Doing Business in California: A Guide for Employers

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Introduction

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

Wage and Hour Laws

Currently, wage and hour class actions 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. 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 2020, the minimum hourly wage in California for businesses with more than 25 employees is $13.00. For businesses with 25 or fewer employees it is $12.00 per hour. Further rate increases are scheduled annually through 2022. An increasing number of cities are setting their own minimum wages, including Belmont, Berkeley, Cupertino, El Cerrito, Emeryville, Los Altos, Los Angeles, Los Angeles County (unincorporated areas), Malibu, Milpitas, Mountain View, Oakland, Palo Alto, Pasadena, Richmond, San Diego, San Francisco, San Jose, San Leandro, San Mateo, Santa Clara, Santa Monica and Sunnyvale. Federal minimum wage remains at $7.25 per hour, where it has been since 2009.

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

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Alternative Workweek Schedules

Hourly employees can vote to have an alternative work week that allows for 10 hours per day of work within a 40-hour work week without the payment of daily overtime. 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 work week schedule may be implemented and maintained.

Meal and Rest Periods

California law requires employers to "provide" meal periods and rest breaks to their employees. 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 satisfied. Employers are also required to keep records of meal periods. California courts, moreover, have placed the burden of proof on the employer to show that it has complied with these requirements. An employee is entitled to an unpaid, uninterrupted meal period of not less than 30 minutes before five hours of work is completed, and 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 his 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 required to take timely meal breaks. Employees are also entitled to a 10-minute off-duty paid rest break for every four hours of work, or major fraction thereof. A "major fraction" is considered two hours work, essentially requiring a 10-minute paid rest break for any employee working more than two hours. 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 pay premium 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. This pay premium is capped at two per day and should be separately coded on the paystub.

Vacation Policies

In California, accrued vacation time is considered a form of earned wages and cannot be forfeited. An employer may therefore not institute a "use-it-or-lose-it" policy. Employees must be allowed to carry over their accrued vacation. If an employee quits or is terminated, he/she must be paid for all unused accrued vacation based on his/her 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.

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 his unused vacation time can recover his pay for vacation time that was earned as far back as the first year of his employment.

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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 his 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. 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 an employee from his or her 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

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. Effective July 1, 2015, 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.

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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
- 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 (as of July 1, 2015)

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."

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Leave Laws

Pregnancy Disability Leave

Employers with five or more employees must provide a Pregnancy Disability Leave (PDL) of up to four months for employees disabled by pregnancy and pregnancy-related conditions 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.

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.

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 or to bond with a new child. PFL is funded through employee contributions and is administered by the state. PFL does not create an additional right to a leave of absence. 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, such as to care for a sibling, in-law, or grandparent.

Notably, San Francisco became the first city in California to require employer paid parental leave of six weeks. The ordinance went into effect on January 1, 2017, and as of January 1, 2018 now applies to cover businesses with 20 or more employees.

Parental Leave

Effective January 1, 2018, employers with 20 to 49 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 only 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 Parental Leave Act 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 he/she needs 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 his or her child's school or day care facility.

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

Domestic Violence Leave

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.

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. 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 need, the medical need 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, San Diego and Emeryville have also implemented local PSL ordinances. 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.

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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

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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 50 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 50 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). By January 1, 2021, 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.

Fair Pay Act

California's Fair Pay Act significantly broadens existing law against gender 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. Effective January 1, 2017, these protections were extended to race and ethnicity. Effective January 1, 2018, employers may no longer ask job applicants about their salary history.

Disability Discrimination

FEHA defines disability far more broadly than the Americans with Disabilities Act (ADA). Under the ADA, an employee must show that he or she suffers from a physical or mental impairment that "substantially limits" a major life activity and mitigating measures may prevent a finding of disability. In contrast, under 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 FEHA, an employee can bring a separate claim for failure to engage in the interactive process, so good documentation is especially important. Finally, under FEHA, an employee can establish that he or she is limited in the major life activity of "working" even if he or she is only limited from performing a particular job as opposed to a broad range of jobs.

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Age Discrimination

Under 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.

Domestic Partners

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 he or she would also be able to

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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 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

In 2008, the California Supreme Court granted same-sex couples the right to marry. This decision was followed by California voters approving a change to the California Constitution to eliminate that right. In 2009, the California Supreme Court upheld the constitutional amendment. In 2013, the California Supreme Court dismissed attempts to overthrow same-sex marriage, and same-sex marriages are now legal in California. Employers were not dramatically affected by these changes because, as discussed above, domestic partners were already protected by law in California.

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.

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Fair Chance/"Ban the Box" Laws

Effective January 1, 2018, 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 who 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 applicants 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 who 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 able 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. 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

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signed acknowledgments from the employees that they understand their work areas, lockers, e-mails, voice mails, etc., may be searched or accessed 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, the recreational use is also legal. However, employers are still allowed to drug test in appropriate circumstances and need not permit employees to use marijuana or be under the influence at work.

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 he or she is not properly paid.

Cal-WARN

California has adopted its own version of the federal Workers Adjustment and Retraining Notification Act (WARN). Cal-WARN applies to any "industrial or commercial facility" that employs at least 75 full or part-time employees (as opposed to 100 full-time employees under federal law). Cal-WARN 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

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19 employees) in California who are not subject to federal COBRA provisions. The coverage period under Cal-COBRA is 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 2019, companies with 100 or more employees are required to spend a minimum of $2.93 per hour per employee. Companies with 20 to 99 workers are required to spend a minimum of $1.95 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.

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.

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).

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 in the 1990s, purportedly to bring it in line with the federal standard, California courts

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have held that there are still significant differences. To obtain summary judgment, a defendant must present evidence of non-liability and not simply point out that the plaintiff does not have the evidence to prove his or her case.

Choice of Law Provisions in Employment Contracts

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.

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 is unhappy with his or her 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

The Private Attorney General Act of 2004 (PAGA) allows employees claiming violations of wage and hour laws to bring civil actions directly against their employers for penalties rather than having to rely upon state agencies to do so. It is an additional weapon for employee plaintiffs to use against their employers. Lawsuits that include PAGA claims require court approval to settle, and a copy of the settlement agreement must go to the state agency (LWDA). PAGA also makes class and collective actions

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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.

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