitas, Monterey Park, Mountain View, Novato, Oakland, Palo Alto, Pasadena, Redwood City, Richmond, San Diego, San Francisco, San Jose, San Leandro, San Mateo, Santa Clara, Santa Monica, Santa Rosa, Sunnyvale and West Hollywood. Federal minimum wage remains at \$7.25 per hour, where it has been since 2009. However, there are certainly efforts in the Biden administration to raise the federal minimum wage.

Daily Overtime

California law requires that employees be paid overtime, at one and a half times their regular rate of pay, not only for work in excess of 40 hours in one workweek, but also for work in excess of eight hours in any given workday. Thus, California employees

may be entitled to overtime pay even if they do not work more than 40 hours in a workweek. Employees are also entitled to overtime, at one-and-a-half times their regular rate of pay, for the first eight hours on the seventh day of work in any one workweek. Any work in excess of 12 hours in one workday, or eight hours on the seventh workday in any one workweek, must be compensated at twice the employee's regular rate of pay. Employers should also review the Industrial Welfare Commission Wage Orders (Wage Orders) for industry-specific overtime requirements.

California employers should pay attention to calculations of the regular rate for overtime purposes. When an employee works at more than one rate in the workweek, the regular rate typically is the blended rate for that workweek. In addition, the FLSA rules regarding nondiscretionary compensation that should be included in the regular rate for overtime purposes also apply in California.

Alternative Workweek Schedules

Hourly employees can vote to have an alternative workweek that allows for more than eight hours per day of work within a 40-hour workweek without the payment of daily overtime. To implement such a schedule, the employer must obtain the consent of two-thirds of the hourly employees in the department or work unit. Specific requirements apply to the manner in which an alternative workweek schedule may be implemented and maintained. There are also strict notice requirements.

Meal and Rest Periods

California law requires employers to "provide" unpaid meal periods to employees and to "authorize and permit" their employees to take paid rest breaks. As long as employees are informed of their rights to take these breaks and are given a genuine opportunity to take them, the law is technically satisfied, although proof remains an uphill battle absent excellent record keeping

practices. Employers are required to keep records of meal periods, which employers typically satisfy by having employees clock out for unpaid meal periods. California courts have placed the burden of proof on the employer to show that it has complied with these requirements. An employee is entitled to timely, an unpaid, uninterrupted meal period of not less than 30 minutes before five hours of work is completed. The employee must be free to leave the premises. Employees are entitled to a second meal period of 30 minutes if they work more than 10 hours in a day. An employee may voluntarily choose not to take the first meal period if their work schedule for that day is six hours or less. The employee can waive the second meal period if the total hours worked on that workday is not more than 12. Employees are also entitled to a paid 10-minute off-duty, uninterrupted rest break for every four hours of work, or major fraction thereof. A "major fraction" is considered more than two hours' work, and employees must work 3.5 hours to be entitled to the break.

A 2016 court decision said that employees were not relieved of all duties for purposes of meal and rest periods if they were required to carry radios or pagers. For employees who work outside, such as those in the construction, landscaping or agricultural industries, employers must provide a "recovery period" or a "cool down period" of at least five minutes as needed.

The premium pay for any violation of the meal period and rest break requirements is one hour of pay at the employee's "regular rate" for each day when the employee missed a meal or rest period. A 2021 California Supreme Court decision clarified that the rate for the meal premium and rest premium was the same "regular rate" for the workweek that is paid for overtime (and includes all non-discretionary pay). This ruling has led to a lot of litigation. These pay premiums are capped at one meal premium and one rest premium per

workday and should be separately coded on the paystub as “meal premium” and “rest premium.”

There is an abundance of litigation in California surrounding meal and rest breaks, so employers are advised to audit practices to confirm compliance.

Vacation Policies

In California, accrued vacation time is considered a form of earned wages and cannot be forfeited. An employer may not institute a “use-it-or-lose-it” policy. Employees must be allowed to carry over their accrued vacation. If employees quit or are terminated, they must be paid for all unused accrued vacation based on their rate of pay when the employment ends. To prevent the uncontrolled increase of vacation days, employers may set a cap on the accrual of unused vacation time of at least one-and-a-half times the employee’s annual accrual. The failure to pay an employee for all accrued, but unused, vacation time can be quite costly, including because such a failure may give rise to “waiting time penalties.”

A California Court of Appeals has held that an employer’s liability for failure to pay an employee for such unused vacation time is not subject to “a look-back period.” The court reasoned that since an employee’s right to be paid for such unused vacation time does not arise until the termination of employment, the employer’s liability for the amount of unused vacation is not limited by any statute of limitations. Thus for example, a 20-year employee who is terminated and not paid for their unused vacation time can recover their pay for vacation time that was earned as far back as the first year of their employment.

Be careful of Paid Time Off (PTO) policies and floating holidays. California considers those accrued wages that also must be paid out upon termination.

Overtime Exemptions

California law provides exemptions from overtime pay for certain “executive,” “administrative” and “professional” employees. For these exemptions to apply, the employees must be “primarily engaged in” the duties that meet the requirements of the particular exemption, customarily and regularly exercise discretion and independent judgment in carrying out those duties, and earn a monthly salary equivalent to no less than twice the California minimum wage for fulltime employment (40 hours per week). The exemptions are similar to those provided under federal law. Federal law, however, only requires that an employee’s “primary duties” meet the test for each exemption. In California, an employee must spend more than half their time (i.e., be “primarily engaged in”) performing the duties that meet the applicable test and meet the “salary test” or earn a minimum month’s salary of no less than two times the state minimum wage. As noted above, the state minimum wage has increased each year, so the minimum salary level also raises each year. In 2023 it is \$64,480 (much higher than the federal exempt classification threshold). California has also adopted an overtime exemption for computer software and design professionals earning a high hourly rate. The comparable federal exemption covers computer professionals earning far less. There is no “highly compensated” exemption in California as there is under federal law.

Deductions From Wages

California law severely restricts the circumstances in which an employer may deduct damages or debts owed by employees from their wages. An employer may not deduct from an employee’s wages any amount to compensate the employer for loss or damage caused by an employee’s simple negligence. It may deduct an amount sufficient to compensate for loss or damage resulting from an

employee's gross negligence, willful misconduct or dishonesty. The burden of proof is on the employer to establish that such deduction is appropriate. In addition, an employer may not deduct any amount from an employee's final paycheck to recover an unpaid debt (such as a loan or cash advance) unless the employee specifically agrees to the deduction in writing at the time of termination.

Notice to Employees

(aka Pay Notice or Wage Theft Form)

Employers must give newly hired, non-union, non-exempt employees written notice of their rate (or rates) of pay, the basis on which the wages are to be calculated (such as hourly, piece rate, commission, etc.), the applicable overtime rates, the designated regular pay day, and the name and mailing address of the employer. The written notice must also include a summary of the employee's Paid Sick Leave rights. Employers must also notify employees within seven days of any changes to this information. Pay notice forms are available on the Division of Labor Standards Enforcement's (DLSE) website.

Itemized Wage Statement and Paycheck Requirements

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

- Gross wages earned
- Total number of actual hours worked (not required for salaried exempt employees)
- The number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis

- All deductions (all deductions made on written orders of the employee may be aggregated and shown as one item)
- Net wages earned
- The inclusive dates of the period for which the employee is paid
- The name of the employee
- Only the last four digits of the employee's Social Security number or an employee ID number. It is unlawful to include an employee's nine-digit Social Security number.
- The name and address of the legal entity that is the employer (which should match the Pay Notice)
- All applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee
- The amount of Paid Sick Leave available

These requirements can get quite tricky when discretionary compensation is earned that impacts the overtime, sick pay, and the meal and rest premium rates each workweek.

Sick leave and vacation leave balances should also be included on the paystubs.

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

Final Paycheck

Most states require that departing employees receive their final paychecks on the next regular payday following the discharge. In California, all wages, including accrued but unused vacation, are due immediately upon an involuntary termination or layoff. Employees who quit with more than 72

hours' notice must be paid on the last day of work. For employees who quit with fewer than 72 hours of notice, wages and unused vacation must be paid within 72 hours after notice is given. There are stiff penalties for not paying wages in full upon termination, including up to 30 days of pay at the employee's regular rate as a "waiting time penalty."

Expense Reimbursements

The California Labor Code requires that all expenses incurred in the course and scope of employment are reimbursed. Traditionally, this applied to travel costs and mileage. However, court cases confirmed the requirement extends to the use of personal phones, computers and related monthly fees. Expense reimbursement has been an active area of litigation since the pandemic. Many companies pay a set monthly fee to cover personal use of electronic equipment and advise employees to expense extra costs.

Hospitality Specific Ordinances

In Los Angeles, Long Beach and West Hollywood, certain employers have higher minimum wage requirements and additional obligations per ordinances directed to the hospitality industry. These ordinances include rights to recall for pandemic related layoffs (see Covid-19 section below).

Predictive Scheduling (Fair Workweek Ordinances)

Predictive scheduling ordinances are a growing trend across the U.S. These laws generally require employers to post schedules ahead of time and restrict the ability to make last minute changes. While there is no statewide predictive scheduling law, California cities are starting to roll out these ordinances, mostly for large retail employers, but sometimes for additional types of businesses. As of 2023, Los Angeles, San Francisco, Emeryville, Berkeley, and San Jose have some version of a predictive scheduling ordinance either pending or on the books.

Rounding

Many employers round time to the nearest seven minutes to allow employees some leeway to punch in early or late (often known as quarter hour rounding). In 2022, a California Court of Appeal rejected an employer's quarter-hour rounding policy, even though evidence showed its neutral application. This issue may ultimately be addressed by the California Supreme Court, which has indicated a hostility towards rounding in prior decisions. In the meantime, employers can avoid litigation risk on this issue by suspending rounding practices. Keep in mind that for union workforces, any change in practice may be construed as a bargaining issue.

Criminal Penalties

A number of statutory wage and hour violations impose potential criminal penalties for intentional violations. For example, California Penal Code section 487m makes *intentional* "wage theft" by employers a form of grand theft and thus a felony. This statute, which took effect January 1, 2022, and others like it up the ante for employers when it comes to wage and hour compliance. They mean managers could face criminal charges and potential imprisonment for workplace law violations.

Leave Laws

California Family Rights Act

In 2021 the California Family Rights Act (CFRA) changed dramatically. Since then, employers with five or more employees must allow employees who work for a covered employer to take 12 weeks of unpaid, job-protected leave if they have worked a minimum of 1,250 hours in the 12 months prior to taking leave. Leave may be taken for an employee's own serious health condition; to care for a family member with a serious health condition; for baby bonding, foster placement or adoption; or for military exigencies. Covered employers will also need to maintain health

coverage under the same terms as an active employee. CFRA will sometimes run concurrently with FMLA, but will never run concurrently with PDL (see below). In addition, CFRA leave covers some relative categories not covered under the FMLA, including grandparents, grandchildren, adult children, parent in-laws, siblings, and as of 2023 a “designated person” who the employee can identify at the time the employee requests the leave. This means that someone who takes CFRA leave for one of these family members (or a designated person) may also be entitled to a separate 12 weeks of FMLA.

Bereavement Leave

Effective January 1, 2023, the CRFA is amended to allow eligible employees to take five days of unpaid bereavement leave after the death of a covered family member. A covered “family member” includes a spouse or a child, parent, sibling, grandparent, grandchild, domestic partner or parent-in-law. The time off must be completed within three months of the date of death, and the leave does not need to be consecutive. To be eligible, an employee must have worked for the employer for more than 30 days prior to the start of the leave. Employees are able to substitute any vacation, personal leave, paid time off (PTO), accrued and available sick leave, or compensatory time available to them. Employers may require employees to provide documentation of the death within 30 days of the request for leave.

Pregnancy Disability Leave

Employers with five or more employees must provide Pregnancy Disability Leave (PDL) of up to four months for employees disabled by pregnancy and pregnancy-related conditions from their first day of employment. PDL applies whether or not an employer is covered by the FMLA or its California equivalent (CFRA). PDL does not run concurrently with CFRA. Thus, an employee could take four months of PDL and then take another leave of

up to 12 weeks under CFRA to bond with the newborn child (known as “baby bonding leave”). Employers must maintain group health benefits for employees on PDL and CFRA, and must provide reinstatement.

Lactation Breaks

Employees who are breastfeeding must be provided with unpaid breaks for expressing milk and a private location, other than a bathroom, for such a purpose. In addition, the location must have a surface area for a breast pump and personal items, a place to sit, as well as electricity, extension and charging cords, with access to a refrigerator and a sink with running water.

Paid Family Leave

Under Paid Family Leave (PFL), employees in California can receive benefits to replace a portion of wages lost when they are on leave from work to care for a sick family member, to bond with a new child or for military exigency leave. PFL is funded through employee contributions and is administered by the state. PFL does not create an additional right to a leave of absence. Rather, it is a benefit that runs concurrently with a leave of absence. Employers are required to advise employees of their PFL rights by posting the state notice advising employees of these rights, and they must provide newly hired employees with the state-published pamphlet setting forth these rights. PFL leave is available for FMLA and CFRA leaves, but also for time off that does not qualify as either (for example for a newly hired employee who does not meet the one-year or 1,250-hour eligibility threshold).

Notably, San Francisco became the first city in California to require businesses with 20 or more employees to pay paid parental leave of eight weeks.

Parental or “Baby Bonding” Leave

There is no requirement for employers to provide paid parental leave in California (except in San Francisco). However, under the CFRA, employers

of five or more employees must allow employees who work for a covered employer to take 12 weeks of unpaid, job-protected leave if they have worked a minimum of 1,250 hours in the 12 months prior to taking leave. Employees can take leave for the purpose of bonding with a newborn child, adopted child or foster child within a year of the birth or placement. Covered employers will also need to maintain health coverage under the same terms as an active employee. The CFRA also prohibits discrimination and retaliation against an employee for taking parental leave.

School Issues and Activities

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

Volunteer Civil Service

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

Time Off to Vote

For statewide elections, employees may, without loss of pay and with prior notice to the employer, take off up to two hours of working time to vote at the beginning or end of their regular working shifts. Because California has statewide elections almost every year, and often more than once in a year, voting leave may be an issue every March and November and whenever there is a "Special Election."

Participation in Judicial Proceedings

Employers are required to allow employees who are victims of certain felonies or who have an immediate family member (including a domestic

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

Leave for Victims of Crimes

Employers with 25 or more employees must provide time off for employees who are victims of domestic violence, sexual assault or stalking to seek medical attention, counseling, protection or relocation services. Those employers must also provide written notice of their rights in this regard. Employers must also provide time off to employees who are: (1) the victim of a crime that either caused physical injury or that caused mental injury and included a threat of physical injury; and, (2) any employee whose immediate family member died due to a crime.

Mandatory Paid Sick Leave

All California employers regardless of their size must provide Paid Sick Leave (PSL) benefits to employees at the rate of one hour for every 30 hours worked. It may be frontloaded or accrued. This requirement applies to all employees working in California—whether part-time or full-time, temporary or permanent, exempt or non-exempt—with limited exceptions for certain union and construction employees, providers of in-home support services, airline flight deck and cabin crew employees with equivalent benefits, and public-sector employees receiving a retirement allowance.

PSL can be used for the employee's medical needs, the medical needs of specified family members, or to obtain legal relief, medical attention or other services if the employee is a victim of domestic violence, sexual assault or stalking. Employers can cap the

amount of PSL hours an employee can accrue to 48 hours or 6 days per year, and can limit the amount of PSL that can be used to 24 hours or 3 days per year.

Santa Monica, San Francisco, Oakland, Berkeley, Los Angeles, San Diego and Emeryville have also implemented local PSL ordinances. Additionally, Los Angeles and Long Beach have mandatory paid time off ordinances solely applicable to hotel workers. Employers subject to these local PSL ordinances must comply with both the local and state laws. Where the laws conflict, employers should apply the provision that is more generous to employees.

Sick leave must be paid at the regular rate of pay (as explained above), and both accruals and usage should be reflected on the employee's paystub.

Employers with Paid Time Off (PTO) programs should ensure that state and local sick leave requirements are satisfied.

Additional paid time off due to public health emergencies, such as COVID-19, may be available under local laws, such as in San Francisco.

Emergency Conditions

With so many natural disasters in the news (such as floods, mudslides and wildfires), California has taken steps to protect employees subject to them. California employers may not threaten to or take adverse action against any employee for refusing to report to, or leaving a workplace or worksite, because the employee has a reasonable belief that the workplace is unsafe. Moreover, employees must also be able to access their mobile devices to seek emergency assistance, assess their safety or to communicate with a person to inform them of their safety. Notably, this provision does not apply to pandemics.

Discrimination and Harassment

Employers face greater risks in employment discrimination cases in California because of the nature of California juries and because,

unlike under Title VII, there are no caps on the compensatory or punitive damages a plaintiff employee may recover. Moreover, the anti-discrimination statutes have been drafted and interpreted more broadly than Title VII.

Protected Classes

The California Fair Employment and Housing Act (FEHA) prohibits discrimination based on sex, age, disability, AIDS or HIV-positive status, marital status, medical condition (cancer), genetic characteristics, race or national origin, military service or veteran status, pregnancy and religion (or lack of one). Employers with five or more employees are covered. To contract with the city of San Francisco, a company must certify that it also does not discriminate on the basis of height or weight ("lookism"). FEHA also prohibits differential treatment based on an employee's "actual or perceived" gender or sexual orientation. This means that the employer cannot discriminate against an employee because he or she is gay, straight or transgender, or based on someone's mistaken belief about the employee's sexual orientation. Employees may dress according to their "self-identified gender" so long as they meet reasonable workplace standards of dress and grooming.

Harassment

In addition to prohibiting harassment, California law requires employers to "take all reasonable steps necessary to prevent and correct harassment and discrimination." Employers are strictly liable for hostile environment harassment by a supervisor. Liability arises for harassment based on any protected class. Individual managers and supervisors can be held personally liable for harassment.

Third-Party Harassment

Employers can be liable when non-employees, such as vendors and customers, harass their employees. This liability has been imposed where

the employer knew or has been given notice of severe and pervasive conduct and has failed to take steps to prevent the harassment.

Sexual Favoritism

A California Supreme Court decision held that an employee may maintain a sexual harassment action by showing that a supervisor's favoritism of employees with whom he or she was having affairs created a hostile working environment. That employee can also maintain a claim that he or she suffered retaliation after complaining of such favoritism.

Policies and Training as a Defense

California requires employers to have a detailed, written anti-harassment and retaliation policy. It requires such policies to be translated into any language spoken by at least 10 percent of an employer's workforce.

Under Title VII, the employer's policies against harassment and the employee's failure to make use of the company's internal procedures to complain of harassment will provide employers with a defense to liability. In California, the employer cannot completely escape liability. Employers can reduce their liability if they can show they took reasonable steps to correct and prevent the harassment. Under this "avoidable consequences doctrine," "a person injured by another's wrongful conduct will not be compensated for damages that the injured person could have avoided by reasonable effort or expenditure." An employer can establish this defense by setting forth evidence that it "took effective steps to encourage victims to come forward with complaints of unwelcome sexual conduct, and to respond effectively to their complaints and to preserve confidentiality." Written policies and training can serve as such evidence.

Harassment Prevention Training

California requires that all employers that do business in the state and have 5 or more

employees provide at least two hours of classroom or other interactive harassment training to its supervisory employees. There is no requirement that the 5 employees work at the same location or all reside in California. This two-hour training is only required for California-based supervisors (or those who reside elsewhere and supervise California employees).

Employers with five or more employees must also provide one hour of sexual harassment training to all employees who are not supervisors. These trainings must be provided every two years or within six months of an employee being hired or assuming a supervisory position. There are specific requirements on what subjects must be covered (including workplace bullying and gender identity), who may provide the training and the manner in which the training is offered. Employers must keep copies of all materials utilized by the trainer, including written slides, materials, attendance sheets, questions submitted during the seminar or webinar and responses given by the trainer, for a period of two years.

California's Civil Rights Division offers free online training in many languages.

Fair Pay Act

California's Fair Pay Act significantly broadens existing law against gender and racial pay inequality. The law requires equal pay for employees who perform "substantially similar work," even if they work at different locations. The law makes it more difficult for employers to prove that the basis for pay inequality is based on a legitimate factor other than sex. California employers may not ask job applicants about their salary history.

Effective in 2023, California employers will be required to include the pay range for the position in a job posting, and to disclose to current employees, upon request, the pay range for the position they hold.

Disability Discrimination

The FEHA defines disability far more broadly than the Americans with Disabilities Act (ADA). Under the ADA, an employee must show that they suffer from a physical or mental impairment that “substantially limits” a major life activity, and mitigating measures may prevent a finding of disability. In contrast, under the FEHA, the employee only needs to show that the physical or mental disability “limits” (not substantially limits) a major life activity. Mitigating measures are not considered in determining whether a condition constitutes a disability. Under the FEHA, an employee can bring a separate claim for failure to engage in the interactive process, so good documentation is especially important. Finally, under the FEHA, an employee can establish that they are limited in the major life activity of “working” even if they are only limited from performing a particular job as opposed to a broad range of jobs.

Age Discrimination

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

Continuing Violation Doctrine

California courts recognize a continuing violation doctrine for discrimination charges based on a course of conduct that occurred partly outside the time period allowed for filing an administrative charge. Under Title VII, this doctrine is generally only available in cases alleging hostile environment harassment.

Reasonable Accommodation for Drug/Alcohol Rehabilitation

Employers with 25 or more employees must reasonably accommodate any employee who voluntarily enters an alcohol or drug rehabilitation

program, provided the reasonable accommodation does not impose an undue hardship on the employer.



Pay Data Reporting

Private sector employers of 100 or more employees are required to file with the Civil Rights Division, data on the race, ethnicity and sex of their employees in each of 10 job categories. According to the implementing legislation, the data will be used for “targeted enforcement” of the state’s pay equity, anti-discrimination and wage and hour laws. The reports are due each March 31. As of 2023, this requirement expands to employers with 100 or more workers obtained through labor contractors (e.g., temp agencies).

Domestic Partners

Opposite sex couples (as well as same sex couples) over the age of 62 can register as domestic partners under California law.

Insurance

California law imposes no direct requirement on employers to offer benefits for domestic partners. The “California Insurance Equality Act,” however, requires that all health care service plans and health insurance policies, as well as all other insurance policies regulated by the California Department of Insurance, provide benefits to registered domestic partners of employees that are equal to those offered to spouses. Insurers are required to make available to employers group policies that would comply with this requirement. An employer would, in theory, only be able to purchase a plan that provides equal coverage for

registered domestic partners. These requirements would not affect employers that are self-insured. Employers that do provide benefits for domestic partners, such as medical coverage, may require proof of registered domestic partnership status or termination of that status but only if similar proof is also requested for spouses.

Other Benefits

The CFRA applies to domestic partners on the same terms as it does to spouses. Thus, an employee may take a CFRA leave to care for a domestic partner. Because such a leave is not available under the FMLA, it would not count against the employee's entitlement to leave under FMLA and they would also be able to take FMLA leave for another qualifying event (e.g., to care for a parent or child with a serious health condition). A domestic partner may therefore be able to take up to 24 weeks of leave while a spouse would only be eligible for 12 weeks. Registered domestic partners are also qualified beneficiaries under California Continuation Benefits Act of 1997 (Cal-COBRA) (see discussion below).

Government Contracts

Companies that wish to bid for contracts with the state of California or to renew existing contracts to provide goods or services of \$100,000 or more in a fiscal year to the state will have to certify that they do not discriminate in the provision of benefits between married spouses and registered domestic partners. Similar requirements apply to contracts with the cities of Los Angeles, San Francisco, Oakland, Berkeley and the county of San Mateo. A few narrow exceptions apply.

Discrimination

California law also provides that domestic partners are entitled to the same rights, protections and benefits granted to spouses. Because the FEHA prohibits discrimination based on marital status, the same law prohibits discrimination based on

participation in a domestic partnership. The limits of this provision have not been tested in court but should apply to any terms and conditions of employment that do not involve the provision of benefits under plans governed by ERISA. Employers may not impose a "no employment of domestic partners" rule. They can, under certain circumstances, refuse to place one domestic partner under the direct supervision of the other domestic partner, or to place both domestic partners in the same department, division or facility.

Same-Sex Marriage

Same-sex marriage has been protected in California since 2008 under the state constitution. California marriages are recognized and protected under the newly passed Respect for Marriage Act.

Other Employment Issues

Covenants Not to Compete

Covenants not to compete are generally unenforceable in California, even when they are narrowly drafted. They will be upheld only in the following circumstances:

- Where a person sells the goodwill of a business;
- Where a partner agrees not to conduct a like business in connection with the dissolution of that partnership;
- Where a member of a limited liability company agrees not to conduct a like business in connection with the dissolution of that limited liability company; or
- Where a restrictive covenant is necessary to protect a company's trade secrets.

Note, this also applies to non-solicitation agreements pertaining to customers, and recent court cases have made non-solicitation agreements as to employees difficult to uphold as well.

Moreover, while "no rehire" or "no future employment" provisions are commonplace in other

states, California law prohibits employers from using blanket “no rehire” provisions in settlement agreements, unless the employer has made a good faith determination that the employee engaged in sexual harassment or sexual assault. Put another way, only harassers can be denied future employment.

Fair Chance/’Ban the Box’ Laws

Employers with five or more employees may not ask applicants on an employment application, or otherwise, about criminal convictions before making a conditional offer of employment. The law also restricts the use of information obtained in a background check and provides that employers that wish to rely on criminal conviction information to withdraw a conditional job offer must notify the applicant of their preliminary decision, give them a copy of the report (if any), explain the applicant’s right to respond, give them at least five business days to do so and then wait five more business days to decide when an applicant contests the decision. There are exceptions for employers that operate health facilities hiring employees who will have regular access to patients or drugs. San Francisco and Los Angeles have their own local versions of “Ban the Box” restrictions.

Independent Contractors

California law is particularly hostile to the independent contractor classification. There is a statutory presumption of employee status, and the employer bears the burden of proving otherwise. In 2018, the California Supreme Court announced that, for wage and hour purposes, workers could not qualify as independent contractors unless they met the three-prong “ABC test.” To do so, employers must be able to prove that:

- A. The company is unable to control or direct what the worker does. In essence, the company tells the worker what to accomplish and the worker determines how to do so.

- B. The worker must perform tasks outside of the hiring entity’s usual course of business. So, for example, a driver for a ride service, a delivery person for a delivery service or a seamstress for a clothing company, cannot be independent contractors no matter how little control the company has over them.
- C. The worker must be engaged in an independently established trade, occupation or business. Here, courts will look at factors such as whether the business is incorporated or licensed, whether it is advertised and whether it offers services to the public or other potential customers.

Again, the company must establish each of these three requirements for the worker to be categorized as an independent contractor. The California Supreme Court has held that the individual factors should not be “applied mechanically as separate tests; they are intertwined and their weights depend often on particular combinations.” The weight of the individual factors also depends on the context in which the analysis is being applied.

The state legislature passed AB 5 in 2019, which applies the ABC test to the California Labor Code but with numerous exemptions, including licensed insurance agents, certain licensed health care professionals and licensed lawyers, architects, engineers and accountants. AB 5 was amended in 2020 to add additional categories of exemptions, including freelance writers, newspaper editors, translators, landscape architects, and some other professions. In November 2020, California voters passed Proposition 22, which created a hybrid model between contractors and employees; essentially a “contractor-plus limited benefits” model.

These are fact-intensive inquiries in a rapidly evolving area of law. Employers should consult qualified counsel to determine whether individuals

can properly be classified as independent contractors.

Right of Privacy

In California, the right of privacy is enshrined in the state constitution. Because employees are presumed to have a reasonable expectation of privacy, it is important for the employer to provide advance notice of what employees can and cannot expect to remain private in the workplace. Well-drafted policies addressing privacy and signed acknowledgments from the employees that they understand their work areas, lockers, e-mails, voice mails, etc., may be searched or accessed, and whether they will be video or audio recorded, are recommended.



Drug Testing

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

Medical marijuana has been available in the state for some time, and as of January 1, 2018,

recreational use has also been legal. However, employers have still been allowed to drug test in appropriate circumstances and need not permit employees to use marijuana or be under the influence at work. Employers that screen for marijuana may want to consider providing notice to their applicants and/or workers.

However, employers' ability to screen for marijuana will soon be impacted. Effective January 1, 2024, employers will be prohibited from discriminating against employees and applicants on the basis of drug tests showing the presence of nonpsychoactive cannabis metabolites or the person's use of cannabis off the job and away from the workplace. Notably, employers can still maintain a drug and alcohol-free workplace. Under the new law, employees shall not possess cannabis while at the workplace or be impaired by or use cannabis while on the job. Employers may still test for controlled substances as a condition of employment. This new law does not apply to employees in the building and construction trades and those requiring a federal background investigation or clearance.

Consumer Credit Reports

California law generally prohibits employers from obtaining consumer credit reports on applicants or employees. But there are a number of exceptions that depend on the type of work the individual is or will be doing. These include positions in management, law enforcement, jobs involving access to confidential information and employees who will be named signatories on an employer's bank account.

Garment Industry Workers

A person or entity who contracts another to perform garment manufacturing is deemed to have guaranteed payment of the minimum wage and overtime and will be liable to the employee for those wages when they are not properly paid.

Warehouse Workers

Effective January 1, 2022, California regulates the use of quotas at warehouse distribution centers in the state, and requires the disclosure of quotas and pace-of-work standards. The DLSE has published helpful FAQs on this new law.

Cal-WARN

California has adopted its own version of the federal Workers Adjustment and Retraining Notification Act (WARN). Cal-WARN applies to any “industrial or commercial facility” that employs at least 75 full or part-time employees (as opposed to 100 full-time employees under federal law) who have worked six of the prior 12 months. Cal-WARN applies to a mass layoff (50 or more employees during a 30-day period), a relocation or a termination (as that term is specifically defined). Cal-WARN requires notice to all employees. Notice to a union will not suffice.

Cal-COBRA

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

Workplace Safety

California’s Division of Occupational Safety and Health, commonly referred to as Cal-OSHA, acts to regulate and protect workers and the public from safety hazards. Cal-OSHA has jurisdiction over every employer and place of employment in California. It enforces and administers all occupational safety and health standards and regulations. Cal-OSHA will conduct inspections

of California workplaces in response to a report of an industrial accident, a complaint about an occupational safety and health hazard or as part of an inspection program targeting industries that have a high rate of occupational hazards, fatalities, injuries or illnesses. Employers in the state have a legal obligation to provide and maintain a safe and healthy workplace for employees, and every employer in California must have a written, effective injury and illness prevention program.

Health Care

San Francisco requires medium and large employers to spend a minimum amount per hour on health care services for their employees. In 2023, companies with 100 or more employees are required to spend a minimum of \$3.40 per hour per employee. Companies with 20 to 99 workers are required to spend a minimum of \$2.27 per hour per employee. These rates are adjusted annually. Employers can meet their spending obligation by purchasing insurance, paying into public programs for the uninsured, contributing to health savings accounts or by direct reimbursement to employees for their health care expenses. Companies that already offer insurance will be required to pay into a health care plan the city has established for uninsured adults within the city if their cost per employee per hour is less than the mandated minimum.

COVID-19

California employers should visit our firm’s [Coronavirus Resources Center](#) for the latest updates in this evolving area of employer mandates. Most importantly, California employers should not just follow CDC and federal guidance, but ensure they follow state (including Cal-OSHA) and local guidance as well. Regulations are very jurisdiction specific.

At this juncture, the previous California requirement for additional Supplemental Paid Sick Leave for Covid-19 related purposes expired at the end of 2022. However, Covid-19 has not gone away, and many cities still may have specific requirements, so check local guidance.

Certain industries in California (mostly related to hotels, event centers, airports, private clubs and those providing services to commercial buildings) are governed by a “right to recall” law passed in April 2020. This law creates specific requirements to offer those laid off due to the pandemic new jobs when businesses re-open and are hiring again.

Litigation

Not only are California laws more favorable to employees than those of almost any other U.S. jurisdiction, litigating employment cases presents unique challenges as well. California employers are encouraged to consider the pros and cons of arbitration agreements, to include a class action waiver.

Summary Judgment

A motion for summary judgment in California state court must be filed and served at least 75 days before the date of the hearing. Since any motion must be heard at least 30 days before the initially scheduled trial date, this means that the motion must be filed and served at least 105 days before trial. California also requires that cases ordinarily be tried within one year of the filing of the complaint (not its service). The effects of the pandemic have caused additional delays in the California court system.

Defendants thus have precious little time to conduct all necessary discovery and file for summary judgment. The standard for summary judgment is also less favorable to defendants. While California’s summary judgment standard was amended years ago, purportedly to bring it in line with the federal standard, California courts have held that there are still significant differences.

To obtain summary judgment, defendants must present evidence of non-liability and not simply point out that plaintiffs do not have the evidence to prove their case.

Choice of Law Provisions in Employment Contracts and Arbitration Agreements

California courts will give effect to choice of law provisions in employment contracts only to the extent that the other provisions of the contract are valid under California law. Thus, for instance, an employee who is terminated for refusing to sign an employment agreement containing an illegal covenant not to compete can maintain a claim for wrongful termination in violation of public policy, even though that covenant would be enforceable under the laws of the state specified by the choice of law provision. Arbitration agreements cannot require California employees to arbitrate in other states or require arbitrators to apply other states’ laws.

Arbitration agreements (including class action waivers) are enforceable in California, as long as they are not procedurally or substantively unconscionable. That said, an employer that enforces an arbitration agreement must pay the fees necessary to commence that arbitration within 30 days after such fees are due, or risk being held to have materially breached the agreement and be sent back to court.

Currently, it is still permissible to require arbitration (even with a class action waiver) as a condition of employment in California. However, there were several key court cases on arbitration in 2022, including a U.S. Supreme Court case that addressed whether and to what extent an action under California’s Private Attorney General Act (PAGA) could be compelled to arbitration. The result is a bit murky and may be addressed by the California Legislature. Moreover, there is one active case pending in 2023 that will determine whether arbitration can still be mandatory (or must be voluntary).

Bottom line, it is important to have your arbitration agreement reviewed periodically to ensure it is enforceable under the most current legal standard.

Wage and Hour Class Actions

The wage and hour provisions of the federal Fair Labor Standards Act (FLSA) are not enforced by class action but rather by collective action. Collective actions are permitted only on behalf of employees who affirmatively “opt in” to a lawsuit. In California, however, one or more employees can file a class action to enforce California’s wage and hour laws on behalf of all purportedly affected employees, and all of those employees will be part of the class unless they affirmatively request exclusion. Thus, one or a handful of disgruntled employees can engage the company in costly litigation on behalf of all similarly situated employees whether or not any of the other employees are unhappy with their compensation. These class actions are costly to litigate and because of the aggregation of allegedly unpaid wages and penalties involved, the potential liability is great. Plaintiffs’ lawyers who prevail on any part of the action can recover attorneys’ fees and costs. These awards are often quite substantial.

Unfair Competition: Business and Professions Code Section 17200

Section 17200 of the Business and Professions Code prohibits any unlawful, unfair or fraudulent business act or practice. A business practice is considered unlawful if it violates other state laws, such as wage and hour regulations. California courts have held that an employee can recover unpaid wages, such as overtime, under this theory. Plaintiffs sue under this theory because it provides a longer statute of limitations than a plain claim for wages under the Labor Code. The statute of limitations for a claim for unpaid wages is three years, whereas the statute of limitations for a Section 17200 claim is four years. Claims under this section are often alleged in wage and hour class actions so as to extend the class period.

Private Attorney General Act (PAGA)

The Private Attorney General Act of 2004 (PAGA) allows employees claiming violations of wage and hour laws to bring civil actions on behalf of the state directly against their employers for penalties rather than having to rely upon state agencies to do so. It is an additional, and common, weapon for employee plaintiffs to use against their employers. PAGA claims can get very expensive when there are different types of wage-and-hour violations. Lawsuits that include PAGA claims require court approval to settle, and a copy of the settlement agreement must go to the Labor and Workforce Development Agency (LWDA). In 2020, the California Supreme Court held that settling an individual employee’s wage-and-hour claims does not provide grounds to dismiss the PAGA claims filed by that employee. In a PAGA action, the state receives 75% of the recovery and the aggrieved employees share 25%, but attorneys’ fees for plaintiff’s counsel are often calculated off the entire amount. Accordingly, these cases are often driven by the possible recovery of attorneys’ fees. PAGA also makes class and collective actions more complicated to litigate, especially when there is an arbitration provision (see discussion above). A PAGA notice must be timely sent to the employer and the LWDA before a PAGA claim can be filed in court, and in some limited cases, the notice provides an opportunity to “cure” and avoid legal action. The only good news for employers relating to PAGA is that the statute of limitations is one year, although if violations continue beyond the lawsuit filing, the penalties accrue per pay period until the case is resolved.

Settlement Agreements

Settlement agreements for employees in California have particularized requirements with regard to many provisions including no rehire, non-disparagement and litigation assistance. They must also include a reference to Section 1542 of the Civil Code. Make sure your settlement agreements are reviewed by California counsel.

What Employers Can Do to Protect Themselves

Because of the many significant differences between California law and those of most other states, employers must be keenly aware of the differences when administering a workforce that includes employees both inside and outside the state. Many employers have chosen to draft different policies or separate employee handbooks for their California operations. Fox Rothschild can assist in drafting and implementing policies that comply with California law, in maintaining compliance with California's employee-friendly laws and in defending employers before government agencies and in the courts. We also offer training in a variety of subjects, including harassment. Training for employees is available in both English and Spanish.

Sahara Pynes*	310.598.4180	spynes@foxrothschild.com
Nancy Yaffe*	310.598.4160	nyaffe@foxrothschild.com
Steven P. Gallagher*	424.285.7096	stevengallagher@foxrothschild.com
Jasmine Anderson	415.315.2223	jlanderson@foxrothschild.com
Cristina K. Armstrong	415.364.5546	carmstrong@foxrothschild.com
Daniel T. Berkley	415.364.5555	dberkley@foxrothschild.com
Ali Brodie	424.249.1759	abrodie@foxrothschild.com
Aceilya G. Burton	415.315.2203	aburton@foxrothschild.com
Keith Chrestionson	415.364.5540	kchrestionson@foxrothschild.com
Andrew S. Esler	215.444.7340	aesler@foxrothschild.com
David F. Faustman	415.364.5550	dfaustman@foxrothschild.com
Gabrielle E. Gordon	424.285.7077	ggordon@foxrothschild.com
Michelle T. Harrington	424.285.7125	mtharrington@foxrothschild.com
Alexander Hernaez	415.364.5566	ahernaez@foxrothschild.com
Daniel V. Kitzes	424.249.1749	dkitzes@foxrothschild.com
Christin Lawler	415.469.1205	calawler@foxrothschild.com
Steven Moore	303.383.7665	swmoore@foxrothschild.com
Ketul D. Patel	424.285.7091	kdpatel@foxrothschild.com
Jeff Polsky	415.364.5563	jpolsky@foxrothschild.com
Claudia Ren	415.364.5547	cren@foxrothschild.com
Allyssa J. Rose	415.248.1552	ajrose@foxrothschild.com
Cody T. Stroman	415.248.1522	codystroman@foxrothschild.com
Jeffrey S. Horton Thomas	424.285.7061	jhortonthomas@foxrothschild.com
Tyreen G. Torner	415.364.5559	ttorner@foxrothschild.com
Steven Wong	415.651.1473	swong@foxrothschild.com

* *Contributing editors*

Stay Current on the Legal Challenges Faced by Employers in California

Subscribe to our California Employment Law blog (<http://californiaemploymentlaw.foxrothschild.com/>) today. Our bloggers discuss the wide array of labor and employment issues – including class actions, wage and hour, discrimination, harassment, accommodation, and privacy matters – confronted by employers in the state of California. And they make it easy to understand too!



Copyright © January 2023 Fox Rothschild LLP. All rights reserved. This publication is intended for general information purposes only. It does not constitute legal advice. The reader should consult with knowledgeable legal counsel to determine how applicable laws apply to specific facts and situations. This publication is based on the most current information at the time it was written. Since it is possible that the laws or other circumstances may have changed since publication, please call us to discuss any action you may be considering as a result of reading this publication.

The images portrayed in this e-book do not depict actual Fox Rothschild clients.

Attorney Advertising