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STATE

Littler on

California Employment Law

COVERAGE

Scope of Discussion. This publication is designed to help employers operating in a state to identify and apply various state employment law requirements. It follows the chronology of employment—tracking requirements from pre-hire, time of hire, during employment, and the end of employment. Because employers are subject to both federal and state employment laws, each section provides a brief overview of federal law and then summarizes applicable state law.

Although the major developments in California employment law are generally covered, this publication is not all-inclusive and the current status of any decision or principle of law should be verified by counsel. In addition:

- This publication focuses on requirements for private-sector employers; requirements applicable solely to public employers are not covered. Similarly, while some provisions applicable to government contractors may be covered, this publication is not designed to address requirements applicable only to government contractors.
- Local ordinances are generally excluded from this publication. Notwithstanding, local rules may be included to the extent they deal with ban-the-box or criminal history restrictions, local minimum wage, paid sick leave, or antidiscrimination provisions. A detailed discussion of these requirements, however, is outside the scope of this publication. Further, the focus of local ordinances is primarily on jurisdictions with populations of 100,000 or more residents, but laws in locations with populations below that threshold may also be included.
- State law may create special rules or provide exceptions to existing rules for certain industries—for example, the health care industry. This publication does not offer an exhaustive look at these industry-specific exceptions and should not be interpreted to cover all industry-specific requirements.
- Civil and criminal penalties for failure to follow any particular state employment law requirement may be covered to the extent the penalty is specifically included and discussed in the statute. Any penalty discussion that is included, however, is nonexhaustive and may only highlight some of the possible penalties under the statute. In many instances, an individual statute will not include its own penalty provision; rather, a general or catchall penalty provision will apply, and these are not covered here.

To adhere to publication deadlines, developments, and decisions subsequent to **October 11, 2024** are not covered.

DISCLAIMER

This publication is not intended to, and does not, provide legal advice or a legal opinion. It does not establish an attorney-client relationship between Littler Mendelson, P.C. and the user. It also is not a do-it-yourself guide to resolving employment issues or handling employment litigation. Nonetheless, employers involved in ongoing disputes and litigation may find the information useful in understanding the issues raised and their legal context. This publication is not a substitute for experienced legal counsel and does not provide legal advice regarding any particular situation or employer, or attempt to address the numerous factual issues that arise in any employment-related dispute.

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1. PRE-HIRE

1.1 Classifying Workers: Employees v. Independent Contractors

1.1(a) *Federal Guidelines on Classifying Workers*

A person providing services to another for payment generally can be classified either as an employee or an independent contractor. An independent contractor is considered self-employed, whereas an employee, as the term suggests, works for an employer. The choice between classifying a worker as an independent contractor or an employee is more than a question of terminology and can have many and far-reaching consequences for a company. A company's legal obligation to its workers under various employment and labor laws depends primarily on whether workers are employees. For example, a company using an independent contractor is not required to:

- withhold income taxes from payments for service;
- pay minimum wages mandated by state or federal law;
- provide workers' compensation coverage or unemployment insurance;
- provide protections for various leaves of absences required by law; or
- provide a wide range of employee benefits, such as paid time off or a 401(k) retirement plan, that are offered voluntarily to the employer's employees as part of the terms or conditions of their employment.

As independent contractor use increased, government officials began to scrutinize asserted independent contractor relationships with increasing skepticism. Courts have also proven willing to overturn alleged independent contractor relationships that fail to satisfy the increasingly rigorous standards applied by federal and state agencies for classifying workers as independent contractors.

For companies, misclassification of a worker as an independent contractor can carry significant tax, wage, and benefit liabilities, as well as unanticipated and perhaps under-insured tort liability to third parties for injuries caused by the worker.

There are four principal tests used to determine whether a worker is an employee or an independent contractor:

1. the common-law rules or common-law control test;[1]
2. the economic realities test (with several variations);[2]

[1] The common-law rules or common-law control test, informed in part by the Internal Revenue Service's 20 factors, focus on whether the engaging entity has the right to control the means by which the worker performs their services as well as the end results. *See generally* Treas. Reg. § 31.3121(d)-(1)(c); I.R.S., Internal Revenue Manual, *Technical Guidelines for Employment Tax Issues*, 4.23.5.4, *et seq*. (Nov. 22, 2017), *available at* https://www.irs.gov/irm/part4/irm_04-023-005r.html#d0e183.

[2] In addition to an evaluation of the right to control how the work is to be performed, the economic realities test also requires an examination of the underlying "economic realities" of the work relationship—namely, do the workers "depend upon someone else's business for the opportunity to render service or are [they] in business for themselves." *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988); *see also Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947).

3. the hybrid test, combining the common law and economic realities test;[3] and
4. the ABC test (or variations of this test).[4]

For a detailed evaluation of the tests and how they apply to the various federal laws, see LITTLER ON CLASSIFYING WORKERS.

1.1(b) *State Guidelines on Classifying Workers*

In California, as elsewhere, an individual who provides services to another for payment is generally considered either an independent contractor or an employee. For the most part, the distinction between an independent contractor and an employee is dependent on the applicable state law (see Table 1).

To reduce instances of misclassification of employees as independent contractors, California has entered into a partnership with the U.S. Department of Labor (DOL), Wage and Hour Division to work cooperatively through information sharing, joint enforcement efforts, and coordinated outreach and education efforts.[5] The California Labor and Workforce Development Agency has an agreement with the Wage and Hour Division.[6]

In September 2019, California enacted a landmark law, AB 5, which clarifies the standard for determining whether a person providing labor or services for remuneration in California may be classified as an independent contractor, rather than as an employee. In sum, this law codifies the standard for determining independent contractor status that was established by the California Supreme Court's decision in *Dynamex v. Superior Court*,[7] for the purposes of the California Wage Orders. The law adopts the ABC test, using the exact language of the *Dynamex* opinion, and expands the use of this test from only the California Wage Orders, to the California Labor Code and the Unemployment Insurance Code. Under the ABC test:

> A person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that all of the following conditions are satisfied:
>
> A. The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

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[3] Under the hybrid test, a court evaluates the entity's right to control the individual's work process, but also looks at additional factors related to the worker's economic situation—such as how the work relationship may be terminated, whether the worker receives yearly leave or accrues retirement benefits, and whether the entity pays social security taxes on the worker's behalf. *Wilde v. County of Kandiyohi*, 15 F.3d 103, 105(8th Cir. 1994). Because the hybrid test focuses on traditional agency notions of control, as a general rule, it results in a narrower definition of employee than under a pure economic realities test. *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 347(5th Cir. 2008).

[4] Under a typical formulation of the ABC test, a worker is an independent contractor if: (A) there is an ABSENCE of control; (B) the BUSINESS is performed outside the usual course of business or performed away from the place of business; and (C) the work is CUSTOMARILY performed by independent contractors.

[5] More information about the DOL Misclassification Initiative is available at https://www.dol.gov/whd/workers/misclassification/#stateDetails.

[6] The Memorandum of Understanding is available at https://www.dol.gov/whd/workers/MOU/ca.pdf.

[7] 4 Cal. 5th 903 (Cal. 2018).

B. The person performs work that is outside the usual course of the hiring entity's business.

C. The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.[8]

The ABC test applies retroactively with respect to wage orders of the Industrial Welfare Commission and violations of the Labor Code relating to wage orders.[9] As well, all exceptions will apply retroactively to the maximum extent permitted by the law, and to the extent they would relieve an employer from liability. The ABC test applies for the purposes of unemployment and to all other Labor Code provisions.[10] Finally, the ABC test applies for the purposes of workers' compensation as of July 1, 2020, but not retroactively.[11]

Exceptions. AB 5, as amended, sets forth numerous exceptions for particular occupations and relationships. If an exception applies, the new law then specifies what standard, other than the ABC test, will govern.[12] However, for the vast majority of the exceptions, the law provides that the determination of employee or independent contractor status will be governed by the pre-*Dynamex* standard, the common-law *Borello* test, as set forth in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*.[13] The categories of exceptions are:

1. Specific occupations including insurance agents; physicians, dentists, podiatrists, psychologists, and veterinarians; lawyers, architects, landscape architects, engineers, private investigators, and accountants; securities broker-dealers and investment advisors; direct sales salespersons; manufactured housing salespersons; commercial fishers; newspaper distributors and carriers working under contract with a newspaper publisher; individuals engaged by an international exchange visitors' program; and competition judges.
2. Contracts for professional services between a hiring entity and an individual providing professional services.
3. Real estate licensees, home inspectors, and repossession agencies.
4. Business-to-business contracting relationships.
5. Relationships between a contractor and an individual performing work pursuant to a subcontract in the construction industry, which includes a limited exception for owner-operator truckers in the construction industry that will expire on January 1, 2025.
6. Relationships between a referral agency and a service provider.
7. Motor club services.
8. Relationships between two individuals where each individual acts as a sole proprietor or separate business entity under certain conditions.

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[8] CAL. LAB. CODE § 2775(a); *see also* CAL. UNEMP. INS. CODE § 621(b) (setting forth the new standard under the Unemployment Compensation law).

[9] CAL. LAB. CODE § 2785(b).

[10] CAL. LAB. CODE § 2775(a).

[11] CAL. LAB. CODE § 3351(i).

[12] CAL. LAB. CODE § 2778.

[13] 48 Cal.3d 341 (1989); CAL. LAB. CODE § 2778.

9. Occupations in connection with creating, marketing, promoting, or distributing sound recordings and musical compositions.
10. Relationships between data aggregators and individuals providing feedback to the aggregator.[14]

In-depth discussion of these exceptions is outside the scope of this publication. All exceptions apply retroactively to the maximum extent permitted by law, to the extent they would relieve an employer from liability.[15] Moreover, any exceptions to the terms employee, employer, employ, or independent contractor, and any extensions of employer status or liability that were already expressly set forth in the Labor Code, the California Wage Orders, or the Unemployment Insurance Code before this law was enacted will remain in effect.[16]

Table 1. State Tests for Classifying Workers

Purpose of Determining Employee Status	State Agency	Test to Apply
Fair Employment Practices Laws	Civil Rights Department (CRD)	Statutory test. Under the California Fair Employment and Housing Act (FEHA), an *independent contractor* is defined as "any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result in accomplished."[17] A worker is considered an independent contractor if the individual: 1. has the right to control the performance of the contract for services, and discretion as to the manner of performance; 2. is customarily engaged in an independently established business; and 3. has control over the time and place of work performed, supplies, tools, and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work.[18]

[14] CAL. LAB. CODE §§ 2776 - 2783.

[15] CAL. LAB. CODE § 2785(b).

[16] CAL. LAB. CODE § 2775(b)(2).

[17] CAL. LAB. CODE § 3353.

[18] CAL. GOV'T CODE § 12940(j)(5).

Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
Income Taxes	Employment Development Department	Common-law test, with emphasis on the right to control.[19]
Unemployment Insurance	Employment Development Department	The ABC test, as forth in AB 5 as amended, discussed above.[20] Prior to January 1, 2020, common-law test, with emphasis on the right to control.[21]
Wage & Hour Laws	Division of Labor Standards Enforcement (DLSE)	With respect to Industrial Welfare Commission Wage Orders, violations of the Labor Code relating to Wage Orders, and all other provisions of the Labor Code, an ABC test, as adopted by the

[19] The "usual common-law rules" remain the statutorily defined test for payroll tax purposes. *See* CAL. UNEMP. INS. CODE § 621(b). Traditionally, the common-law rules have been used by California tax agencies to determine a worker's status for payroll tax purposes. The test was first articulated in *Empire Star Mines Co. v. California Employment Commission* as follows:

> In determining whether one who performs services for another is an employee or an independent contractor, the most important factor is the right to control the manner and means of accomplishing the result desired. If the employer has the authority to exercise complete control, whether or not that right is exercised with respect to all details, an employer-employee relationship exists. Strong evidence in support of an employment relationship is the right to discharge at will, without cause.

168 P.2d 687, 692 (Cal. 1946), *overruled on other grounds by People v. Sims*, 186 Cal. Rptr. 77 (Cal. 1982), *superseded by statute*, *People v. Preston*, 50 Cal. Rptr. 2d 778 (Cal. Ct. App. 1996). Other factors to be considered include: (1) whether the individual performing the services is engaged in a distinct occupation or business; (2) the kind of occupation, and particularly whether, in the locality, such work is typically completed under the direction of a principal or by a specialist without supervision; (3) the skill required in the particular occupation; (4) whether the principal or the worker supplies the instrumentalities, tools, and place of work; (5) the length of time the services are to be performed; (6) the method of payment, whether by the hour or by the job; (7) whether the work is a part of the principal's regular business; and (8) whether the parties believe they are creating the relationship of employer-employee. *Empire Star Mines Co.*, 168 P.2d 686 at 692. No one factor is decisive, but by far the most important factor is the right to control the method and manner used to achieve the results desired. *Barton v. Studebaker Corp. of Am.*, 189 P. 1025 (Cal. Ct. App. 1920); *see also Varisco v. Gateway Sci. & Eng'g, Inc.*, 83 Cal. Rptr. 3d 393, 395 (Cal. Ct. App. 2008).

[20] UNEMP. INS. CODE §§ 606.5(a) and 621(b).

[21] CAL. UNEMP. INS. CODE § 621(b). The common-law test is articulated in *Empire Star Mines Co*. *See* 168 P.2d at 692. However, some courts have also looked to the economic realities test explained in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 256 Cal. Rptr. 543 (Cal. 1989), known as the "*Borello* test" because it "has strong applicability to cases arising under the Unemployment Insurance Code." *NCM Direct Delivery v. Employment Dev. Dep't*, Cal. Unemp. Ins. App. Bd. Precedent Tax Dec. No. P-T-49 (2007); *Air Couriers Int'l v. Employment Dev. Dep't*, 59 Cal. Rptr. 3d 37 (Cal. Ct. App. 2007) (finding that the lower court correctly applied the *Borello* test to find that drivers were not independent contractors). Moreover, using the *Borello* test for unemployment insurance cases has been upheld by California appellate courts. *See Messenger Courier Ass'n of the Americas v. California Unemployment Ins. Appeals Bd.*, 96 Cal. Rptr. 3d 797, 808 (Cal. Ct. App. 2009).

Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
		California Supreme Court on April 30, 2018 and codified in AB 5, as amended. This test is set forth above.[22] The ABC test applies retroactively to Wage Orders and violations of the Labor Code relating to Wage Orders. The ABC test applies to all other Labor Code provisions not relating to Wage Orders beginning January 1, 2020.[23] As this test was only recently changed from the economic realities test, there is little guidance from the California Supreme Court on the three prongs.[24]

[22] CAL. LAB. CODE §§ 2775 *et seq.*; *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, No. S222732 (Cal. Sup. Ct. Apr. 30, 2018). In an opinion letter dated May 3, 2019, the California Department of Industrial Relations, Division of Labor Standards Enforcement (DLSE) clarified that the ABC test set forth in *Dynamex* applies to claims arising under Wage Orders issued by the Industrial Welfare Commission. As well, the letter confirmed that the *Dynamex* ABC test also applies to the Labor Code provisions themselves, which enforce minimum wage, overtime, meal and rest breaks, and itemized pay stubs. The letter reasons: "All IWC wage orders contain provisions enforceable through section 2802 [of the California Labor Code] (*See, e.g.*, Wage Order No. 1-2001, §§ 8, 9). Thus, reimbursement claims under section 2802 that enforce specific requirements directly set forth in the wage orders are also governed by the ABC test (*See Dynamex*, *supra*, 4 Cal. 5th at pp. 915-16, 942)." Finally, the letter address section 203 of the California Labor Code, concerning waiting time penalties. The letter points out: "California appellate courts have differed on whether the IWC "suffer or permit" definition [of employ] applies to section 203 claims for waiting time penalties." The letter specifies that where a claim is to enforce minimum wage and overtime obligations set forth in wage orders, and seeks penalties under section 203, application of the ABC test is also appropriate. DLSE Opinion Letter, *Application of the "ABC" Test to Claims Arising Under Wage Orders* (May 3, 2019), available at https://www.dir.ca.gov/dlse/opinions/2019-05-03.pdf. Relatedly, on May 2, 2019, in *Vazquez v. Jan-Pro Franchising Int'l, Inc.*, the Ninth Circuit held that the *Dynamex* ABC test applies retroactively. 923 F.3d 575 (9th Cir. 2019). However, this opinion was withdrawn and the Ninth Circuit certified the retroactivity question to the state Supreme Court. 930 F.3d 1107 (9th Cir. 2019). Upon review, the California Supreme Court determined that the holding in *Dynamex* applies retroactively to all non-final cases governed by similarly worded wage orders. 273 Cal. Rptr. 3d 741 (Cal. 2021).

[23] CAL. LAB. CODE § 2785.

[24] However, while presenting limited substantive guidance, the California Supreme Court in *Dynamex Operations* did make clear that the newly articulated "ABC" test is intended to be stricter than the previously applied economic realities test set forth in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 256 Cal. Rptr. 543 (Cal. 1989). The Court held that the "A" prong (freedom from control and direction) is similar to the common-law test used in *Borello*, asking whether the person is free from the "type and degree of control a business typically exercises over employees." The "B" prong (outside the usual course of the business) focuses on whether the person is "providing services to the business in a role comparable to that of an employee, rather than in a role comparable to that of a traditional independent contractor." And, the "C" prong (independent trade, occupation, or business) asks whether the person "independently has made the decision to go into business for himself or

Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
Workers' Compensation	Department of Industrial Relations, Division of Workers' Compensation	The ABC test, as set forth in AB 5, as amended, and discussed above, will apply, though not retroactively.[25] Prior to July 1, 2020, common-law test. Additionally, some California courts have examined workers' compensation matters using the economic realities test adopted by the California Supreme Court in *Borello*.[26] There is a presumption that workers are employees under the workers' compensation law. Thus, the worker alleging to be an independent contractor has the burden of proof.[27]
Workplace Safety: California Occupational Safety and Health Act (Cal-OSHA)	Cal-OSHA, Division of Occupational Health and Safety	Cal-OSHA does not include a definition of either employee or independent contractor, nor does it contain an independent contractor test. In addition, there are no relevant court decisions concerning independent contractor status.[28] As a result, there

herself," evidenced by things such as "incorporation, licensure, advertisements, [or] routine offerings to provide the services of the independent business to the public or to a number of potential customers." *Dynamex Operations*, No. S222732 (Cal. Sup. Ct. Apr. 30, 2018).

[25] CAL. LAB. CODE § 3351(i).

[26] California Dep't of Indus. Relations, *Independent Contractor Versus Employee*; *see also Rinaldi v. Workers' Comp. Appeals Bd.*, 278 Cal. Rptr. 105, 107-11 (Cal. Ct. App. 1991) (applying *Borello* test); *Yellow Cab Coop., Inc. v. Workers' Comp. Appeals Bd.*, 277 Cal. Rptr. 434 (Cal. Ct. App. 1991); *State Comp. Ins. Fund v. Urgent Nursing Res., Inc.*, 2015 WL 9259887 (Cal. Ct. App. Dec. 17, 2015), *review denied* 2016 Cal. LEXIS 1693 (Cal. Mar. 23, 2016); *Lexington Ins. Co. v. Workers' Comp. Appeals Bd.*, 2015 WL 9008035 (Cal. Ct. App. Dec. 16, 2015), *review denied* 2016 Cal. LEXIS 1695 (Cal. Mar. 23, 2016).

[27] CAL. LAB. CODE § 3357. California Labor Code section 2750.5 also creates a rebuttable presumption that a person performing certain construction or trade services for which a state license is required, or who performs such services for a person who is required to possess such a license, is an employee rather than an independent contractor or contract services provider. This labor code section has been held to apply to workers' compensation matters. *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.*, 219 Cal. Rptr. 13 (Cal. 1985).

[28] Cal-OSHA governs workplace safety laws in the state but does not provide guidance on how to determine independent contractor status. *See* CAL. CODE REGS. tit. 8, §§ 330-339.11. Additionally, while there are a number of Cal-OSHA cases that discuss the *liability* of independent contractors for injuries suffered by their employees on the job, those cases do not provide a *test* for determining independent contractor status. *See, e.g.*, *Privette v. Superior Ct.*, 21 Cal. Rptr. 2d 72 (Cal. 1993) (when employees of independent contractors are injured at the workplace, the employee cannot sue the party that hired the independent contractor); *Seabright Ins. Co. v. U.S. Airways*, 129 Cal. Rptr. 3d 601 (Cal. 2011) (finding that a company cannot be held liable for injuries to an independent contractor's employee resulting from the company's failure to comply with Cal-OSHA regulations or statutes because this duty is presumptively delegated to the independent contractor).

Table 1. State Tests for Classifying Workers		
Purpose of Determining Employee Status	**State Agency**	**Test to Apply**
		is no direct guidance concerning independent contractor status for this purpose.

1.1(c) *Local Guidelines on Classifying Workers*

Los Angeles Freelance Worker Protections Ordinance. Effective July 1, 2023, the Freelance Worker Protections Ordinance creates specific procedures for compensating freelance workers for their services. The ordinance applies to services performed by freelance workers in the geographical boundaries of the city of Los Angeles, based on a contract entered on or after July 1, 2023, and for payment of $600 or more in a calendar year due from a single hiring entity. A written contract is required for certain relationships, and the ordinance requires specific information to be included in writing, such as the date on which the hiring entity must pay compensation. The ordinance is enforced by the Office of Wage Standards and permits a freelance worker to bring a private civil action for alleged violations.[29]

1.1(d) *State Enforcement, Remedies & Penalties*

A California employer found to have willfully misclassified a worker may face harsh penalties of not less than $5,000 and up to $15,000 per violation imposed by the California Labor and Workforce Development Agency or a court.[30] *Willful misclassification* means avoiding employee status for an individual by voluntarily and knowingly misclassifying that individual as an independent contractor.[31] If the employer is found to have a "pattern or practice" of misclassification, the fines can be increased to a minimum of $10,000 and capped at $25,000 per violation.[32] In addition to these fines (which are in addition to existing penalties, interest, and taxes that may be imposed at the state level for misclassifying contractors), the law also requires a one-year public prominent posting (on a website or at a worksite) of notice that the employer was found to have willfully misclassified an independent contractor.[33]

Moreover, AB 5, as amended, provides that, in addition to other remedies available, the Attorney General or other public officials may prosecute civil actions for injunctive relief to prevent employee misclassification. This provision is applicable to work performed on or after January 1, 2020.[34]

1.2 Employment Eligibility & Verification Requirements

1.2(a) *Federal Guidelines on Employment Eligibility & Verification Requirements*

The federal Immigration Reform and Control Act of 1986 (IRCA) prohibits knowingly employing workers who are not authorized to work in the United States. Under IRCA, an employer must verify each new hire's

[29] L.A., CAL., MUN. CODE ch. XVII, art. 10.

[30] CAL. LAB. CODE §§ 226.8, 2753.

[31] CAL. LAB. CODE § 226.8(i)(4).

[32] CAL. LAB. CODE §§ 226.8, 2753.

[33] CAL. LAB. CODE §§ 226.8, 2753.

[34] CAL. LAB. CODE § 2786.

identity and employment eligibility. Employers and employees must complete the U.S. Citizenship and Immigration Service's Employment Eligibility Verification form (Form I-9) to fulfill this requirement. The employer must ensure that: (1) the I-9 is complete; (2) the employee provides required documentation; and (3) the documentation appears on its face to be genuine and to relate to the employee. If an employee cannot present the required documents within three business days of hire, the individual cannot continue employment.

Although IRCA requires employers to review specified documents establishing an individual's eligibility to work, it provides no way for employers to verify the documentation's legitimacy. Accordingly, the federal government established the "E-Verify" program to allow employers to verify work authorization using a computerized registry. Employers that choose to participate in the program must enter into a Memorandum of Understanding with the Department of Homeland Security (DHS) which, among other things, specifically prohibits employers from using the program as a screening device. Participation in E-Verify is generally voluntary, except for federal contractors with prime federal contracts valued above simplified acquisition threshold for work in the United States, and for subcontractors under those prime contracts where the subcontract value exceeds $3,500.[35]

Federal legislative attempts to address illegal immigration have been largely unsuccessful, leading some states to enact their own immigration initiatives. Whether states have the constitutional power to enact immigration-related laws or burden interstate commerce with requirements in addition to those imposed by IRCA largely depends on how a state law intends to use an individual's immigration status. Accordingly, state and local immigration laws have faced legal challenges.[36] An increasing number of states have enacted immigration-related laws, many of which mandate E-Verify usage. These state law E-Verify provisions, most of which include enforcement provisions that penalize employers through license suspension or revocation for knowingly or intentionally employing undocumented workers, have survived constitutional challenges.[37]

For more information on these topics, see **LITTLER ON I-9 COMPLIANCE & WORK AUTHORIZATION VISAS**.

1.2(b) *State Guidelines on Employment Eligibility & Verification Requirements*

1.2(b)(i) *Private Employers*

Under the California Employment Acceleration Act of 2011 ("Acceleration Act"), the state and localities are prohibited from requiring a private-sector employer to use an electronic employment verification system (such as the federal E-Verify system), except when required by federal law or as a condition of receiving federal funds.[38]

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[35] 48 C.F.R. §§ 22.1803, 52.212-5, and 52.222-54 (contracts for commercially available off-the-shelf items and contracts with a period of performance of less than 120 days are excluded from the E-Verify requirement). For additional information, see **LITTLER ON GOVERNMENT CONTRACTORS & EQUAL EMPLOYMENT OPPORTUNITY OBLIGATIONS**.

[36] *See, e.g.*, *Lozano v. Hazelton*, 496 F. Supp. 2d 477 (E.D. Pa. 2007), *aff'd*, 724 F.3d 297 (3d Cir. 2013) (striking down a municipal ordinance requiring proof of immigration status for lease and employment relationship purposes).

[37] *See Chamber of Commerce of the U.S. v. Whiting*, 563 U.S. 582 (2011).

[38] CAL. LAB. CODE §§ 2811-13.

An employer may *voluntarily* use E-Verify to check the employment authorization status of a person who has been offered employment.[39] Under the Acceleration Act, however, it is an unlawful employment practice for an employer to use E-Verify to check the employment authorization status of an existing employee or an applicant who has not been offered employment or use E-Verify at a time or in a manner not required or authorized under federal law.[40]

In addition, California law adds a requirement regarding employers' use of notaries with respect to completion of the federal Form I-9. Under federal law, an employer or its authorized representative, including personnel officers, foremen, agents, or notaries public, may complete the Form I-9. Under California law, an employer that designates a notary as its authorized representative for completing the Form I-9 is required to use a notary that is a "qualified and bonded immigration consultant."[41]

1.2(b)(ii) *Unfair Immigration-Related Practices & Other Prohibitions*

An employer may not engage in unfair immigration-related practices against any person in retaliation for exercising a protected right. A *protected right* includes the right to: (1) file a good faith complaint or inform any person of an employer's or other party's alleged violation of these requirements; (2) seek information regarding whether an employer or other party is in compliance; and (3) inform a person of their potential rights and remedies, and assisting the person in asserting those rights.[42]

An *unfair immigration-related practice* is any of the following when taken for retaliatory purposes:

- requesting more or different documents than are required under federal immigration law or refusing to honor documents that on their face reasonably appear to be genuine;
- using E-Verify to check the individual's employment authorization at a time or in a manner not otherwise required or not authorized under federal law;
- refusing to honor documents or work authorization based on the specific status of the authorization;
- attempting to reinvestigate or reverify an existing employee's work authorization using an unfair immigration-related practice;
- reverifying the employment eligibility of a current employee at a time or in a manner not required by 8 U.S.C. § 1324a. However, this does not include:
  - reverifying an employee's employment authorization in a time and manner consistent with federal regulations;
  - taking lawful action to review an employee's employment authorization upon knowing that the employee is or has become unauthorized to be employed in the U.S.;
  - reminding an employee, at least 90 days before the date verification is required, that the employee must present appropriate documentation showing continued authorization; or
  - taking lawful action to correct any errors or omissions on a missing or incomplete I-9 form;

[39] CAL. LAB. CODE § 2814(a)(2).

[40] CAL. LAB. CODE § 2814(a)(1).

[41] CAL. BUS. & PROF. CODE §§ 22440-49; CAL. GOV'T CODE § 8223(c).

[42] CAL. LAB. CODE §§ 1019, 1019.1.

- threatening to file or filing a false police report; or
- threatening to contact or contacting immigration authorities.[43]

Antiretaliation Provisions. An employer may not report or threaten to report an employee's or applicant's suspected citizenship or immigration status or that of a family member because the employee or applicant exercised a right under the California Labor Code, Government Code, or Civil Code.[44]

An employer may not discharge an employee or in any manner discriminate, retaliate, or take any adverse action against an employee because the employee updates or attempts to update their personal information based on a lawful change of name, Social Security number, or federal employment authorization document.[45]

Finally, the California Unruh Civil Rights Act ("Unruh Act") prohibits discrimination, harassment, and retaliation on the basis of an individual's immigration status, primary language, or citizenship. However, verification of an individual's immigration status and any discrimination based upon verified immigration status, where required by federal law, does not violate the Unruh Act.[46]

Identification Documents Discrimination Prohibition. Under the Unruh Act, the Fair Employment and Housing Act (FEHA), and other laws, employers cannot discriminate against an individual holding or presenting a driver's license containing the following notice: "This card is not acceptable for official federal purposes. This license is issued only as a license to drive a motor vehicle. It does not establish eligibility for employment, voter registration, or public benefits."[47] The California Department of Motor Vehicles issues this license to any person who is ineligible for a Social Security number, but can provide additional documentation verifying identity and California residency.[48]

Employers can still require employees and applicants to present or possess a driver's license if required or permitted by law. Moreover, this prohibition does not affect employers' obligations and rights to comply with federal law regarding employment eligibility verification.

Immigration Worksite Enforcement. Employers may not provide voluntary consent to an immigration enforcement agent to enter any nonpublic areas of a place of labor, unless the agent provides a judicial warrant. Similarly, employers may not provide voluntary consent to an immigration enforcement agent to access, review, or obtain the employer's employee records without a subpoena or judicial warrant. However, this does not apply to I-9 Employment Eligibility Verification forms and other documents for which a Notice of Inspection has been provided to the employer. Employers that violate these provisions are subject to a civil penalty of $2,000 to $5,000 for a first violation and $5,000 to $10,000 for each subsequent violation.[49]

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[43] CAL. LAB. CODE §§ 1019, 1019.1, and 1019.2.

[44] CAL. LAB. CODE § 244; CAL. BUS. & PROF. CODE § 494.6.

[45] CAL. LAB. CODE § 1024.6.

[46] CAL. CIV. CODE § 51(b), (g).

[47] CAL. VEH. CODE § 12801.9(d)(2), (h).

[48] CAL. VEH. CODE § 12801.9.

[49] CAL. GOV'T CODE §§ 7285.1, 7285.2.

Employers must provide notice to each current employee, by posting in the language the employer normally uses to communicate employment-related information to the employee, of any inspections of I-9 Employment Eligibility Verification forms or other employment records conducted by an immigration agency within 72 hours of receiving notice of the inspection. Written notice must also be given within 72 hours to the employee's authorized representative, if any. The posted notice must contain the following information:

- name of the immigration agency conducting the inspections of I-9 Employment Eligibility Verification forms or other employment records;
- date the employer received notice of the inspection;
- nature of the inspection, to the extent known; and
- copy of the Notice of Inspection of I-9 Employment Eligibility Verification forms for the inspection to be conducted.

Upon request, employers must provide an affected employee with a copy of the Notice of Inspection of I-9 Employment Eligibility Verification forms.

Similarly, employers must provide to each current affected employee and the employee's authorized representative, a copy of the written immigration agency notice that provides the results of the inspection of I-9 Employment Eligibility Verification forms or other employment records within 72 hours of its receipt of the notice. Within 72 hours, the employer shall also provide to each affected employee and authorized representative, written notice of the obligations of the employer and the affected employee arising from the results of the inspection. The notice must relate to the affected employee only and must be delivered by hand at the workplace, but exceptions apply. "Affected employees" are those identified by the immigration agency inspection results to be an employee that may lack work authorization, or an employee whose work authorization documents have been identified by the inspection to have deficiencies. The notice must contain the following information:

- description of any deficiencies or other items identified in the written immigration inspection results notice related to the affected employee;
- time period for correcting any potential deficiencies identified by the immigration agency;
- time and date of any meeting with the employer to correct any identified deficiencies; and
- notice that the employee has the right to representation during any meeting scheduled with the employer;

Employers that fail to provide the required notices are subject to a civil penalty of $2,000 to $5,000 for a first violation and $5,000 to $10,000 for each subsequent violation.[50]

1.2(b)(iii) *State Enforcement, Remedies & Penalties*

E-Verify Violations. In addition to other available remedies, an employer may be liable for a civil penalty not to exceed $10,000 for each violation, and each unlawful use of the E-Verify system on an employee or applicant constitutes a separate violation.[51]

[50] CAL. LAB. CODE § 90.2.

[51] CAL. LAB. CODE § 2814(c).

Unfair Immigration-Related Practices & Antiretaliation Provisions. An employee or other person who is the subject of an unfair immigration-related practice may bring a civil action for equitable relief and any applicable damages or penalties, including attorney and experts' fees and costs for the prevailing party. Upon the finding of a violation, the court may also order government agencies to suspend all licenses required by law and issued by any agency for the purposes of operating a business in California. Licenses subject to suspension are those held by the violating party specific to the business location(s) where the unfair immigration-related practice occurred.[52] For reporting or threatening to report immigration status, an employer's business license may be subject to revocation or suspension and the employee or applicant may bring a civil action.[53]

Identification Documents. Employers may be found liable under the various California fair employment practices laws that prohibit discrimination.

Public Works Contracts. State agencies and departments subject to the public contract code are prohibited from awarding a public works or purchase contract to a bidder or contractor that has been convicted of violating a state or federal law regarding the employment of undocumented immigrants in the preceding five years.[54]

1.3 Restrictions on Background Screening & Privacy Rights in Hiring

1.3(a) *Restrictions on Employer Inquiries About & Use of Criminal History*

1.3(a)(i) *Federal Guidelines on Employer Inquiries About & Use of Criminal History*

There is no applicable federal law restricting employer inquiries into an applicant's criminal history. However, the federal Equal Employment Opportunity Commission (EEOC) has issued enforcement guidance pursuant to its authority under Title VII of the Civil Rights Act of 1964 ("Title VII").[55] While there is uncertainty about the level of deference courts will afford the EEOC's guidance, employers should consider the EEOC's guidance related to arrest and conviction records when designing screening policies and practices. The EEOC provides employers with its view of "best practices" for implementing arrest or conviction screening policies in its guidance. In general, the EEOC's positions are:

1. **Arrest Records.** An exclusion from employment based on an arrest itself is not job related and consistent with business necessity as required under Title VII. While, from the EEOC's perspective, an employer cannot rely on arrest records alone to deny employment, an employer can consider the underlying conduct related to the arrest if that conduct makes the person unfit for the particular position.
2. **Conviction Records.** An employer with a policy that excludes persons from employment based on criminal convictions must show that the policy effectively links specific criminal conduct with risks related to the particular job's duties. The EEOC typically will consider three factors when analyzing an employer's policy: (1) the nature and gravity of the offense or

[52] CAL. LAB. CODE §§ 1019(d)-(e), 1019.1.

[53] CAL. LAB. CODE § 244; CAL. BUS. & PROF. CODE § 494.6.

[54] CAL. PUB. CONT. CODE § 6101.

[55] EEOC, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e et seq.* (Apr. 25, 2012), *available at* https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

conduct; (2) the time that has passed since the offense, conduct, and/or completion of the sentence; and (3) the nature of the job held or sought.

Employers should also familiarize themselves with the federal Fair Credit Reporting Act (FCRA), discussed in **1.3(b)(i)**. The FCRA does not restrict conviction-reporting *per se*, but impacts the reporting and consideration of criminal history information in other important ways.

For additional information on these topics, see **LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING**.

1.3(a)(ii) *State Guidelines Restricting Criminal History in Employment Decisions*

California employers are prohibited from considering criminal history in employment decisions if doing so results in an adverse impact on individuals within a protected class.[56] If the individual is able to establish adverse impact, the burden shifts to the employer to establish that the policy is nonetheless justifiable because it is job-related and consistent with business necessity. The criminal conviction consideration policy or practice needs to bear a demonstrable relationship to successful performance on the job and in the workplace and measure the person's fitness for the specific position. The employer is required to conduct an individualized assessment of the circumstances and qualifications of the applicants or employees excluded by the conviction screen. An individualized assessment must involve:

- notice to the adversely impacted employees or applicants, before any adverse action is taken, that they have been screened out because of a criminal conviction;
- a reasonable opportunity for the individual to demonstrate that the exclusion should not be applied due to the particular circumstances; and
- consideration by the employer as to whether the additional information provided by the individual or otherwise obtained by the employer warrants an exception to the exclusion and shows that the policy as applied to the employees or applicants is not job-related and consistent with business necessity.[57]

If an employer demonstrates that its policy or practice of considering conviction history is job-related and consistent with business necessity, adversely impacted employees or applicants may still prevail if they can demonstrate that there is a less discriminatory policy or practice that serves the employer's goals as effectively as the challenged policy or practice, such as a more narrowly targeted list of convictions or another form of inquiry that evaluates job qualification or risk as accurately without significantly increasing the cost or burden on the employer.

Obtaining Criminal Background Information. Under the California Investigative Consumer Reporting Agencies Act, law enforcement may not report, as to any applicant or employee, a record of arrest, indictment, or conviction for which seven years has passed since the date of disposition, release, or parole.[58]

[56] CAL. CODE REGS. tit. 2, § 11017.1.

[57] CAL. CODE REGS. tit. 2, § 11017.1.

[58] CAL. CIV. CODE §§ 1786.12, 1786.18(a)(7), and 1786.28.

1.3(a)(iii) *State Guidelines on Employer's Use of Arrest Records*

In California, an employer may not ask an applicant to disclose information about:

- an arrest or detention that did not result in conviction;
- an arrest or detention that resulted in a referral to, and participation in, any pretrial or post-trial diversion program; or
- an arrest, detention, processing, diversion, supervision, adjudication, or court disposition that occurred while the person was subject to the process and jurisdiction of juvenile court.[59]

Moreover, an employer may not seek this information from any other source or use it as a factor in determining any condition of employment of an applicant or employee.[60]

An employer may ask an applicant or an employee about an arrest for which the individual is out on bail or on personal recognizance pending trial, but may not use that information as the sole basis for an adverse employment decision.[61]

1.3(a)(iv) *State Guidelines on Employer's Use of Conviction Records*

In addition to the restrictions noted above, an employer is prohibited from requesting or considering a nonfelony conviction for possession of marijuana that is two or more years old.[62] Employers are also prohibited from using information disclosed on the state sex offender registry website for purposes related to employment.[63]

Notwithstanding these restrictions, California law does not prohibit an employer from asking applicants about particular criminal convictions that have not been judicially dismissed or sealed.[64] In addition, an employer can ask an applicant or seek information from any source about a particular criminal conviction or entry into a pretrial diversion or similar program if the following apply:

- the employer is required by law to obtain information regarding a particular conviction of an applicant;
- the applicant would be required to possess or use a firearm in the course of the employment;
- an individual with a particular conviction is prohibited by law from holding the position sought by the applicant, regardless of whether that conviction has been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation; or
- the employer is prohibited by law from hiring an applicant with that particular conviction.[65]

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[59] CAL. LAB. CODE § 432.7(a); *see also* CAL. CODE REGS. tit. 2, § 11017 (prohibiting an employer from inquiring of or seeking information on an applicant into any arrest or detention that did not result in conviction, or any arrest from which a pretrial diversion program has been successfully completed).

[60] CAL. LAB. CODE § 432.7(a).

[61] CAL. LAB. CODE § 432.7(a); *see also Pitman v. City of Oakland*, 243 Cal. Rptr. 306 (Cal. Ct. App. 1988).

[62] CAL. CODE REGS. tit. 2, § 11017.1.

[63] CAL. PENAL CODE § 290.46(l)(2).

[64] CAL. LAB. CODE § 432.7.

[65] CAL. LAB. CODE § 432.7(m).

A *particular conviction* means a conviction for specific criminal conduct or a category of criminal offenses prescribed by any federal law, federal regulation, or state law that contains requirements, exclusions, or both, expressly based on that specific criminal conduct or category of criminal offenses.[66]

While a California employer is still permitted to ask about convictions subject to the limitations set forth in the Labor Code, the Fair Employment and Housing Act (FEHA) regulations[67] acknowledge that an employer's consideration of criminal convictions may have an adverse impact on applicants on a basis protected under the FEHA, including gender, race, and national origin. The regulations place the burden on the applicant to demonstrate that an employer's policy of considering criminal convictions has an adverse impact. If the applicant succeeds in demonstrating adverse impact, the burden would then shift to the employer to establish that its policy is nonetheless justifiable because it is job-related and consistent with business necessity. However, the applicant may still prevail if the applicant can demonstrate that the employer could adopt a "less discriminatory policy or practice that serves the employer's goals as effectively as the challenged policy or practice, such as a more narrowly targeted list of convictions or another form of inquiry that evaluates job qualification or risk as accurately without significantly increasing the cost or burden on the employer."[68]

Ban-the-Box Law. In addition to the Labor Code provisions, California employers are subject to ban-the-box requirements under the FEHA.[69] It is an unlawful employment practice for an employer with five or more employees to:

- include on any application for employment, before the employer makes a conditional offer of employment to the applicant, any question that seeks the disclosure of an applicant's conviction history;
- inquire into or consider an applicant's conviction history, including any inquiry about conviction history on any employment application, until after the employer has made a conditional offer of employment to the applicant;
- consider, distribute, or disseminate information about any of the following while conducting a conviction history background check in connection with any application for employment:
  - arrests not followed by conviction, except in the circumstances as permitted in Labor Code section 432.7(a)(1) and (f)(1);
  - referral to or participation in a pretrial or posttrial diversion program;
  - convictions that have been sealed, dismissed, expunged, or statutorily eradicated pursuant to law; or
- interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right provided under the ban-the-box statute.[70]

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[66] CAL. LAB. CODE § 432.7(m).

[67] CAL. CODE REGS. tit. 2, § 11017.1.

[68] CAL. CODE REGS. tit. 2, § 11017.1.

[69] CAL. GOV'T CODE § 12952.

[70] CAL. GOV'T CODE § 12952(a).

The statute does not prevent an employer from conducting a conviction history background check that does not conflict with the provisions of Government Code section 12952(a).[71] Further, *conviction history* includes an arrest for which an individual is out on bail or the individual's own recognizance pending trial.[72]

The FEHA further requires employers to conduct an individualized assessment into an applicant's conviction record and imposes specific obligations on employers if they intend to take adverse action against an applicant based on the applicant's criminal record. An employer that intends to deny employment to an applicant solely or in part because of the applicant's conviction history is required to make an individualized assessment of whether the applicant's conviction history has a direct and adverse relationship with the specific duties of the job that justify denying the applicant the position.

In making the individualized assessment, the employer must consider all of the following:

1. the nature and gravity of the offense or conduct;
2. the amount of time that has passed since the offense or conduct and completion of the sentence; and
3. the nature of the job held or sought.[73]

An employer may, but is not required to, commit the results of this individualized assessment to writing.[74]

If the employer makes a preliminary decision that the applicant's conviction history disqualifies the applicant from employment, the employer must notify the applicant of this preliminary decision in writing. That notification may, but is not required to, justify or explain the employer's reasoning for making the preliminary decision. The notification must contain all of the following:

1. notice of the disqualifying conviction or convictions that are the basis for the preliminary decision to rescind the offer;
2. a copy of the conviction history report, if any;
3. an explanation of the applicant's right to respond to the notice of the employer's preliminary decision before that decision becomes final and the deadline by which to respond.[75]

The explanation must inform the applicant that the response may include submission of evidence challenging the accuracy of the conviction history report that is the basis for rescinding the offer, evidence of rehabilitation or mitigating circumstances, or both.[76]

The applicant has at least five business days to respond to the notice before the employer may make a final decision. If, within the five business days, the applicant notifies the employer in writing that the applicant disputes the accuracy of the conviction history report that was the basis for the preliminary decision to rescind the offer and that the applicant is taking specific steps to obtain evidence supporting

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[71] CAL. GOV'T CODE § 12952(b).

[72] CAL. GOV'T CODE § 12952(f).

[73] CAL. GOV'T CODE § 12952(c); CAL. CODE REGS., tit. 2, § 11017.1.

[74] CAL. GOV'T CODE § 12952(c); CAL. CODE REGS., tit. 2, § 11017.1.

[75] CAL. GOV'T CODE § 12952(c); CAL. CODE REGS., tit. 2, § 11017.1.

[76] CAL. GOV'T CODE § 12952(c); CAL. CODE REGS., tit. 2, § 11017.1.

that assertion, then the applicant shall have five additional business days to respond to the notice. The employer must consider any such information the applicant submits before making a final decision.[77]

If an employer makes a final decision to deny an application solely or in part because of the applicant's conviction history, the employer must notify the applicant in writing of all the following:

1. the final denial or disqualification. The employer may, but is not required to, justify or explain the employer's reasoning for making the final denial or disqualification;
2. any existing procedure the employer has for the applicant to challenge the decision or request reconsideration; and
3. the right to file a complaint with the Civil Rights Department.[78]

Some employers and employment circumstances may be exempt from the ban-the-box provisions. The criminal history inquiry prohibitions set forth in Government Code section 12952(a) do not apply to:

- a position for which a state or local agency is otherwise required by law to conduct a conviction history background check;
- a position with a criminal justice agency;
- a position as a farm labor contractor; or
- a position where an employer or agent thereof is required by any state, federal, or local law to conduct criminal background checks for employment purposes or to restrict employment based on criminal history.[79]

1.3(a)(v) *State Guidelines on Employer's Use of Sealed or Expunged Criminal Records*

Unless the exceptions allowing for consideration of sealed or expunged criminal records applies as noted above, an employer may not ask an applicant to disclose, through a written form or verbally:

- information concerning any conviction that has been judicially ordered sealed, expunged, or statutorily eradicated;
- any misdemeanor conviction for which probation has been successfully completed or otherwise discharged and the case has been judicially dismissed.[80]

In addition, an employer may not seek information about judicially sealed or dismissed convictions from any source, and may not use such information as a factor in determining any employment condition, including hiring, promotion, termination, or any apprenticeship training program or any other training program leading to employment.[81]

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[77] CAL. GOV'T CODE § 12952(c); CAL. CODE REGS., tit. 2, § 11017.1.

[78] CAL. GOV'T CODE § 12952(c); CAL. CODE REGS., tit. 2, § 11017.1.

[79] CAL. GOV'T CODE § 12952(d).

[80] CAL. LAB. CODE § 432.7; CAL. CODE REGS. tit. 2, § 11017.

[81] CAL. LAB. CODE § 432.7(a). *See also* CAL. CODE REGS., tit. 2, § 11017.1 (if an applicant voluntarily discloses criminal history prior to receiving a conditional offer of employment, the employer must not consider any information that the employer is otherwise prohibited from considering).

Juvenile Records. A person whose juvenile records have been sealed may reply to inquiries by stating that no proceedings occurred.[82]

1.3(a)(vi) *Local Guidelines on the Use of Criminal History*

San Francisco's Fair Chance Ordinance. Under San Francisco's Fair Chance Ordinance (FCO),[83] employers that are located in or do business in San Francisco and that have five or more employees worldwide are prohibited from inquiring about, requiring disclosure of, or basing adverse action on, with respect to potential applicants, applicants, and employees:

- arrests that did not lead to a conviction, except under circumstances identified in the law as an unresolved arrest;[84]
- a conviction that has been judicially dismissed, expunged, voided, invalidated, or otherwise rendered inoperative;
- a conviction or any other determination or adjudication in the juvenile justice system, or information regarding a matter considered in or processed through the juvenile justice system;
- participation in or completion of a diversion or deferral of judgment program;
- a conviction that is more than seven years old, the date of conviction being the date of sentencing;
- information pertaining to an offense other than a felony or misdemeanor, such as an infraction; or
- a conviction that arises out of conduct that has been decriminalized since the conviction date, including but not limited to marijuana offenses.[85]

The term *inquiry* is broadly defined as "any direct or indirect conduct intended to gather information from or about an applicant, candidate, potential applicant or candidate, or employee, using any mode of communication, including but not limited to application forms, interviews, and Background Check Reports."[86]

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[82] CAL. WELF. & INST. CODE §§ 389(a) (dependent children), 781(a) (wards of court); CAL. PENAL CODE § 1203.45 (minor's misdemeanor records).

[83] *See* S.F., CAL., POLICE CODE §§ 4903 to 4903, 4905, and 4916; *see also* San Francisco Office of Labor Standards Enforcement, *The San Francisco Fair Chance Ordinance for Employers and City Contractors Frequently Asked Questions*, *available at* http://sfgov.org/olse/modules/showdocument.aspx?documentid=12136.

[84] S.F., CAL., POLICE CODE § 4904(b). *Unresolved arrest* is defined as a pending criminal investigation or trial that is unresolved: "An Arrest has been resolved if the arrestee was released and no accusatory pleading was filed charging him or her with an offense, or if the charges have been dismissed or discharged by the district attorney or the court." S.F., CAL., POLICE CODE § 4903.

[85] S.F., CAL., POLICE CODE §§ 4903, 4903, and 4904(a).

[86] S.F., CAL., POLICE CODE § 4903.

While employers are not entirely barred from asking about an unresolved arrest or a conviction history with proper notice, none of the information above may be considered by covered employers in any manner.[87]

Moreover, the FCO prohibits employers from asking about an applicant's conviction history or unresolved arrests until after the employer has made a conditional employment offer. The same is true for criminal background checks.[88]

Procedure for Conducting Background Check. An employer cannot conduct a background check on an applicant until after extending a conditional offer of employment.[89] Prior to obtaining a copy of a background check report, the employer must provide notice to the applicant or employee that such a report is being sought, and must also provide the applicant with a notice of rights under the ordinance.[90]

In making an employment decision based on an applicant's conviction history, an employer must conduct an individualized assessment, considering only directly-related convictions, the time that has elapsed since the conviction or unresolved arrest, and any evidence of inaccuracy, evidence of rehabilitation, or other mitigating factors.[91] If the employer will be taking adverse action as a result of the applicant's criminal history, the employer must first provide the applicant with a copy of the background check report, notice of the prospective adverse action, and the specific basis for the action.[92] The employer also must defer the adverse action for an unspecified reasonable period of time if, within seven days of the date that the notice is provided, the applicant gives notice, orally or in writing, of evidence of inaccuracy, evidence of rehabilitation, or any other mitigating factors.[93] During the deferral period, the employer must reconsider the prospective adverse action in light of the information, and if it decides to proceed with the adverse action, the employer also must provide final notice to the applicant.[94]

Requirements for Application Forms & Job Advertisements. Employment applications cannot ask for the facts or details of any unresolved arrest, conviction history, or matter "off limits" under Article 49 of San Francisco's Police Code. Employers are cautioned against using a nationwide single job application form, even one that includes an instruction to San Francisco applicants not to complete criminal history questions, due to the risk that San Francisco applicants may inadvertently answer such questions. However, if an employer still chooses to use a single application form, the employer should "include a clear and conspicuous disclaimer next to the question instructing applicants for San Francisco positions not to answer that question."[95]

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87 S.F., CAL., POLICE CODE § 4904(a)-(d).

88 S.F., CAL., POLICE CODE § 4904(c).

89 S.F., CAL., POLICE CODE § 4904(c).

90 S.F., CAL., POLICE CODE §§ 4904(e), 4905.

91 S.F., CAL., POLICE CODE § 4904(f).

92 S.F., CAL., POLICE CODE § 4904(g).

93 S.F., CAL., POLICE CODE § 4904(h).

94 S.F., CAL., POLICE CODE § 4904(i).

95 San Francisco Office of Labor Standards Enforcement, *The San Francisco Fair Chance Ordinance for Employers and City Contractors Frequently Asked Questions*, *available at* http://sfgov.org/olse/modules/showdocument.aspx?documentid=12136.

An application may request an applicant's written consent for a criminal background check if it includes a clear and conspicuous statement that neither the employer nor a third party will conduct a background check until after the employer has extended a conditional employment offer..[96]

With respect to advertising vacancies, employers cannot "produce or disseminate any solicitation or advertisement that is reasonably likely to reach persons who are reasonably likely to seek employment in the City, and that expresses, directly or indirectly, that any person with an Arrest or Conviction will not be considered for employment or may not apply for employment."[97] Instead, employers must "state in all solicitations or advertisements for employees that are reasonably likely to reach persons who are reasonably likely to seek employment in the City that the Employer will consider for employment qualified applicants with criminal histories in a manner consistent with the requirements of this Article."[98]

Exceptions. Certain regulated employers may inquire about criminal convictions during the application phase, where required by federal or state law.[99]

Employers that violate San Francisco's FCO may be fined by the Office of Labor Standards (OLSE). OLSE may also bring a civil action against the employer. An individual alleging a violation of the ordinance may bring a civil action against an employer after exhausting administrative remedies with the OLSE.[100]

Los Angeles's Fair Chance Initiative for Hiring. Under Los Angeles's Fair Chance Initiative ("Initiative"),[101] employers with 10 or more employees located or doing business in Los Angeles are prohibited from inquiring about or requiring the disclosure of an applicant's criminal history unless and until a conditional job offer has been made.[102] This prohibition broadly includes: asking the applicant or employee to self-disclose criminal history during an interview; searching the internet for information about the candidate's criminal record; or, ordering a criminal background report from a third-party consumer reporting agency, the FBI, the California Department of Justice, or any other source.[103]

Conditional offer of employment means an employer's offer of employment to an applicant conditioned only on an assessment of the applicant's criminal history, if any, and the duties and responsibilities of the employment position.[104]

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[96] San Francisco Office of Labor Standards Enforcement, *The San Francisco Fair Chance Ordinance for Employers and City Contractors Frequently Asked Questions*, *available at* http://sfgov.org/olse/modules/showdocument.aspx?documentid=12136.

[97] S.F., CAL., POLICE CODE § 4904(j).

[98] S.F., CAL., POLICE CODE § 4905(a).

[99] S.F., CAL., POLICE CODE § 4916.

[100] S.F., CAL., POLICE CODE § 4909.

[101] L.A., CAL., MUN. CODE §§ 189.01 to 189.15.

[102] *Employee* includes any individual who performs at least two hours of work on average each week within the geographic boundaries of Los Angeles, and who qualifies as an employee entitled to payment of a minimum wage from any employer under the California minimum wage law. L.A., CAL., MUN. CODE § 189.01. An employer includes job placement and referral agencies, and employment includes temporary, seasonal work, part-time work, contracted work, contingent work, commission work, and any forms of vocational or educational training with or without pay. L.A., CAL., MUN. CODE § 189.01.

[103] L.A., CAL., MUN. CODE §§ 189.01, 189.02.

[104] L.A., CAL., MUN. CODE § 189.01.

Requirements for Application Forms & Job Advertisements. Employment applications may not include any question that seeks the disclosure of an applicant's criminal history. Employers are required to state affirmatively in all solicitations or advertisements seeking applicants that the employer will consider qualified applicants with criminal histories.[105]

Adverse Actions & the Fair Chance Process. An employer cannot take an adverse action against an applicant to whom a conditional offer of employment has been made based on an applicant's criminal history unless the employer performs a written assessment that effectively links the specific aspects of the applicant's criminal history with risks inherent in the duties of the employment position the applicant seeks. In performing the assessment, the employer must, at a minimum, consider the factors identified by the U.S. Equal Employment Opportunity Commission (EEOC) and other factors as may be required by rules and guidelines promulgated by the relevant enforcement agency. *Adverse action* means an employer's withdrawal or cancellation of a conditional offer of employment made to an applicant or a failure or refusal to employ the applicant.[106]

An employer, prior to taking an adverse action against an applicant, must provide the applicant with a fair chance process, including the provision of written notification of the proposed adverse action, a copy of the written assessment performed as part of the fair chance process, and any other information or documentation supporting the employer's proposed adverse action. The "fair chance process" is an opportunity for an applicant to provide information or documentation to an employer regarding the accuracy of their criminal history or criminal history report. It also allows an applicant to point out information that should be considered in the employer's assessment, such as evidence of rehabilitation or other mitigating factors.[107]

The employer cannot take an adverse action or fill the employment position the applicant seeks for a period of at least five business days after informing the applicant of the proposed adverse action in order to allow the applicant to complete the fair chance process. If the applicant provides the employer with any information or documentation pursuant to the fair chance process, then the employer must consider the information or documentation and perform a written reassessment of the proposed adverse action. If the employer, after performing the reassessment of the proposed adverse action, takes the adverse action against the applicant, then the employer must notify the applicant of the decision and provide that applicant with a copy of the written reassessment.[108]

Exceptions. The prohibition against criminal history inquiries and the fair chance process requirement do not apply in the following circumstances:

- the employer is required by law to obtain information regarding an applicant's conviction(s);
- the applicant would be required to possess or use a firearm in the course of the employment;
- an individual who has been convicted of a crime is prohibited by law from holding the position the applicant seeks, regardless of whether that conviction has been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation; or

[105] L.A., CAL., MUN. CODE §§ 189.02, 189.04.

[106] L.A., CAL., MUN. CODE § 189.01.

[107] L.A., CAL., MUN. CODE §§ 189.01, 189.03.

[108] L.A., CAL., MUN. CODE § 189.03.

- an employer is prohibited by law from hiring an applicant who has been convicted of a crime.[109]

Antiretaliation Provisions. An employer is prohibited from discharging, reducing the compensation of, or otherwise taking adverse employment action against an employee for complaining to the City on the employer's compliance or anticipated compliance with the ordinance, for opposing any practice proscribed by the ordinance, for participating in proceedings related to the ordinance, for seeking to enforce their rights by any lawful means, or for otherwise asserting any rights under the ordinance.[110]

Enforcement. Employers that violate Los Angeles's ban-the-box law may be issued penalties or administrative fines. An aggrieved individual may also bring a civil action, but only after first filing an administrative complaint with the Department of Public Works, Bureau of Contract Administration within one year of the alleged violation and upon completion of the administrative enforcement process.[111]

Los Angeles County Fair Chance Ordinance for Employers. The Los Angeles County Fair Chance Ordinance for Employers imposes significant obligations beyond existing state and federal law, and beyond the City of Los Angeles Hair Chance Initiative.[112]

Coverage. The County ordinance applies to any employer that is located or doing business in the unincorporated areas of the County and employs five or more employees regardless of employees' location. *Employer* includes job placement, temporary agencies, referral agencies, and other employment agencies, as well as nonprofit organizations.[113]

The County ordinance protects both applicants and employees.[114] *Employment* is broadly defined in the ordinance to mean any occupation, vocation, job, or work, including but not limited to temporary or seasonal work, part-time work, contracted work, contingent work, work on commission, and work through the services of a temporary or other employment agency, including non-profit organizations, or any form of vocational or educational training with or without pay. The definition includes work or services provided pursuant to a contract for an employer in furtherance of an employer's business enterprise. The physical location of the employment must be within the unincorporated areas of the County, including when a person is working remotely, teleworking, or telecommuting from a location within the unincorporated areas of the County.[115]

Requirements for Job Postings and Like Materials. The County ordinance prohibits any language in job postings that may deter job applicants from applying. The ordinance also requires all job solicitations,

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[109] L.A., CAL., MUN. CODE § 189.07.

[110] L.A., CAL., MUN. CODE § 189.05.

[111] L.A., CAL., MUN. CODE §§ 189.08 to 189.10.

[112] L.A. CNTY., CAL., CODE Chapter 8.300 (as added by L.A. CNTY, CAL., ORDINANCE NO. 2024-0012).

[113] L.A. CNTY., CAL., CODE § 8.300.040(P). *Employer* also includes any entity that evaluates an applicant's or employee's criminal history on behalf of an employer, or acts as an agent of an employer, directly or indirectly, in evaluating an applicant's or employee's criminal history.

[114] *Applicant* is defined as an individual who is seeking employment with an employer. Employees seeking promotions with their current employers are also considered applicants. L.A. CNTY., CAL., CODE § 8.300.040(B). *Employee* is defined as any individual whose job involves or will involve performing at least two hours of work on average each week within the unincorporated areas of the County. L.A. CNTY., CAL., CODE § 8.300.040(O).

[115] L.A. CNTY., CAL., CODE § 8.300.040(Q).

bulletins, postings, announcements, and advertisements to include language stating that qualified applicants with arrest or conviction records will be considered for employment in accordance with the ordinance and state law. Further, employers that condition job offers on a criminal background check must include in all job posting materials a list of all material job duties of the specific job position for which the employer reasonably believes criminal history may have a direct, adverse, and negative relationship, potentially resulting in the withdrawal of the conditional job offer.[116]

Unlawful Practices. The County ordinance broadly prohibits employers from inquiring into or considering an applicant's criminal history before first extending a conditional job offer.[117] The ordinance also prohibits inquiring into information currently prohibited by state law, including the information that the California Labor Code prohibits, including records of arrest, including pending charges, and certain marijuana-related convictions.[118]

Significantly, the ordinance contains specific sequencing restrictions on the employer's ability to ask candidates about their criminal history.[119] Employers may not do so, until they first extend the conditional offer of employment, then only after the employer receives the criminal background check report and provides the report to the candidate.[120] The ordinance also restricts the scope of questions about criminal history to seven years from the date of disposition, with exceptions for certain roles (*e.g.*, roles that require interacting with minors or dependent adults).[121] Questions about non-criminal infractions are also prohibited, except for driving-related infractions for jobs requiring more than *de minimis* driving for work. These limitations exceed the restrictions in the state law.[122]

Background Check Procedures. The County ordinance mandates a notice to candidates with the conditional offer of employment and before inquiring into their criminal history. The notice must indicate the offer is contingent on passing the criminal history review and include a specific statement of good cause to review such information. "Good cause" requires specific information beyond simply generalized "safety concerns." The employer must demonstrate either a significant risk to business operations or reputation unless a criminal history review is conducted for the job position, or that a criminal history review is necessary due to articulable concerns regarding the safety of, or risk of harm or harassment to, the employers' staff, employees, contractors, vendors, associates, clients, customers, or the general

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[116] L.A. CNTY., CAL., CODE § 8.300.050(B).

[117] L.A. CNTY., CAL., CODE § 8.300.050(C). *Conditional Offer of Employment* is defined as an employer's offer of employment to an applicant conditioned on the completion of certain specified requirements or conditions, including background checks, reference checks, training, certification, drug testing, or medical exams. L.A. CNTY., CAL., CODE § 8.300.040(H).

[118] L.A. CNTY., CAL., CODE § 8.300.050(F).

[119] *Criminal History* is defined as information regarding one or more convictions or unresolved arrests transmitted to the employer by any means and from any source, including the applicant, employee, or a criminal background check report. L.A. CNTY., CAL., CODE § 8.300.040(J). *Conviction* means a record from any jurisdiction indicating that the person has been convicted of a felony or misdemeanor, provided the person was placed on probation, fined, imprisoned, or paroled because of the conviction. L.A. CNTY., CAL., CODE §§ 8.300.040(I). *Unresolved arrest* means an arrest for which the applicant or employee is out on bail or on their own recognizance pending trial. L.A. CNTY., CAL., CODE § 8.300.040(Y).

[120] L.A. CNTY., CAL., CODE § 8.300.050(E).

[121] L.A. CNTY., CAL., CODE § 8.300.050(F)(6).

[122] L.A. CNTY., CAL., CODE § 8.300.050(F)(7).

public. If the employer also intends to review information beyond criminal history, such as employment and education history, the notice must provide a complete list.[123]

Adverse Action Procedures. Before taking any adverse action, including rescinding the conditional offer of employment, the employer must conduct a written individualized assessment of the candidate's criminal history. The assessment must consider whether the candidate's criminal history has a direct adverse and negative bearing on their ability to perform the duties or responsibilities necessarily related to the applied-for position, such that it justifies denying employment. The employer's assessment must consider specified factors, including the nature and gravity of the offense and the amount of time that has passed since the criminal conduct or completion of sentence.[124]

If after performing the initial individualized assessment, the employer intends to take adverse action based in whole or in part on the candidate's criminal history, the employer must provide the candidate with a preliminary adverse action notice. The contents of the notice are mandatory and include informing the candidate of the right to submit evidence of rehabilitation. Importantly, a copy of the written individualized assessment, as well as a copy of the criminal background check report, must be enclosed with the notice, which must be sent by both mail and e-mail if the employer has the individual's e-mail address.[125]

The employer may not take adverse action or fill the employment position for at least five business days after the candidate has received this notification.[126] Employers must consider any additional information timely submitted by an applicant or employee before making a final decision. This second individualized assessment also must be documented in writing.[127]

If an employer decides to take adverse action following the second assessment, a final adverse action notice is required. The contents of the notice are mandatory, including enclosing a copy of the second individualized assessment and notifying the individual of the right to submit a complaint to the Los Angeles County Department of Consumer and Business Affairs (DCBA) for violations of the ordinance, and with the California Civil Rights Department for violations of the state law. It must be sent by both mail and email if the employer has the individual's e-mail address.[128]

Enforcement and Exhaustion. The ordinance authorizes public and private remedies, including civil claims. A person alleging a violation of the ordinance may not file a private lawsuit against an employer unless and until they first exhaust administrative remedies by pursuing a complaint with the DCBA.[129]

1.3(a)(vii) *State Enforcement, Remedies & Penalties*

An applicant may bring an action to recover actual damages or $200, whichever is greater, from any employer that violates the provisions regarding disclosure of arrest or detention records not resulting in

[123] L.A. CNTY., CAL., CODE § 8.300.050(D).

[124] L.A., CNTY., CAL., CODE § 8.300.050(G).

[125] L.A. CNTY., CAL., CODE §§ 8.300.040(V), 8.300.050(I).

[126] L.A. CNTY., CAL., CODE § 8.300.050(I).

[127] L.A. CNTY., CAL., CODE §§ 8.300.040(V), 8.300.050(J).

[128] L.A. CNTY., CAL., CODE § 8.300.050(K).

[129] L.A. CNTY., CAL., CODE §§ 8.300.100, 8.300.110.

conviction. An applicant may recover treble actual damages or $500, whichever is greater, for an intentional violation. An intentional violation is also a misdemeanor.[130]

1.3(b) *Restrictions on Credit Checks*

1.3(b)(i) *Federal Guidelines on Employer's Use of Credit Information & History*

The Fair Credit Reporting Act (FCRA). The FCRA[131] governs an employer's acquisition and use of virtually any type of information gathered by a "consumer reporting agency"[132] regarding job applicants for use in hiring decisions or regarding employees for use in decisions concerning retention, promotion, or termination. Preemployment reports created by a consumer reporting agency (such as credit reports, criminal record reports, and department of motor vehicle reports) are subject to the FCRA, along with any other consumer report used for employment purposes.

The FCRA establishes procedures that an employer must strictly follow when using a consumer report for employment purposes. For example, before requesting a consumer report from a consumer reporting agency, the employer must notify the applicant or employee in writing that a consumer report will be requested and obtain the applicant's or employee's written authorization before obtaining the report. An employer that intends to take an adverse employment action, such as refusing to hire the applicant, based wholly or partly on information contained in a consumer report must also follow certain notification requirements. For additional information on the FCRA, see LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING.

Many states have enacted their own version of the FCRA, referred to as "mini-FCRAs." While these laws often mirror the FCRA's requirements, there may be important distinctions between federal and state requirements.

Discrimination Concerns. While federal law does not prevent employers from asking about financial information provided they follow the FCRA, as noted above, federal antidiscrimination law prohibits employers from applying a financial requirement differently based on an individual's protected status—*e.g.*, race, national origin, religion, sex, disability, age, or genetic information. The EEOC also cautions that an employer must not have a financial requirement "if it *does not help the employer to accurately identify* responsible and reliable employees, and if, at the same time, the requirement significantly disadvantages people of a particular [protected category]."[133]

1.3(b)(ii) *State Guidelines on Employer's Use of Credit Information & History*

California has enacted a mini-FCRA law, the Consumer Credit Reporting Agencies Act (CCRAA). Any consumer credit report used for employment purposes is subject to the provisions of this Act. A *consumer credit report* in the employment application context consists of written, oral, or other communications of

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[130] CAL. LAB. CODE §§ 432.7(c), 433.

[131] 15 U.S.C. §§ 1681 *et seq*.

[132] A *consumer reporting agency* is any person or entity that regularly collects credit or other information about consumers to provide "consumer reports" for third persons. 15 U.S.C. § 1681a(f). A *consumer report* is any communication by a consumer reporting agency bearing on an individual's "creditworthiness, credit standing, character, general reputation, personal characteristics or mode of living" that is used for employment purposes. 15 U.S.C. § 1681a(d).

[133] EEOC, *Pre-Employment Inquiries and Financial Information*, *available at* https://www.eeoc.gov/laws/practices/financial_information.cfm (emphasis in original).

any information by a consumer credit-reporting agency bearing on an individual's creditworthiness, credit standing, or credit capacity that is used as a factor in evaluating an applicant for employment or an employee's promotion, reassignment, or retention.[134]

Under the CCRAA, an employer may only use an applicant's or employee's consumer credit report for specific and limited employment purposes, set forth below. Moreover, before requesting a report, the employer must provide notice, in writing, informing the applicant or employee for what purpose the report will be used and the source of the report.[135] The notice must contain a box that the individual may check to receive a copy of the report, and if the individual so indicates, the employer must provide a copy contemporaneously and at no charge to the applicant.[136]

Usage Restrictions. An employer may obtain a consumer credit report for employment purposes only if the position of the person for whom the report is sought is any of the following:

- a managerial position;
- a position in the state Department of Justice;
- a sworn peace officer or other law enforcement position;
- a position for which the information contained in the report is required by law to be disclosed or obtained;
- a position that involves regular access, for any purpose other than the routine solicitation and processing of credit card applications in a retail establishment, to all of the following types of information of any one person:
  - bank or credit card account information;
  - Social Security number; and
  - date of birth.
- a position in which the person is, or would be, any of the following:
  - a named signatory on the employer's bank or credit card account;
  - authorized to transfer money on the employer's behalf; and
  - authorized to enter into financial contracts on the employer's behalf.
- a position that involves access to confidential or proprietary information, including a formula, pattern, compilation, program, device, method, technique, process, or trade secret that:
  - derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who may obtain economic value from the disclosure or use of the information; and
  - is the subject of an effort that is reasonable under the circumstances to maintain secrecy of the information.

[134] CAL. CIV. CODE § 1785.3(c), (f).

[135] CAL. CIV. CODE § 1785.20.5.

[136] CAL. CIV. CODE § 1785.20.5.

- a position that involves regular access to cash totaling $10,000 or more of the employer, a customer, or client during the workday.[137]

As used here, "consumer credit report" does not include a report that verifies income or employment and credit related information such as credit history or credit score.[138]

Adverse Action. If an employer will take adverse action against an applicant, including denying employment, wholly or partly because of information in the consumer credit report, the employer must provide:

- written notice of the adverse action to the individual;
- the name, address, and telephone number of the consumer credit reporting agency that furnished the report;
- a statement that the decision to take adverse action was based in whole or in part upon information contained in a consumer credit report; and
- written notice of the following rights: the right to obtain a free copy of the report within 60 days and the right to dispute the report's accuracy or completeness.[139]

Investigative Consumer Reports. Under the Investigative Consumer Reporting Agencies Act (ICRAA), an employer may obtain an investigative consumer report to evaluate an employee or applicant for employment, promotion, reassignment, or retention.[140] An *investigative consumer report* means a consumer report in which information on an individual's character, general reputation, personal characteristics, or mode of living is obtained through any means.[141]

Before obtaining the report, the employer must provide written notice which states:

- that an investigative consumer report may be obtained;
- the permissible purpose of the report;
- that the disclosure may include information on the individual's character, general reputation, personal characteristics, and mode of living;
- the name, address, and telephone number of the investigative consumer reporting agency conducting the investigation;
- the nature and scope of the investigation requested, including a summary of the investigative consumer reporting provisions;
- the website of the investigative consumer reporting agency, or, if the agency has no website, the telephone number of the agency, where the individual may find information about the agency's privacy practices; and

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[137] CAL. LAB. CODE § 1024.5.

[138] CAL. LAB. CODE § 1024.5(c)(1).

[139] CAL. CIV. CODE §§ 1785.20, 1785.20.5(b).

[140] CAL. CIV. CODE §§ 1786.12(d)(1), 1786.16(a)(2), (c).

[141] CAL. CIV. CODE § 1786.2(c).

- that the individual has consented in writing.[142]

Additionally, the employer must provide a form, either on the required disclosure form or on a separate consent form, which allows the individual to check a box in order to receive a copy of the report, and if the individual so indicates, the employer must provide a copy within three business day.[143]

Notably, the notice requirements set forth above do not apply to an investigative consumer report if the employer is seeking the information for employment purposes due to the employer's suspicion of wrongdoing or misconduct by the subject of the investigation.[144]

Waiver of the CCRAA or ICRAA provisions is prohibited.[145]

1.3(b)(iii) *State Enforcement, Remedies & Penalties*

Employers that violate the CCRAA can be ordered to stop violations, and may be held liable for actual damages for negligent violations, punitive damages for willful violations, and attorneys' fees and costs.[146]

Investigative Consumer Reports. An employer that fails to comply with the provisions of the ICRAA may be liable for actual damages, attorneys' fees, and punitive damages if the court finds the violation was grossly negligent or willful.[147]

1.3(c) *Restrictions on Access to Applicants' Social Media Accounts*

1.3(c)(i) *Federal Guidelines on Access to Applicants' Social Media Accounts*

There is no federal law governing an employer's ability to request access to applicants' or employees' social media accounts. However, various federal laws, or federal agencies' interpretations and enforcement of these laws, may impact employer actions. For example:

- Preemployment action taken against an applicant, or post-employment action taken against an employee, based on information discovered via social media may run afoul of federal civil rights law (*e.g.*, Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act).
- The National Labor Relations Board, which is charged with enforcing federal labor laws, has taken an active interest in employers' social media policies and practices, and has concluded in many instances that, regardless of whether the workplace is unionized, the existence of such a policy or an adverse employment action taken against an employee based on the employee's violation of the policy can violate the National Labor Relations Act.
- Accessing an individual's social media account without permission may potentially violate the federal Computer Fraud and Abuse Act or the Stored Communications Act.

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[142] CAL. CIV. CODE § 1786.16(a)(2).

[143] CAL. CIV. CODE § 1786.16(b)(1).

[144] CAL. CIV. CODE § 1786.16(c).

[145] CAL. CIV. CODE §§ 1785.36, 1786.57.

[146] CAL. CIV. CODE § 1785.31.

[147] CAL. CIV. CODE § 1786.50.

For additional information on federal law related to background screening, see LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING.

1.3(c)(ii) *State Guidelines on Access to Applicants' Social Media Accounts*

California law restricts an employer's access to an applicant's or employee's social media accounts. *Social media* is defined as an electronic service or account, or electronic content, including, but not limited to, videos, still photographs, blogs, video blogs, podcasts, instant and text messages, email, online services or accounts, or internet website profiles or locations.[148]

With respect to both applicants and employees, an employer cannot:

- require or request that the individual disclose a username or password for the purpose of accessing personal social media;
- require or request that the individual access personal social media in the presence of the employer;
- require or request that the individual divulge any personal social media; or
- discharge, discipline, threaten to discharge or discipline, or otherwise retaliate against an individual for not complying with a request or demand by the employer that violates the law, unless the action is otherwise permitted by law.[149]

Exceptions. Notwithstanding the above prohibitions, an employer is permitted to conduct certain investigations with respect to an employee's social media accounts. An employer can request that an employee divulge personal social media reasonably believed to be relevant to an investigation of allegations of employee misconduct or employee violation of applicable laws and regulations, provided that the social media is used solely for purposes of that investigation or a related proceeding.[150]

Separate rules apply to accounts accessed via an employer-provided device or online account. An employer can require or request that an employee disclose a username, password, or other method for the purpose of accessing an employer-issued electronic device.[151]

1.3(c)(iii) *State Enforcement, Remedies & Penalties*

Although the law does not expressly provide a private right of action for violations, California law *may* provide individuals the ability to file a lawsuit based on social media access violations.[152]

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[148] CAL. LAB. CODE § 980(a).

[149] CAL. LAB. CODE § 980(b), (e).

[150] CAL. LAB. CODE § 980(c).

[151] CAL. LAB. CODE § 980(d).

[152] *See, e.g.*, The Labor Code Private Attorneys General Act of 2004, CAL. LAB. CODE §§ 2698 to 2699.5, and California's Unfair Competition Law, CAL. BUS. & PROF. CODE §§ 17200 *et seq*.

1.3(d) *Polygraph / Lie Detector Testing Restrictions*

1.3(d)(i) *Federal Guidelines on Polygraph Examinations*

The federal Employee Polygraph Protection Act (EPPA) imposes severe restrictions on using lie detector tests.[153] The law bars most private-sector employers from requiring, requesting, or suggesting that an employee or job applicant submit to a polygraph test, and from using or accepting the results of such a test.

The EPPA further prohibits employers from disciplining, discharging, or discriminating against any employee or applicant:

- for refusing to take a lie detector test;
- based on the results of such a test; and
- for taking any actions to preserve employee rights under the law.

There are some limited exceptions to the general ban. The exception applicable to most private employers allows a covered employer to test current employees reasonably suspected of involvement in a workplace incident that resulted in economic loss or injury to the employer's business. There is also a narrow exemption for prospective employees of security guard firms and companies that manufacture, distribute, or dispense controlled substances.

Notably, the EPPA prohibits only mechanical or electrical devices, not paper-and-pencil tests, chemical tests, or other nonmechanical or nonelectrical means that purport to measure an individual's honesty. For more information on federal restrictions on polygraph tests, including specific procedural and notice requirements and disclosure prohibitions, see LITTLER ON EMPLOYMENT TESTING.

Most states have laws that mirror the federal law. Some of these state laws place greater restrictions on testing by prohibiting lie detector "or similar" tests, such as pencil-and-paper honesty tests.

1.3(d)(ii) *State Guidelines on Polygraph Examinations*

In California, an employer cannot require an employee or applicant to submit to or take a polygraph, lie detector, or similar examination as a condition of employment or continued employment.[154] An employer can request that an applicant or employee take a test, but only after first advising the person, in writing, and at the time the test is to be administered, of the right to refuse the test.[155]

1.3(d)(iii) *State Enforcement, Remedies & Penalties*

Violating the prohibition on lie detector tests in California is a misdemeanor.[156]

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[153] 29 U.S.C. §§ 2001 to 2009; *see also* U.S. Dep't of Labor, *Other Workplace Standards: Lie Detector Tests*, *available at* https://webapps.dol.gov/elaws/elg/eppa.htm.

[154] CAL. LAB. CODE § 432.2(a).

[155] CAL. LAB. CODE § 432.2(b).

[156] CAL. LAB. CODE § 433.

1.3(e) *Drug & Alcohol Testing of Applicants*

1.3(e)(i) *Federal Guidelines on Drug & Alcohol Testing of Applicants*

Whether an employer must implement a drug testing program for its employees under federal law is often determined by the industry in which it operates. For example, the Omnibus Transportation Employee Testing Act requires testing certain applicants and employees in the transportation industries.[157] The Drug-Free Workplace Act of 1988 also requires some federal contractors and all federal grantees (but not subcontractors or subgrantees) to certify to the appropriate federal agency that they are providing a drug-free workplace.[158] Employers not legally mandated to implement workplace substance abuse and drug and alcohol testing policies may still do so to promote workplace safety, deter illegal drug use, and diminish absenteeism and turnover. For more information on drug testing requirements under federal law, see LITTLER ON EMPLOYMENT TESTING.

For the most part, workplace drug and alcohol testing is governed by state law, and state laws differ dramatically in this area and continue to evolve.

1.3(e)(ii) *State Guidelines on Drug & Alcohol Testing of Applicants*

California law contains no express provisions regulating preemployment drug or alcohol screening by private employers. In general, employers are not prohibited from conducting preemployment drug testing of applicants. That being said, the California constitution expressly guarantees an individual's right to privacy.[159] The state courts have provided guidance on the interplay between the right to privacy and the use of drug testing for employment purposes. Key decisions from the California Supreme Court have balanced an employer's right to test against an applicant's constitutional right to privacy.

The California Supreme Court's decision in *Hill v. NCAA* established a balancing test for determining whether private-sector drug testing meets state privacy requirements: "[An] invasion of a privacy interest is not a violation of the state constitutional right to privacy if the invasion is justified by a competing interest. Legitimate interests derive from the legally authorized and socially beneficial activities of government and private entities."[160] Building on the principles outlined in *Hill*, the court concluded in *Loder v. City of Glendale* that "an employer has a legitimate and substantial interest in determining whether or not an applicant currently is engaging in [drug or alcohol abuse] before the employer finalizes any hiring decision."[161] Although *Loder* challenged a public employer's program, the opinion is relevant to private-sector employers because California's constitutional right to privacy—which governs the conduct of private as well as public actors—guided the court's decision as to the permissibility of preemployment testing.[162] Employers intending to implement drug testing of applicants must establish preemployment drug testing policies and apply them uniformly, without targeting certain candidates for testing.

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[157] These industries are covered by the Federal Aviation Administration (FAA); the Federal Motor Carrier Safety Administration (FMSCA); the Federal Railroad Administration (FRA); the Federal Transit Administration (FTA); and the Pipeline and Hazardous Materials Safety Administration (PHMSA). In addition, the U.S. Department of Defense, the Coast Guard, and the Nuclear Regulatory Commission, as well as other government agencies, have adopted regulations requiring mariners, employers, and contractors to maintain a drug-free workplace.

[158] 41 U.S.C. §§ 8101 *et seq*.; *see also* 48 C.F.R. §§ 23.500 *et seq*.

[159] CAL. CONST. ART. I, § 1.

[160] *Hill v. National Collegiate Athletic Ass'n*, 26 Cal. Rptr. 2d 834 (Cal. 1994).

[161] *Loder v. City of Glendale*, 59 Cal. Rptr. 2d 696, 729 (Cal. 1997).

[162] 59 Cal. Rptr. 2d at 722–31.

In addition to the generally applicable drug testing principles above, the California Drug Free Workplace Act sets forth drug testing parameters applicable only to certain employers that receive contracts or grants from a state agency. Such employers must establish a drug-free workplace program and notify applicants and employees of the testing provisions established thereunder prior to undertaking any testing.[163]

For a discussion of the drug testing of current employees—which is more heavily regulated—see **3.12(b)(ii)**.

1.3(f) *Additional State Guidelines on Preemployment Conduct*

1.3(f)(i) *State Restrictions on Job Application Fees, Deductions, or Other Charges*

Employers cannot require applicants to pay fees or provide other consideration to apply for employment, either orally or in writing or to receive, obtain, complete, or submit job applications. Employers cannot charge fees to provide, accept, or process job applications.[164]

1.3(f)(ii) *Fingerprints & Photographs*

Under the California Labor Code, a prospective employer may require an applicant to provide fingerprints or a photograph for the employer's own use. However, employers are prohibited from requiring applicants or employees to furnish either fingerprints or photographs if this information will be provided to a third party and the information could be used to the applicant's or employee's detriment; to do so is a misdemeanor.[165]

Moreover, the employer, not the applicant or the employee, must pay the cost of photographing.[166]

1.3(f)(iii) *Medical & Psychological Examinations*

Under the California Fair Employment and Housing Act (FEHA), an employer may not conduct a medical or psychological examination or inquiry of an applicant before an offer of employment has been extended to the applicant. A medical or psychological examination includes a procedure or test that seeks information about an individual's physical or mental conditions or health, but does not include testing for current illegal drug use.[167]

Post-offer, an employer or other covered entity may condition a *bona fide* offer of employment on the results of a medical or psychological examination or inquiries conducted prior to the employee's entrance on duty to determine fitness for the job in question, provided:

- all entering employees in the same job classification are subject to the same examination or inquiry;

[163] CAL. GOV'T CODE §§ 8350 *et seq*.

[164] CAL. LAB. CODE § 450.

[165] CAL. LAB. CODE § 1051.

[166] CAL. LAB. CODE § 401.

[167] CAL. CODE REGS. tit. 2, § 11071(a).

- if the results of an examination would result in disqualification, the applicant or employee may submit independent medical opinions for consideration before a final decision is made; and
- the examination results are maintained on separate forms and as confidential medical records.[168]

During employment, an employer may make disability-related inquiries, including fitness for duty examinations, and may require medical examinations of employees as long as the inquiries are job-related and consistent with business necessity.[169]

1.3(f)(iv) *Salary History Inquiry Restrictions*

California's salary history inquiry restrictions prohibit an employer from:

- relying on an applicant's salary history information as a factor in determining whether to offer employment to an applicant or what salary to offer an applicant;[170] or
- seeking an applicant's salary history information, including compensation and benefits, whether orally or in writing, personally or through an agent.[171]

Consistent with the California Equal Pay Act, nothing in the statute may be construed to allow prior salary to justify any disparity in compensation.[172] .

An employer is not prohibited from asking an applicant about the individual's salary expectation for the position being applied for.[173]

In addition, the statute does not prohibit an applicant from voluntarily and without prompting disclosing salary history information to a prospective employer.[174] In addition, if an applicant voluntarily and without prompting discloses salary history information to a prospective employer, the statute does not prohibit the employer from considering or relying on that voluntarily disclosed salary history information in determining the salary for that applicant.[175]

The statute does not apply to salary history information disclosable to the public pursuant to federal or state law, including the California Public Records Act or the federal Freedom of Information Act.[176]

The statute also requires an employer, upon reasonable request, must provide the pay scale for a position to an applicant applying for employment.[177] *Pay scale* means a salary or hourly wage range. *Reasonable*

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[168] CAL. CODE REGS. tit. 2, § 11071(b).

[169] CAL. CODE REGS. tit. 2, § 11071(d)(1).

[170] CAL. LAB. CODE § 432.3(a).

[171] CAL. LAB. CODE § 432.3(b).

[172] CAL. LAB. CODE § 432.3(i).

[173] CAL. LAB. CODE § 432.3(i).

[174] CAL. LAB. CODE § 432.3(g).

[175] CAL. LAB. CODE § 432.3(h).

[176] CAL. LAB. CODE § 432.3(e).

[177] CAL. LAB. CODE § 432.3(c).

request means a request made after an applicant has completed an initial interview with the employer.[178] Further, the term *applicant* or *applicant for employment* means an individual who is seeking employment with the employer and is not currently employed with that employer in any capacity or position.[179]

San Francisco. Employers in San Francisco are also subject to restrictions on inquiring into a job applicant's salary or wage history when considering an applicant for a position. The city's Parity In Pay Ordinance prohibits employers from:

- considering or relying on an applicant's salary history as a factor in determining whether to offer employment to an applicant or what salary to offer an applicant;
- inquiring about an applicant's salary history; and
- refusing to hire, or otherwise disfavoring, injuring, or retaliating against an applicant for not disclosing the applicant's salary history to the employer.[180]

Employment means any occupation, vocation, job, or work, including but not limited to temporary or seasonal work, part-time work, contracted work, contingent work, work on commission, and work through the services of a temporary or other employment agency, for which an applicant is to receive a salary, but does not include work as an independent contractor. *Salary* includes wages, commissions, and other monetary compensation. *Inquire* means any direct or indirect statement, question, prompting, or other communication, orally or in writing, personally or through an agent, to gather information from or about an applicant, using any mode of communication, including but not limited to application forms and interviews.[181]

The Ordinance further prohibits an employer from releasing the salary history of a current or former employee to that person's prospective employer without the person's written authorization, unless the release of salary history is required by law, is part of a publicly available record, or is subject to a collective bargaining agreement.[182]

Notably, the Ordinance does not prohibit an applicant from disclosing salary history voluntarily and without prompting. If an applicant discloses their salary history in this manner, or provides written authorization for release of salary history, an employer may consider the applicant's salary history to determine the applicant's salary or verify the salary history.[183]

In addition, an employer may, without inquiring about salary history, engage in discussion with the applicant about the applicant's expectations with respect to salary, including but not limited to unvested equity or deferred compensation or bonus that an applicant would forfeit or have cancelled by virtue of the applicant's resignation from their current employment. An employer is also not prohibited from verifying nonsalary related information the applicant disclosed or from conducting a background check, provided that if the verification or background check discloses the applicant's salary history, the employer

[178] CAL. LAB. CODE § 432.3(c).

[179] CAL. LAB. CODE § 432.3(k).

[180] S.F., CAL., LAB. & EMP. CODE § 61.4.

[181] S.F., CAL., LAB. & EMP. CODE § 61.3.

[182] S.F., CAL., LAB. & EMP. CODE § 61.4.

[183] S.F., CAL., LAB. & EMP. CODE § 61.4.

cannot consider salary history for purposes of determining the salary to be offered to the applicant during the hiring process or whether to offer employment to the applicant.[184]

The Ordinance also touches on equal pay obligations. An employer cannot use salary history alone to justify paying any employee of a different sex, race, or ethnicity less than an applicant or prospective employee for doing substantially similar work under similar working conditions.[185]

The San Francisco Office of Labor Standards Enforcement administers and enforces the terms of the Ordinance. An applicant alleging a violation may file an administrative complaint with the OLSE within 180 days of the alleged violation. A first violation incurs a warning and notice to correct, but subsequent violations will incur a fine of $100. Additional violations within a 12-month period are subject to fines of up to $500. The OLSE may also elect to initiate an enforcement action against an employer. However, there is no private right of action for an applicant.[186]

2. TIME OF HIRE

2.1 Documentation to Provide at Hire

2.1(a) *Federal Guidelines on Hire Documentation*

Table 2 lists the documents that must be provided at the time of hire under federal law.

Table 2. Federal Documents to Provide at Hire

Category	Notes
Benefits & Leave Documents: Affordable Care Act (ACA)	Currently, employers covered under the Fair Labor Standards Act (FLSA) must provide to each employee, at the time of hire, written notice: • informing the employee of the existence of an insurance exchange, including a description of the services provided by such exchange, and the manner in which the employee may contact the exchange to request assistance; • that if the employer-plan's share of the total allowed costs of benefits provided under the plan is less than 60% of such costs, the employee may be eligible for a premium tax credit under section 36B of the Internal Revenue Code of 1986[187] and a cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act[188] if the employee purchases a qualified health plan through the exchange; and

[184] S.F., CAL., LAB. & EMP. CODE § 61.4.

[185] S.F., CAL., LAB. & EMP. CODE § 61.4.

[186] S.F., CAL., LAB. & EMP. CODE § 61.6.

[187] 26 U.S.C. § 36B.

[188] 42 U.S.C. § 18071.

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	• that if the employee purchases a qualified health plan through the exchange, the employee may lose the employer contribution (if any) to any health benefits plan offered by the employer and that all or a portion of such contribution may be excludable from income for federal income tax purposes.[189] The U.S. Department of Labor's Employee Benefits Security Administration provides a model notice for employers that offer a health plan to some or all employees and a separate notice for employers that do not offer a health plan.[190]
Benefits & Leave Documents: Consolidated Omnibus Budget Reconciliation Act (COBRA)	Employers or group health plan administrators must provide written notice to employees and their spouses outlining their COBRA rights no later than 90 days after employees and spouses become covered under group health plans. Employers or plan administrators can develop their own COBRA rights notice or use the COBRA Model General Notice.[191] Employers or plan administrators can send COBRA rights notices through first-class mail, electronic distribution, or other means that ensure receipt. If employees and their spouses live at the same address, employers or plan administrators can mail one COBRA rights notice addressed to both individuals; alternatively, if employees and their spouses do not live at the same address, employers or plan administrators must send separate COBRA rights notices to each address.[192]
Benefits & Leave Documents: Family and Medical Leave Act (FMLA)	In addition to posting requirements, if an FMLA-covered employer has any eligible employees, it must provide a general notice to each employee by including the notice in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist, or by distributing a copy of the general notice to each new employee upon hiring.[193] In either case, distribution may be accomplished electronically. Employers may use a format other than the FMLA poster as a model notice, if the

[189] 29 U.S.C. § 218b.

[190] Model notices are available in English and Spanish at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/affordable-care-act/for-employers-and-advisers/coverage-options-notice.

[191] The model notice is available in English and Spanish at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra.

[192] 29 C.F.R. § 2590.606-1.

[193] 29 C.F.R. § 825.300(a).

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	information provided includes, at a minimum, all of the information contained in that poster.[194] Where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer must provide the general notice in a language in which the employees are literate. Employers furnishing FMLA notices to sensory-impaired individuals must also comply with all applicable requirements under federal or state law.[195]
Immigration Documents: Form I-9	Employers must ensure that individuals properly complete Form I-9 section 1 ("Employee Information and Verification") at the time of hire and sign the attestation with a handwritten or electronic signature. Also, individuals must present employers documentation establishing their identity and employment authorization. Within three business days of the first day of employment, employers must physically examine the documentation presented in the employee's presence, ensure that it appears to be genuine and relates to the individual, and complete Form I-9, section 2 ("Employer Review and Verification"). Employers must also, within three business days of hiring, sign the attestation with a handwritten or electronic signature. Employers that hire individuals for a period of less than three business days must comply with these requirements at the time of hire.[196] For additional information on these requirements, see LITTLER ON I-9 COMPLIANCE & WORK AUTHORIZATION VISAS.
Tax Documents	On or before the date employment begins, employees must furnish employers with a signed withholding exemption certificate (Form W-4) relating to their marital status and the number of withholding exemptions they claim.[197]
Uniformed Services Employment and Reemployment Rights Act (USERRA) Documents	Employers must provide to persons covered under USERRA a notice of employee and employer rights, benefits, and obligations. Employers may meet the notice requirement by posting notice where employers customarily place notices for employees.[198]

[194] The U.S. Department of Labor's Wage & Hour Division's model FMLA poster, which satisfies the notice requirement, is available at https://www.dol.gov/WHD/fmla/index.htm.

[195] 29 C.F.R. § 825.300(a).

[196] *See generally* 8 C.F.R. § 274a.2. The form is available at https://www.uscis.gov/i-9.

[197] 26 C.F.R. § 31.3402(f)(2)-1. The IRS provides this form at https://www.irs.gov/pub/irs-pdf/fw4.pdf.

[198] 38 U.S.C. § 4334. This notice is available at https://www.dol.gov/sites/dolgov/files/VETS/legacy/files/USERRA_Private.pdf.

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
Wage & Hour Documents	To qualify for the federal tip credit, employers must notify tipped employees: (1) of the minimum cash wage that will be paid; (2) of the tip credit amount, which cannot exceed the value of the tips actually received by the employee; (3) that all tips received by the tipped employee must be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and (4) that the tip credit will not apply to any employee who has not been informed of these requirements.[199]

2.1(b) *State Guidelines on Hire Documentation*

Table 3 lists the documents that must be provided at the time of hire under state law.

Table 3. State Documents to Provide at Hire	
Category	**Notes**
Benefits & Leave Documents: California Family Rights Act (Optional)	If an employer subject to the California Family Rights Act (CFRA)[200] publishes an employee handbook that describes other kinds of personal or disability leaves available to its employees, it must include a description of CFRA leave in its handbook.[201] Moreover, covered employers are *encouraged*, but not required, to give a copy of the CFRA notice to each new employee, ensure that copies are otherwise available to new employees, and disseminate the notice in any other way.[202]
Benefits & Leave Documents: Disability & Paid Family Leave Insurance	All employers must provide new employees a notice informing them of their disability insurance rights and benefits due to the employee's own sickness, injury, or pregnancy, or the employee's need to provide care for any sick or injured family member, or the employee's need to bond with a minor child within the first year of the child's birth or placement in connection with foster care or adoption.[203] The state has prepared informational notices both for paid family leave benefits (Form DE 2511)[204] and for disability benefits (Form DE 2515).[205]

[199] 29 C.F.R. § 531.59.

[200] Employers with 50 or more employees, including successors-in-interest and joint employers. The employees need not all work in California. CAL. GOV'T CODE § 12945.2(c)(2); CAL. CODE OF REGS. tit. 2, § 11087(d).

[201] CAL. CODE REGS. tit. 2, § 11095(a).

[202] CAL. CODE REGS. tit. 2, § 11095(b). This notice is available at https://calcivilrights.ca.gov/family-medical-pregnancy-leave/.

[203] CAL. UNEMP. INS. CODE § 2613.

[204] This notice (Form DE 2511) is available at http://www.edd.ca.gov/pdf_pub_ctr/de2511.pdf.

[205] This notice (Form DE 2515) is available at http://www.edd.ca.gov/pdf_pub_ctr/de2515.pdf.

Table 3. State Documents to Provide at Hire	
Category	**Notes**
	Employees must also be given: (1) written notice explaining their right to consent to or reject a voluntary plan for the payment of disability insurance and paid family leave insurance benefits in lieu of the mandatory state plan coverage; and (2) a written statement setting forth the essential features of the plan.[206]
Benefits & Leave Documents: Leave for Victims of Domestic Violence, Sexual Assault, or Stalking	Employers with 25or more employees must inform each new employee upon hire (and other employees upon request), in writing, of the employee's rights under Labor Code section 230(c), (e), and (f). If the employer elects not to use the state-approved form, the notice provided must be substantially similar in content to that form.[207]
Benefits & Leave Documents: Cal Savers	Once operational, California Secure Choice Retirement Savings Trust Act ("Cal Savers") applies to employers with five or more employees that do not offer an employer-sponsored retirement plan or an automatic enrollment payroll deduction IRA. Covered employers will be required to either: (1) offer an employer-sponsored retirement plan; or (2) enable their employees to make a direct payroll contribution to the employee's personal Secure Choice Retirement account. The employee information packet with disclosure and opt-out forms is available to employers must be supplied to employees at the time of hiring. All new employees must review the packet and acknowledge receipt.[208]
Benefits & Leave: Flexible Spending Account Notice	Although not specific to at hire, an employer must notify an employee who participates in a flexible spending account, including, but not limited to, a dependent care flexible spending account, a health flexible spending account, or adoption assistance flexible spending account, of any deadline to withdraw funds before the end of the plan year. Notice must be provided in two different forms, one of which may be electronic. Acceptable forms of notice include: electronic mail

[206] CAL. UNEMP. INS. CODE § 3257. Voluntary disability insurance plan insurers must also supply claim forms to their employees. For more information, see http://www.edd.ca.gov/Disability/Employer_Voluntary_Plans.htm.

[207] CAL. LAB. CODE § 230.1. The model notice (Rights of Victims of Domestic Violence, Sexual Assault and Stalking) is available in English at https://www.dir.ca.gov/dlse/Victims_of_Domestic_Violence_Leave_Notice.pdf and in Spanish at https://www.dir.ca.gov/dlse/Victims_of_Domestic_Violence_Leave_Notice_spanish.pdf.

[208] CAL. GOV'T CODE § 100014. Forms are available from the Cal Savers resource page at https://saver.calsavers.com/home/savers/forms.html.

Table 3. State Documents to Provide at Hire	
Category	**Notes**
	communication; telephone communication; text message notification; postal mail notification; or, in-person notification.[209]
Benefits & Leave Documents: San Francisco Bay Area Commuter Benefits	Employers with an average of 50or more full-time employees per week in the Bay Area Quality Management District (BAQMD)[210] must adopt policies that encourage commuting by means other than driving alone.[211] Among other requirements, covered employers must provide commuter benefits information as part of the employee benefits package explained to all new hires. To satisfy the notice requirements, employers must: • notify all covered employees that the employer is subject to BAQMD Regulation 14, Rule 1; and • inform covered employees which commuter benefit options will be offered; • provide information concerning how covered employees may apply for and receive commuter benefits; and • designate a person in the organization employees can contact concerning further commuter benefit information.[212]
Employee Inventions	If an employment agreement contains a provision requiring the employee to assign or offer to assign any of the employee's rights in any invention to the employer, the employer must also, at the time the agreement is made, provide a written notification to the employee that the agreement does not apply to an invention which qualifies fully under the provisions of Labor Code section 2870.[213]
Fair Employment Practices Documents: Sexual Harassment Materials	The California Fair Employment and Housing Act (FEHA) imposes several obligations on covered employees, including two notice obligations. First, they must distribute to new hires either the state-approved fact sheet on sexual harassment (Form CRD-185), the poster (Form CRD-185P), or an alternative writing that complies with the law.[214] Second, covered employers must develop and disclose a harassment, discrimination, and retaliation prevention policy. Dissemination of the policy must include one or more of CRD's

[209] CAL. LAB. CODE § 2810.7.

[210] Coverage is explained at http://www.baaqmd.gov/rules-and-compliance.

[211] CAL. GOV'T CODE § 65081; Bay Area Air Quality Management District Regulation 14, Rule 1.

[212] CAL. GOV'T CODE § 65081; Bay Area Air Quality Management District Regulation 14, Rule 1.

[213] CAL. LAB. CODE § 2872.

[214] These notices (Form CRD-185 and Form CRD-185P) are available in several languages at https://calcivilrights.ca.gov/posters/.

Table 3. State Documents to Provide at Hire	
Category	**Notes**
	distribution methods, one of which is discussing policies upon hire and/or during a new hire orientation session.[215]
Fair Employment Practices Documents: Lactation Law	Every California employers must develop and implement a policy regarding lactation accommodation that includes the following information: a statement about an employee's right to request lactation accommodation; the process by which the employee must make a request for lactation accommodation; an employer's obligation to respond to a lactation accommodation request. If the employer cannot provide break time or a location that complies with the law, the employer must so notify the employee in writing; and, a statement about an employee's right to file a complaint with the Labor Commissioner for any violation of a right under the lactation provisions. The employer must include the written lactation accommodation policy in an employee handbook or set of policies that the employer makes available to employees. Moreover, the employer must distribute the policy: (1) to new employees upon hiring; and (2) when an employee makes an inquiry about or requests parental leave.[216]
Fair Employment Practices: San Francisco Lactation Law	San Francisco's lactation accommodation law requires that employers develop a written lactation accommodation policy. Employers must provide a copy of the lactation accommodation policy to new employees upon hire and to any employee who inquires about or requests parental leave. If the employer maintains an employee handbook, the handbook must include the lactation accommodation policy.[217]
Tax Documents	California employers must provide Employment Development Department (EDD) Form DE-4, the state's exemption certification, to determine the number of withholding exemptions to be allowed in computing the tax required to be deducted and withheld for each employee.[218]
Unemployment Insurance	The EDD provides a pamphlet entitled "California's Programs for the Unemployed" (Form DE-2320). This pamphlet provides information on unemployment insurance and other programs offered for the benefit of unemployed Californians. The California Tax Service Center instructs

[215] CAL. CODE REGS. tit. 2, § 11023.

[216] CAL. LAB. CODE § 1034.

[217] S.F., CAL., ORDINANCE NO. 170240.

[218] CAL. UNEMP. INS. CODE § 13040. This form (Form DE-4) is available at http://www.edd.ca.gov/pdf_pub_ctr/de4.pdf.

Table 3. State Documents to Provide at Hire	
Category	**Notes**
	employers to provide Form DE-2320 to new and laid-off/terminated employees.[219]
Wage & Hour Documents: Commission Agreements	Whenever an employer enters into an employment contract with an employee for services to be rendered within California, and the contemplated method of payment involves commissions, the contract must be in writing and set forth the method by which the commissions will be computed and paid. The employer must give a signed copy of the contract to every employee who is a party to the contract and must obtain a signed receipt for the contract from each employee.[220]
Wage & Hour Documents: Local Minimum Wage Ordinances	As discussed in **3.3(b)(v)**, numerous cities and counties in California, including Los Angeles and San Francisco, have adopted minimum wage ordinances. Most of these ordinances include a requirement that notice be given to employees at hiring. Employers should consult the relevant local ordinances for further details.
Wage & Hour Documents: Local Paid Sick Leave Ordinances	As discussed in **3.9(b)(iv)**, numerous cities, including Los Angeles, San Diego, and San Francisco, have adopted paid sick leave ordinances. California employers should consult the relevant local ordinances for further information and details about any required documentation at hiring.
Wage & Hour Documents: Local Predictive Scheduling Ordinances	Certain cities—Berkeley, Emeryville, San Francisco, San Jose, and Los Angeles (and Los Angeles County, effective July 1, 2025)—have adopted predictive scheduling ordinances, which may carry their own notice requirements. See **3.5(c)** for additional details.
Wage & Hour Documents: Wage Theft Prevention Act	The Wage Theft Prevention Act requires employers to provide employees a written notice (Form DLSE-NTE), in the language the employer normally uses to communicate employment-related information to employees, with the following information: • rate(s) of pay and basis thereof (by the hour, shift, day, week, salary, piece, commission, or otherwise, including any rates for overtime, as applicable); • allowances, if any, claimed as part of the minimum wage, including meal or lodging allowances; • regular payday; • employer's name, including any "doing business as" names used;

[219] Form DE-2320 is available at http://www.edd.ca.gov/pdf_pub_ctr/de2320.pdf. It is also available in Armenian, Cantonese, Mandarin, Hmong, Laotian, Punjabi, Spanish, and Vietnamese, at http://www.edd.ca.gov/Payroll_Taxes/Forms_and_Publications.htm. *See also* Employment Development Department, *Required Notices and Pamphlets, available at* https://www.edd.ca.gov/payroll_taxes/required_notices_and_pamphlets.htm.

[220] CAL. LAB. CODE § 2751.

Table 3. State Documents to Provide at Hire	
Category	**Notes**
	• physical address of the employer's main office or principal place of business, and a mailing address, if different; • employer's telephone number; • name, address, and telephone number of employer's workers' compensation insurance carrier; • any other information the Labor Commissioner deems material and necessary; and • the employee's rights and obligations under the California paid sick leave law.[221] • **Effective January 1, 2024**, information on any state or federal emergency or disaster declaration applicable to any county in which the employee will work that was issued within 30 days of the employee's start date, and that may affect their health or safety during their employment.[222] Additional requirements may apply in special occupations and/or industries.[223] Certain employees are not required to receive the wage notice, including overtime-exempt employees. Another exemption applies to employees covered by a valid collective bargaining agreement, if the agreement expressly provides for the employees' wages, hours of work, and working conditions, and if the agreement provides premium wage rates for all overtime hours worked as well as a regular hourly rate of pay for those employees of not less than 30% more than the state minimum wage.[224]
Workers' Compensation	Covered employers must notify new employees, either at the time an employee is hired or by the end of the employee's first pay period, of the employee's right to receive workers' compensation benefits should the employee be injured on the job.[225] Additionally, covered employers must give new employees, either at the time the employee is hired or by the end of the first pay period, written notice of the information contained in Labor Code section 3550 (in English and Spanish, where

[221] CAL. LAB. CODE § 2810.5. This notice is available at http://www.dir.ca.gov/dlse/LC_2810.5_Notice.pdf. It is also available in Spanish and Vietnamese, along with other information, at http://www.dir.ca.gov/dlse/Governor_signs_Wage_Theft_Protection_Act_of_2011.html.

[222] AB 636.

[223] *See, e.g.*, CAL. LAB. CODE § 2810.5(a)(3) (temporary service employers).

[224] *See, e.g.*, CAL. LAB. CODE § 2810.5(c).

[225] CAL. CODE REGS. tit. 8, § 15596.

Table 3. State Documents to Provide at Hire	
Category	**Notes**
	there are Spanish-speaking employees).[226] The notice must be easily understandable, in nontechnical terms, and include the following: • name of employer's current workers' compensation insurance carrier (if an employer is self-insured, who is responsible for claims adjustment); • how to get emergency medical treatment, if needed; • the kinds of events, injuries, and illnesses covered by workers' compensation; • the injured employee's right to receive medical care; • the rights of the employee to select and change the treating physician; • the rights of the employee to receive temporary disability indemnity, permanent disability indemnity, supplemental job displacement, and death benefits, as appropriate; • to whom injuries should be reported; • the existence of time limits for the employer to be notified of an occupational injury; • the protections against discrimination provided under the law; • the website address and contact information that employees may use to obtain information about the workers' compensation claims process and an injured employee's rights and obligations, including location and telephone number of the nearest information and assistance officer; • generally, how to obtain appropriate medical care for a job injury; • the role and function of the primary treating physician; • a form that the employee may use as an optional method for notifying the employer of the name of the employee's personal physician or chiropractor; and • a description about Medical Provider Networks (MPN), including that the employer may be using a MPN, what a MPN is, the pre-designation exemption from the MPN, when an employee must begin to use a physician from the MPN, and how to request information about using a MPN.[227]
California Consumer Privacy Act ("CCPA"): Privacy Policy Requirement	The California Consumer Privacy Act (CCPA) generally applies to all "personal information" of "consumers." *Consumers* are defined as California residents, and *personal information* is any individually identifiable information about them. Businesses subject to the CCPA must inform consumers at or before data collection. Businesses are subject to the CCPA if one or more of the following are true: (1) the

[226] CAL. LAB. CODE § 3551.

[227] CAL. LAB. CODE § 3550; CAL. CODE REGS. tit. 8, §§ 9880, 9883. A model pamphlet is available at http://www.dir.ca.gov/dwc/DWCPamphlets/TimeOfHirePamphlet.pdf.

Table 3. State Documents to Provide at Hire	
Category	**Notes**
	business has gross annual revenues in excess of $25 million; (2) the business buys, receives, or sells the personal information of 50,000 or more consumers, households, or devices; or (3) the business derives 50% or more of annual revenues from selling consumers' personal information. California employers are required to put in place the same type of comprehensive data privacy compliance program that the CCPA previously required only for consumer data. This program must include, for example, posting an "online privacy policy" for HR Individuals (in addition to providing the notice at collection), ensuring that contracts with service providers contain statutorily mandated language, and establishing procedures so that HR Individuals can exercise their new data rights. The CCPA does not mandate the specific form or method of delivery required for the privacy policy notice regarding personal information of Workforce Members. Employers should consult with knowledgeable counsel in this regard.[228]

2.2 New Hire Reporting Requirements

2.2(a) *Federal Guidelines on New Hire Reporting*

The federal New Hire Reporting Program requires all states to establish new hire reporting laws that comply with federal requirements.[229] State new hire reporting laws must include these minimum requirements:

1. employers must report to the appropriate state agency the employee's name, address, and Social Security number, as well as the employer's name, address, and federal tax identification number provided by the Internal Revenue Service;
2. employers may file the report by first-class mail, electronically, or magnetically;
3. if the report is transmitted by first-class mail, the report must be made not later than 20 days after the date of hire;
4. if the report is transmitted electronically or magnetically, the employer may report no later than 20 days following the date of hire or through two monthly transmissions not less than 12 days nor more than 16 days apart;

[228] CAL. CIV. CODE §§ 1798.100 *et seq.* The limited exemption for employment-related information sunset on January 1, 2023. More information about the CCPA is available online from the California Attorney General at https://oag.ca.gov/privacy/ccpa.

[229] The New Hire Reporting Program is part of the Personal Responsibility and Work Opportunity Act of 1996. 42 U.S.C. §§ 651 to 669.

5. the format of the report must be a Form W-4 or, at the option of the employer, an equivalent form; and
6. the maximum penalty a state may set for failure to comply with the state new hire law is $25 (which increases to $500 if the failure to comply is the result of a conspiracy between the employer and the employee to not supply the required report or to supply a false or incomplete report).[230]

These are only the minimum requirements that state new hire reporting laws must satisfy. States may enact new hire reporting laws that, for example, require additional information to be submitted or require a shorter reporting timeframe. Many states have also developed their own reporting form; however, its use is optional.

Multistate Employers. The New Hire Reporting Program includes a simplified reporting method for multistate employers. The statute defines *multistate employers* as employers with employees in two or more states and that file new hire reports either electronically or magnetically. The federal statute permits multistate employers to designate one state to which they will transmit all of their reports twice per month, rather than filing new hire reports in each state. An employer that designates one state must notify the Secretary of the U.S. Department of Health and Human Services (HHS) in writing. When notifying the HHS, the multistate employer must include the following information:

- Federal Employer Identification Number (FEIN);
- employer's name, address, and telephone number related to the FEIN;
- state selected for reporting purposes;
- other states in which the company has employees;
- the corporate contact information (name, title, phone, email, and fax number); and
- the signature of person providing the information.

If the company is reporting new hires on behalf of subsidiaries operating under different names and FEINs, it must list the names and FEINs, and the states where those subsidiaries have employees working.

[230] 42 U.S.C. § 653a.

Multistate employers can notify the HHS by mail, fax, or online as follows:

Table 4. Multistate Employer New Hire Information	
Contact By Mail or Fax	**Contact Online**
Department of Health and Human Services Administration for Children and Families Office of Child Support Enforcement Multi-State Employer Registration Box 509 Randallstown, MD 21133 Fax: (410) 277-9325	Register online by submitting a multistate employer notification form over the internet.[231] Multistate employers can receive assistance with registration as a multistate employer from the Multistate Help Desk by calling (410) 277-9470, 9:00 A.M. to 5:00 P.M., Eastern Time.

2.2(b) *State Guidelines on New Hire Reporting*

The following is a summary of the key elements of California's new hire reporting law.[232]

Who Must Be Reported. Employees newly hired and rehired must be reported. In any case that the employer is required to give an individual a W-2 form, the employer must report the individual as a new hire. An employee returning to work who is required to complete a new W-4 form must be reported. If an employee returning to work had not been formally terminated or removed from payroll, there is no need to report the individual as a new hire. An independent contractor also must be reported if the contractor is an individual or sole proprietor and is paid at least $600 or enters into a contract for at least $600.

Report Timeframe. California employers must submit new hire information for employees within 20 days of hiring date. If submitted magnetically or electronically, twice per month, not less than 12 days nor more than 16 days apart.

Information Required. The information required to be reported includes the employee's full name, address, Social Security number, and first day of work, as well as the employer's name, address, and state and federal tax identification numbers.

Form & Submission of Report. The information should be submitted via W-4 form, the form provided by the California Employment Development Department (EDD), Form DE 34 *Report of New Employees*, or any other paper with the required information. Reports may be submitted by first-class mail, online, magnetically, or electronically.

Location to Send Information.

Employment Development Department
P.O. Box 997016 MIC 23
West Sacramento, CA 95799-7016
(916) 657-0529
(916) 319-4400 (fax)
www.edd.ca.gov

[231] HHS offers the form online at http://www.acf.hhs.gov/programs/css/resource/multistate-employer-registration-form-instructions.

[232] CAL. UNEMP. INS. CODE § 1088.5; CAL. CODE REGS. tit. 22, § 1088.5-1.

Multistate Employers. Any employer that transmits reports magnetically or electronically and has employees in two or more states may designate one state to report all new hires. An employer that makes this designation must notify, in writing, the Department of Health and Human Services, Administration for Children and Families, Office of Child Support Enforcement, Multistate Employer Notification.

2.3 Restrictive Covenants, Trade Secrets & Protection of Business Information

2.3(a) *Federal Guidelines on Restrictive Covenants & Trade Secrets*

Restrictive covenants are limitations placed on an employee's conduct that remain in force after the individual's employment has ended. Post-employment restrictions are designed to protect the employer and typically prevent an individual from disclosing the employer's confidential information or soliciting the employer's employees or customers. These restrictions may also prohibit individuals from engaging in competitive employment, including competitive self-employment, for a specific time period after the employment relationship ends. There is no federal law governing these types of restrictive covenants. Therefore, a restrictive covenant's ability to protect an employer's interests is dependent upon applicable state law and the type of relationship or covenant involved.

As a general rule, a covenant restraining competition (referred to as a "noncompete") is more likely to be viewed critically because restraints of trade are generally disfavored. The typical exception to this general rule is a reasonable restraint that has a legitimate business purpose, such as the protection of trade secrets, confidential information, customer relationships, business goodwill, training, or the sale of a business. Notwithstanding, state laws vary widely regarding which of these interests can be protected through a restrictive covenant. Even where states agree on the interest that can be protected, they may vary on what is seen as a reasonable and enforceable provision for such protection.

Protections against trade secret misappropriation are also available to employers. Until 2016, trade secrets were the only form of intellectual property (*i.e.*, copyrights, patents, trademarks) not predominately governed by federal law. However, the Defend Trade Secrets Act of 2016 (DTSA) now provides a federal court civil remedy and original (but not exclusive) jurisdiction in federal court for claims of trade secret misappropriation.[233] As such, the DTSA provides trade secret owners a uniform federal law under which to pursue such claims. The DTSA operates alongside more limited existing protections under the federal Economic Espionage Act of 1996 and the Computer Fraud and Abuse Act, as well as through state laws adopting the Uniform Trade Secrets Act (UTSA).

For more information on these topics, see LITTLER ON PROTECTION OF BUSINESS INFORMATION & RESTRICTIVE COVENANTS.

2.3(b) *State Guidelines on Restrictive Covenants & Trade Secrets*

2.3(b)(i) *State Restrictive Covenant Law*

Noncompetition agreements are unenforceable in California: "[E]very contract by which anyone is restrained from engaging in a lawful profession, trade or business of any kind is to that extent void."[234] This statutory restriction applies to provisions that prohibit an employee from working for a particular time period, geographic area, or for a class of defined competitors. Furthermore, employment agreements that penalize former employees for working for competitors by depriving them of profit

[233] 18 U.S.C. §§ 1832 *et seq.*

[234] CAL. BUS. & PROF. CODE § 16600.

sharing or imposing other penalties are unenforceable pursuant to this statute. The statute codifies a strong public policy against post-employment covenants not to compete in employment contracts.[235]

An employer may also face liability for attempting to enforce a noncompete, as well as for conditioning an employment offer on its execution. If an employer fires or refuses to hire someone because they refuse to sign a noncompete, the employee or prospective employee could recover lost wages, lost benefits, damages for emotional distress, and punitive damages.[236] For example, in *Latona v. Aetna U.S. Healthcare*, a federal trial court found that an employee had been fired for refusing to sign a noncompete agreement containing language violating Business and Professions Code section 16600. Rejecting the employer's argument that section 16600 would not apply unless it attempted to enforce the agreement, the court found that the employee's termination violated the public policy contained in section 16600 and therefore supported an action under the Act.[237]

Moreover, attempting to honor a noncompete may give rise to liability against an employer in light of the public policy against enforcing noncompetes in California. In *Silguero v. Creteguard, Inc*., the plaintiff-employee's former employer contacted the employee's subsequent employer and informed it that the employee had executed a covenant during his employment with the former employer.[238] The subsequent employer terminated the employee out of "'respect and understanding with colleagues in the same industry,' notwithstanding its belief that 'non-compete clauses are not legally enforceable here in California.'"[239] The court held that the employee's complaint stated facts supporting a claim for wrongful termination against the subsequent employer in violation of the public policy prohibiting covenants not to compete. The court noted that the complaint alleged an "understanding" between the subsequent employer and the former employer pursuant to which the subsequent employer would honor the former employer's noncompete. Such an "understanding," the court held, would be void and unenforceable as against public policy because it "'unfairly limit[ed] the mobility of an employee' and because [the former employer] 'should not be allowed to accomplish by indirection that which it cannot accomplish directly.'"[240] Moreover, the court concluded, permitting a wrongful termination claim against the subsequent employer under the circumstances of the case furthered "the interest of employees in their own mobility and betterment."[241]

Effective January 1, 2024, an addition to the Business and Professions Code extends the reach of California's restriction on noncompete agreements to contracts signed out of state. Specifically, Section 16600.5 prohibits employers and former employers from entering into, attempting to enter into, or attempting to enforce, an employment contract that is void under California law, regardless of where and when the contract was signed. The law states that a violation of this provision is a civil violation and

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[235] CAL. BUS. & PROF. CODE §§ 16600 *et seq.*; *see also Edwards v. Arthur Andersen L.L.P.*, 81 Cal. Rptr. 3d 282 (Cal. 2008) (rejecting Ninth Circuit "narrow restraint" exception to section 16600 as contrary to the general prohibition on covenants not to compete in California).

[236] *D'Sa v. Playhut, Inc.*, 102 Cal. Rptr. 2d 495 (Cal. Ct. App. 2000); *Latona v. Aetna U.S. Healthcare Inc*., 82 F. Supp. 2d 1089 (C.D. Cal. 1999).

[237] *Latona*, 82 F. Supp. 2d 1089.

[238] 113 Cal. Rptr. 3d 653 (Cal. Ct. App. 2010).

[239] 113 Cal. Rptr. 3d at 655.

[240] 113 Cal. Rptr. 3d at 661.

[241] 113 Cal. Rptr. 3d at 661.

provides that an employee, former employee, or prospective employee may bring a private action to enforce the law for injunctive relief, actual damages, or both, plus attorneys' fees.[242]

Additionally, **effective January 1, 2024**, another amendment to Cal. Bus. & Prof. Code §§ 16600 provides that California's prohibition against noncompete agreements applies even if the person restricted from engaging in a profession, trade, or business is not a party to the contract. Furthermore, Section 16600.1 states that it is unlawful to include a noncompete clause in employment contracts and requires that employers whose contracts previously included a noncompetition provision must notify all current and former employees employed after January 1, 2022, that these clauses are void. The notification deadline is February 14, 2024.[243]

There are two contexts that represent statutory exceptions to the general rule against enforceability: (1) the termination of ownership interests; and (2) the sale of the good will of a business.[244] Business and Professions Code section 16601 allows enforcement of noncompetes where the contracting party sells or disposes of stock, assets, or other interests in business and transfers goodwill to the buyer. This statute is designed to prevent "such competition [that] would diminish the value of the business which had been purchased."[245] However, the number of shares transferred should constitute a substantial interest in a corporation such that the corporation's goodwill is clearly transferred.[246] In *Bosley Medical Group v. Abramson*, the court denied the enforcement of a noncompete provision that required employees to purchase a small number of shares and then resell them upon termination.[247]

One appellate court found that stock repurchases containing no additional compensation for goodwill are not covered by the express language of Business and Professions Code section 16601.[248] This interpretation may limit an employer's ability to tie noncompetition language to relatively small employee stock repurchases as opposed to the purchase of all or much of an existing business. Restrictive covenants found in stock purchase agreements, which run from the date of closing, are likely to be given less scrutiny than restrictive covenants found in employment agreements that run from the date of termination.[249]

Section 16602 of the Business and Professions Code allows the enforcement of covenants not to compete in agreements for dissolution of partnerships. In *South Bay Radiology Medical Associates v. Asher*, the court considered the enforceability of a restrictive covenant in a partnership agreement when one of the partners was withdrawing. The court specifically held that the withdrawal from the partnership was a

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[242] CAL. BUS. & PROF. CODE § 16600.5, as amended by S.B. 699 (Cal. 2023).

[243] CAL. BUS. & PROF. CODE § 16600.1, as amended by S.B. 1076 (Cal. 2023).

[244] CAL. BUS. & PROF. CODE §§ 16601-16602.5.

[245] *Vacco Indus., Inc. v. Van Den Berg*, 6 Cal. Rptr. 2d 602, 609 (Cal. Ct. App. 1992). *See also Samuelian v. Life Generations Healthcare, LLC*, 2024 WL 3878448 (Cal. Ct. App. Aug. 20, 2024) (holding that a noncompetition agreement may be enforceable under a reasonableness standard following the *partial* sale of a business, where the party to be restricted remains a part owner of the company).

[246] *See Bosley Med. Grp. v. Abramson*, 207 Cal. Rptr. 477, 481 (Cal. Ct. App. 1984).

[247] 207 Cal. Rptr. 477.

[248] *Hill Med. Corp. v. Wycoff*, 103 Cal. Rptr. 2d 779 (Cal. Ct. App. 2001).

[249] *Fillpoint, L.L.C. v. Maas*, 146 Cal. Rptr. 3d 194 (Cal. Ct. App. 2012).

dissolution that brought the agreement within the exception of section 16602.[250] Section 16602 has long been relied upon to enforce noncompetes in professional partnership agreements.[251]

Trade Secrets. There has been extensive litigation in both California federal and state courts as to whether a judicially-created trade secrets exception applies to section 16600. Federal courts have more consistently recognized this exception than California state courts. The Supreme Court of California has not specifically invalidated this exception, however.[252]

Duty of Loyalty. In addition, an agreement not to compete *during* employment may be enforceable. An agreement not to engage in competitive activity by a current employee will not run afoul of the prohibition against noncompetes, in light of the overriding consideration of an employee's duty of loyalty and confidentiality to an employer.[253] Specifically, the duty of loyalty is codified in the California labor code.[254] During the term of employment, an employer is entitled to its employee's undivided loyalty.[255]

The duty of loyalty places obligations on the employee, including the duty to refrain from competing with the employer and from taking action on behalf of or otherwise assisting the employer's competitors. An employee must not acquire a material benefit from a third party in exchange for actions taken by the employee through the employee's position.[256]

California federal courts have debated whether the duty of loyalty applies only to managerial or other employees who owe their employer a fiduciary obligation, or whether it applies more broadly.[257] The majority of federal courts facing this question have concluded that the state courts, consistent with prior

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[250] *South Bay Radiology Med. Assocs. v. Asher*, 269 Cal. Rptr. 15 (Cal. Ct. App. 1990).

[251] *Howard v. Babcock*, 25 Cal. Rptr. 2d 80 (Cal. 1993) (attorneys); *Swenson v. File*, 90 Cal. Rptr. 580 (Cal. 1970) (accountants); *Farthing v. San Mateo Clinic*, 299 P.2d 977 (Cal. Ct. App. 1956) (physicians).

[252] A summary of a few select cases follows; though numerous more exist. The following cases support the existence of a trade secret exception: *Muggill v. Reuben H. Donnelley Corp.*, 398 P.2d 147, 149 (Cal. 1965) (noting that an exception to section 16600 exists where necessary to protect trade secrets, though trade secrets were not specifically at issue in the case); *see also Thompson v. Impaxx, Inc.*, 7 Cal. Rptr. 3d 427 (Cal. Ct. App. 2003); *Gatan, Inc. v. Nion Company*, 2017 WL 1196819 (N.D. Cal. March 31, 2017) (noting generally that agreements necessary to protect trade secrets do not violate section 16600, but finding that a trade secret exception would not even apply because the contract provision was not necessary to protect trade secrets). *But see The Retirement Group v. Galante*, 98 Cal. Rptr. 3d 585 (Cal. Ct. App. 2009) and *Dowell v. Biosense Webster, Inc.*, 102 Cal. Rptr. 3d 1, 10-11 (Cal. Ct. App. 2009) (holding that section 16600 voids noncompete clause that, among other things, prohibited employee from using confidential information to render services toward a competing product, but not specifically reaching the issue of whether the common law trade secret exception is still valid).

[253] *Bancroft-Whitney Co. v. Glen*, 49 Cal. Rptr. 825, 839 n.10 (Cal. 1966) (quoting Restatement (2d) of Agency § 393, cmt. e).

[254] CAL. LAB. CODE § 2863.

[255] *Barney v. Burrow*, 558 F. Supp. 2d 1066 (E.D. Cal. 2008).

[256] *Huong Que, Inc. v. Luu*, 58 Cal. Rptr. 3d 527 (Cal. Ct. App. 2007).

[257] *Compare Mattel, Inc. v. MGA Entm't, Inc.*, 782 F. Supp. 2d 911, 952 (C.D. Cal. 2011) (holding there is no separate tort for duty of loyalty), *with E.D.C Techs., Inc. v. Seidel*, 216 F. Supp. 3d 1012 (N.D. Cal. 2016) (rejecting claim that only managerial employees owe a duty of loyalty, *and Zayo Grp. L.L.C. v. Hisa*, 2013 WL 12201401 (C.D. Cal. Sept. 17, 2013) (rejecting the distinction for these purposes between managerial and lower-level staff), *and Otsuka v Polo Ralph Lauren Co.*, 2007 WL 3342721, at *3, (N.D. Cal. Nov. 9, 2007) (reasoning that the California state courts would "recognize that a lower-level employee, such as a sales clerk or a laborer, owes a duty of loyalty to his employer").

precedent and the applicable restatement, would not draw any distinction.[258] Accordingly, it appears that the duty of loyalty applies to all employees, regardless of their position. Moreover, a cause of action for breach of the duty of loyalty is separate from a claim for breach of fiduciary duty, despite their similarities.[259]

Nonsolicitation Covenants. California courts have found that employee non-solicitation clauses are unenforceable under California law.[260] California does not permit "no-hire" arrangements between employers. No-hire agreements are likely to be construed as unlawful restraints upon trade and can expose employers to claims for unlawful hiring practices.[261] Customer nonsolicitation clauses are void and unenforceable unless it is shown that the employer possesses legitimate trade secrets that it is attempting to protect through the use of the restrictive clause.[262]

Enforceability Following Employee Discharge. In California, noncompetes following discharge are only enforceable under the same narrow statutory guidelines as general noncompetition agreements.[263]

2.3(b)(ii) *Consideration for a Noncompete*

Restrictive covenants require an employee to promise not to do something the employee would otherwise have been able to do. For example, by signing a noncompete agreement, an employee is giving up the right to open a competing business or work for an employer in a competing business. Therefore, employers need to provide an employee with "consideration" in return for the agreement to be binding.

In California, there is no case law on point addressing the consideration issue, as most noncompetition agreements are unenforceable under California law regardless of the consideration. Providing consideration means giving something of value—*i.e.*, a promise to do something that the employer was not otherwise obligated to do—such as extending an offer of employment to a new employee or providing a bonus for an existing employee.

2.3(b)(iii) *Ability to Modify or Blue Pencil a Noncompete*

When a restrictive covenant is found to be unreasonable in scope, some states refuse to enforce its terms entirely (sometimes referred to as the "all-or-nothing" rule), while others may permit the court to "blue pencil" or modify an agreement that is unenforceable as written. *Blue penciling* refers to the practice whereby a court strikes portions of a restrictive covenant it deems unenforceable. *Reformation*, on the other hand, refers to a court modifying a restrictive covenant to make it enforceable, which may include introducing new terms into the agreement (sometimes referred to as the "reasonableness" rule). By rewriting an overly broad restrictive covenant rather than simply deeming it unenforceable, courts attempt to effectuate the parties' intentions as demonstrated by their agreement to enter into a restrictive covenant in the first place.

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[258] *See, e.g.*, *Les Fields/C.C.H.I. Ins. Servs. v. Hines*, 2016 WL 6873459 (N.D. Cal. Nov. 22, 2016); *Integral Dev. Corp. v. Tolat*, 2013 WL 5781581 (N.D. Cal. Oct. 25, 2013).

[259] *Les Fields/C.C.H.I. Ins. Servs.*, 2016 WL 6873459, at **14-15.

[260] *Barker v. Insight Global*, 2019 WL 176260 (N.D. Cal. Jan. 11, 2019).

[261] *Silguero v. Creteguard, Inc.*, 113 Cal. Rptr. 3d 653, 658-59 (Cal. Ct. App. 2010).

[262] *Thompson v. Impaxx, Inc.*, 7 Cal. Rptr. 3d 427 (Cal. Ct. App. 2003).

[263] CAL. BUS. & PROF. CODE §§ 16600 *et seq.*; *see also Vacco Indus., Inc. v. Van Den Berg*, 6 Cal Rptr 2d 602 (Cal. Ct. App. 1992).

California courts have "blue penciled" noncompetition covenants with overbroad provisions, but will not strike a new bargain for the parties for the purposes of saving an illegal contract.[264] California courts will likely render specific offensive provisions void rather than render the parties' entire agreement enforceable.[265]

In California, courts will not reform a covenant that is illegal and void under the statute.[266] This is true even if the contract has a savings clause allowing the court to reform the covenant as written,[267] or language "severing" any terms found to be unlawful.[268]

2.3(b)(iv) *State Trade Secret Law*

As previously stated, noncompete agreements are unenforceable in California, except where necessary to protect an employer's trade secrets.[269]

Definition of a Trade Secret. In 1984, California adopted the Uniform Trade Secrets Act (UTSA),[270] which provides a statutory definition of "trade secret" and "misappropriation." Under the UTSA, California Civil Code section 3426.1(d), a *trade secret* is defined as:

> [I]nformation, including a formula, pattern, compilation, program, device, method, technique, or process, that:
>
> 1. Derives independent economic value, actual or potential, form not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and
> 2. The subject of efforts are reasonable under the circumstances to maintain its secrecy.

This definition covers economically valuable information that is not generally known to competitors. The statute protects not only actual secret valuable information, but also information that may be of potential value to the holder. The concept of a trade secret also includes information that has negative value (*e.g.*, the results of research that prove that a certain process will not work). A competitive advantage is one that can be gained by cutting short a process to compile and gather data. With respect to having independent economic value, "[t]he [competitor] who can satisfactorily and expeditiously complete this

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[264] *Strategix, Ltd. v. Infocrossing West, Inc.*, 48 Cal. Rptr. 3d 614, 617 (Cal. Ct. App. 2006); *but see Rebecca Bamberger Works, LLC v. Bamberger*, 2024 WL 2805323, at *17 & n.16 (S.D. Cal. May 31, 2024) (declining to follow *Strategix* and finding that the court would likely reform rather than invalidate the overbroad agreement at issue, which was executed in connection with the sale of the goodwill of a business).

[265] *Thomas Weisel Partners L.L.C. v. BNP Paribas*, 2010 WL 546497, at *6 (N.D. Cal. Feb. 10, 2010).

[266] *Applied Materials, Inc. v. Advanced Micro-Fabrication Equip. Co.*, 630 F. Supp. 2d. 1084, 1090-91 (N.D. Cal. 2009).

[267] *Kolani v. Gluska*, 75 Cal. Rptr. 2d 257, 260 (Cal. Ct. App. 1998).

[268] *Dowell v. Biosense Webster, Inc.*, 102 Cal Rptr. 3d 1, 12 (Cal. Ct. App. 2009); *D'Sa v. Playhut, Inc.*, 102 Cal. Rptr. 2d 495 (Cal. Ct. App. 2000).

[269] CAL. BUS. & PROF. CODE § 16600; *see also Edwards v. Arthur Andersen L.L.P.*, 81 Cal. Rptr. 3d 282 (Cal. 2008).

[270] CAL. CIV. CODE §§ 3426–3426.11.

time-consuming process has a distinct advantage over competitors."[271] "The advantage 'need not be great,' but must be 'more than trivial.'"[272]

Where an employer's customers are known to the competitors as potential customers, the employer's customer list may not be a trade secret under California law.[273] For example, if a company sells a product or service that is widely used by an easily identifiable and finite set of consumers, then it is unlikely that a court would afford that information trade secret protection. Likewise, a customer's preference in working with a particular employee in a personal service industry may not be a trade secret belonging to the employer.[274] However, several cases have concluded that in some circumstances customer lists can be protected under the UTSA.

In an important case concerning customer lists, *ABBA Rubber Co. v. Seaquist*, a California appellate court discussed the nature and characteristics of customer information that is not generally known by competitors.[275] The court explained that a customer list has competitive value if the names on the list are not generally known to competitors to be purchasers of particular products. Under such circumstances, that information is valuable to competitors because it indicates to them who would purchase the product, a fact previously unknown to them. Importantly, the court explained that whether information could be "readily ascertainable" by competitors is completely irrelevant to California's definition of a trade secret.[276] The court explained that California's legislature deleted from the definition of a trade secret language that it could be "readily ascertainable by proper means."[277]

The statute also requires that reasonable efforts be made to maintain the secrecy of the information. The level of protection needed depends upon the nature of the industry and the type of trade secret. The California Senate specifically commented that efforts needed to maintain secrecy include: advising employees of the existence of a trade secret; limiting access on a need-to-know basis; and controlling access.[278] The standard for secrecy is reasonableness; the statute does not require extreme and unduly expensive procedures to protect the secret. Moreover, controlled disclosures to employees will not destroy the protected status of the secret.

Misappropriation of a Trade Secret. Even if a protected trade secret exists, there is no liability under the California UTSA unless the trade secret has been misappropriated. Under the UTSA, there are two types of misappropriation:

1. acquisition by improper means; and
2. unauthorized use and disclosure of a trade secret.

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[271] *San Jose Constr., Inc. v. S.B.C.C., Inc.*, 67 Cal. Rptr. 3d 54, 63 (Cal. Ct. App. 2007).

[272] *Yield Dynamics, Inc. v. Tea Sys. Corp.*, 66 Cal. Rptr. 3d 1, 18 (Cal. Ct. App. 2007) (citation omitted).

[273] *American Credit Indem. Co. v. Sacks*, 262 Cal. Rptr. 92 (Cal. Ct. App. 1989).

[274] *Metro Traffic Control, Inc. v. Shadow Traffic Network*, 27 Cal. Rptr. 2d 573 (Cal. Ct. App. 1994).

[275] 286 Cal. Rptr. 518, 526-29 (Cal. Ct. App. 1991).

[276] 286 Cal. Rptr. at 528-29.

[277] 286 Cal. Rptr. at 529 n.9.

[278] LEGISLATIVE COMM. CMT., 84 Cal. Sen. J. 13883, 13885 (1984).

Under the UTSA, *improper means* includes theft, bribery, espionage, and the breach of a duty to maintain secrecy.[279] The UTSA may protect innocent employers that did not know or suspect that one of their employees had acquired a trade secret. One case found that "[a]n 'acquirer' is not liable under the UTSA unless he knew or *had reason to know* that the trade secret was improperly disclosed."[280] However, another case has held that mere possession of a trade secret can be a basis for liability under the UTSA.[281]

The definition of *misappropriation* includes "disclosure" or "use" of a trade secret without express or implied consent by one who:

1. used improper means to acquire the knowledge of the trade secret; or
2. knew or had reason to know that their knowledge of the secret was derived from a person who had utilized improper means to acquire it, acquired it under circumstances giving rise to a duty to maintain its secrecy or limit its use, or derived from or through a person who owed a duty to the one seeking relief to maintain its secrecy of limit its use; or
3. before a material change of their position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.[282]

For use or disclosure claims, it is a common misperception that a wrongdoer must abscond with a physical document or somehow electronically transfer trade secret information for the statute to take effect. The UTSA certainly applies to documents and electronic information, but "to afford protection to the employer, the information need not be in writing but may be in the employee's memory."[283]

2.3(b)(v) *State Guidelines on Employee Inventions & Ideas*

Labor Code sections 2870 through 2872 address the issues of intellectual property ownership in the workplace. Pursuant to these provisions, intellectual property assignment agreements must meet specific requirements. California Labor Code section 2870 limits when an employment agreement can contain a provision assigning an employee's invention rights to an employer. Employees must be notified that the agreement does not apply, and the employee need not assign invention rights to inventions:

- for which no property of the employer was used;
- that were developed entirely on the employee's own time;
- that do not relate to the business, research, or development of the employer; or
- that do not result from any work performed by the employer.

An employer may also require an employee to disclose their inventions during their employment provided the employer keeps these disclosures in confidence.[284]

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[279] CAL. CIV. CODE § 3426.1(a).

[280] *Ajaxo Inc. v. E*Trade Grp. Inc.*, 37 Cal. Rptr. 3d 221, 256 (Cal. Ct. App. 2005) (emphasis in original, citation omitted).

[281] *San Jose Constr., Inc. v. S.B.C.C., Inc*., 67 Cal. Rptr. 3d 54, 67-68 (Cal. Ct. App. 2007).

[282] CAL. CIV. CODE § 3426.1.

[283] *Morlife, Inc. v. Perry*, 66 Cal. Rptr. 2d 731, 736 (Cal. Ct. App. 1997) (citation omitted).

[284] CAL. LAB. CODE § 2871.

Alternatively, the employer's ownership rights may arise out of the so-called shop-right doctrine. The *shop-right doctrine* was defined as follows:

> Where an employee (1) during his hours of employment, (2) working with his employer's materials and appliances, (3) conceives and (4) perfects an invention for which he obtains a patent, he must accord his employer a nonexclusive right to practice the invention.[285]

California courts have defined the employer rights as follows: "While one who discovers a new principle or improvement in a machine or other device is not deprived of that discovery because he employs others to perfect the details, this is true so long as such improvements do not depart from the original principle and purpose of the employer."[286]

3. DURING EMPLOYMENT

3.1 Posting, Notice & Record-Keeping Requirements

3.1(a) *Posting & Notification Requirements*

3.1(a)(i) *Federal Guidelines on Posting & Notification Requirements*

Several federal employment laws require that specific information be posted in the workplace. Posting requirements vary depending upon the law at issue. For example, employers with fewer than 50 employees are not covered by the Family and Medical Leave Act and, therefore, would not be subject to the law's posting requirements. Table 5 details the federal workplace posting and notice requirements.

Table 5. Federal Posting & Notice Requirements

Poster or Notice	Notes
Employee Polygraph Protection Act (EPPA)	Employers must post and keep posted on their premises a notice explaining the EPPA.[287]
Equal Employment Opportunity (EEO) Act ("EEO is the Law" Poster)	Employers must post and keep posted in conspicuous places upon their premises, in an accessible format, a notice that describes the federal laws prohibiting discrimination in employment.[288]
Fair Labor Standards Act (FLSA)	Employers must post and keep posted a notice, summarizing employee rights under the FLSA, in conspicuous places in every establishment where employees subject to the FLSA are employed.[289]

[285] *Banner Metals, Inc. v. Lockwood*, 3 Cal. Rptr. 421, 432 (Cal. Ct. App. 1960).

[286] 3 Cal. Rptr. at 431.

[287] 29 C.F.R. § 801.6. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/eppa.htm.

[288] 29 C.F.R. §§ 1601.30 (Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act), 1627.10 (Age Discrimination in Employment Act). This poster is available in English, Spanish, Arabic, and Chinese at https://www1.eeoc.gov/employers/poster.cfm.

[289] 29 C.F.R. § 516.4. This poster is available in English, Spanish, Chinese, Russian, Thai, Hmong, Vietnamese, Korean, Polish, and Haitian Creole at http://www.dol.gov/whd/regs/compliance/posters/flsa.htm.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
Family & Medical Leave Act (FMLA)	Employers must conspicuously post, where employees are employed, a notice explaining the FMLA's provisions and providing information on filing complaints of violations.[290]
Migrant and Seasonal Agricultural Worker Protection Act (MSPA)	Farm labor contractors, agricultural employers, and agricultural associations that employ or house any migrant or seasonal agricultural worker must conspicuously post at the place of employment a poster setting forth the MSPA's rights and protections, including the right to request a written statement of the information described in 29 U.S.C. § 1821(a). The poster must be provided in Spanish or other language common to migrant or seasonal agricultural workers who are not fluent or literate in English.[291]
Notice to Workers with Disabilities/Special Minimum Wage Poster	Employers of workers with disabilities under special minimum wage certificates must at all times display and make available to employees a poster explaining the conditions under which the special wage rate applies. Where an employer finds it inappropriate to post notice, directly providing the poster to its employees is sufficient.[292]
Occupational Safety and Health Act ("the Fed-OSH Act")	Employers must post a notice or notices informing employees of the Fed-OSH Act's protections and obligations, and that for assistance and information employees should contact the employer or nearest U.S. Department of Labor office.[293]
Uniformed Service Employment and Reemployment Rights Act (USERRA)	Employers must provide notice about USERRA's rights, benefits, and obligations to all individuals entitled to such rights and benefits. Employers may provide notice by posting or by other means, such as by distributing or mailing the notice.[294]
In addition to the federal posters required for all employers, government contractors may be required to post the following posters.	
"EEO is the Law" Poster with the EEO is the Law Supplement	Employers subject to Executive Order No. 11246 must prominently post notice, where it can be readily seen by employees and applicants, explaining that discrimination in employment is prohibited on

[290] 29 C.F.R. § 825.300. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/fmla.htm.

[291] 29 C.F.R. §§ 500.75, 500.76. This poster is available in English, Spanish, Haitian Creole, Vietnamese, and Hmong at http://www.dol.gov/whd/regs/compliance/posters/mspaensp.htm.

[292] 29 C.F.R. § 525.14. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/disab.htm.

[293] 29 C.F.R § 1903.2. This poster is available in English, Spanish, Arabic, Chinese, Russian, Nepali, Thai, Hmong, Vietnamese, Korean, Polish, Portuguese, and Haitian Creole at https://www.osha.gov/Publications/poster.html.

[294] 20 C.F.R. app. § 1002. This poster is available at http://www.dol.gov/vets/programs/userra/poster.htm.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
	numerous grounds.[295] The second page includes reference to government contractors.
Annual EEO, Affirmative Action Statement	Government contractors covered by the Affirmative Action Program (AAP) requirements are required to post a separate EEO/AA Policy Statement (in addition to the required "EEO is the Law" Poster), which indicates the support of the employer's top U.S. official. This statement should be reaffirmed annually with the employer's AAP.[296]
Employee Rights Under the Davis-Bacon Act Poster	Employers performing work covered by the labor standards of the Davis-Bacon and Related Acts must prominently post notice, where accessible to employees, summarizing the protections of the law.[297]
Employee Rights Under the Service Contract or Walsh-Healey Public Contracts Acts Poster	Employers performing work covered by the McNamara-O'Hara Service Contract Act ("Service Contract Act") or the Walsh-Healey Public Contracts Act ("Walsh-Healey Act") must prominently post notice, where accessible to employees, summarizing all required compensation and other entitlements. To comply, employers may notify employees by attaching a notice to the contract, or may post the notice at the worksite.[298]
E-Verify Participation & Right to Work Posters	The Department of Homeland Security requires certain government contractors, under Executive Order Nos. 12989, 13286, and 13465, to post notice informing current and prospective employees of their rights and protections. Notices must be posted in a prominent place that is visible to prospective employees and all employees who are verified through the system.[299]
Notice to Workers with Disabilities/Special Minimum Wage Poster	Employers of workers with disabilities under special minimum wage certificates authorized by the Service Contract Act or the Walsh-Healey Public Contracts Act must post notice, explaining the conditions under which the special minimum wages may be paid. Where an employer

[295] 41 C.F.R. § 60-1.42; *see also* 41 C.F.R. § 60-741.5(a) (requiring all agencies and contractors to include an equal opportunity clause in contracts, in which the contractor agrees to post this notice). This poster is available at https://www.dol.gov/ofccp/regs/compliance/posters/ofccpost.htm.

[296] 41 C.F.R. §§ 60-300.44, 60-741.44.

[297] 29 C.F.R. § 5.5(a)(l)(i). This poster is available at https://www.dol.gov/whd/regs/compliance/posters/davis.htm.

[298] 29 C.F.R. § 4.6(e); 29 C.F.R. § 4.184. This poster is available at https://www.dol.gov/whd/regs/compliance/posters/sca.htm.

[299] U.S. Citizenship and Immigration Servs., Dep't of Homeland Sec., *E-Verify Memorandum of Understanding for Employers*, *available at* https://www.e-verify.gov/sites/default/files/everify/memos/MOUforEVerifyEmployer.pdf. The poster is available at https://preview.e-verify.gov/sites/default/files/everify/posters/IER_RightToWorkPoster%20Eng_Es.pdf. According to the U.S. Citizenship and Immigration Services, this poster must be displayed in English and Spanish.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
	finds it inappropriate to post this notice, directly providing the poster to its employees is sufficient.[300]
Notification of Employee Rights Under Federal Labor Laws	Government contractors are required under Executive Order No. 13496 to post this notice in conspicuous locations and, if the employer posts notices to employees electronically, it must also make this poster available where it customarily places other electronic notices to employees about their jobs. Electronic posting cannot be used as a substitute for physical posting. Where a significant portion of the workforce is not proficient in English, the notice must be provided in the languages spoken by employees.[301]
Office of the Inspector General's Fraud Hotline Poster	Certain government contractors must prominently post notice, where accessible to employees, addressing fraud and how to report such misconduct.[302]
Paid Sick Leave Under Executive Order No. 13706	Certain government contractors must prominently post notice, where accessible to employees at the worksite, informing employees of their right to earn and use paid sick leave. Notice may be provided electronically if customary to the employer.[303] **Pay Period or Monthly Notice.** A contractor must inform an employee in writing of the amount of accrued paid sick leave no less than once each pay period or each month, whichever is shorter. Additionally, this information must be provided when employment ends and when an employee's accrued but unused paid sick leave is reinstated. Providing these notifications via a pay stub meets the compliance requirements of the executive order. **Pay Stub / Electronic.** A contractor's existing procedure for informing employees of available leave, such as notification accompanying each paycheck or an online system an employee can check at any time, may be used to satisfy or partially satisfy these requirements if it is written (including electronically, if the contractor customarily corresponds with or makes information available to its employees by electronic means).[304]

[300] 29 C.F.R. § 525.14. This poster is available at https://www.dol.gov/whd/regs/compliance/posters/disab.htm.

[301] 29 C.F.R. § 471.2. This poster is available at https://www.dol.gov/olms/regs/compliance/EO13496.htm.

[302] 48 C.F.R. §§ 3.1000 *et seq*. This poster is available at https://oig.hhs.gov/documents/root/243/OIG_Hotline_Ops_Poster_-_Grant__Contract_Fraud.pdf.

[303] 29 C.F.R. § 13.26. This poster is available at https://www.dol.gov/whd/govcontracts/eo13706/index.htm. Additional resources on the sick leave requirement are available at https://www.dol.gov/whd/govcontracts/eo13706/index.htm.

[304] 29 C.F.R. § 13.5.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
Pay Transparency Nondiscrimination Provision	Employers covered by Executive Order No. 11246 must either post a copy of this nondiscrimination provision in conspicuous places available to employees and applicants for employment, or post the provision electronically. Additionally, employers must distribute the nondiscrimination provision to their employees by incorporating it into their existing handbooks or manuals.[305]
Worker Rights Under Executive Order Nos. 13658 (contracts entered into on or after January 1, 2015), 14026 (contracts entered into on or after January 30, 2022)	Employers that contract with the federal government under Executive Order Nos. 13658 or 14026 must prominently post notice, where accessible to employees, summarizing the applicable minimum wage rate and other required information.[306]

3.1(a)(ii) *State Guidelines on Posting & Notification Requirements*

Table 6 details the state workplace posting and notice requirements. While local ordinances are generally excluded from this publication, some local ordinances may have posting requirements, especially in the minimum wage or paid leave areas. Local posting requirements may be discussed in the table below or in later sections, but the local ordinance coverage is not comprehensive.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
Benefits & Leave: Family Rights Leave	Employers covered by the state's family and medical leave law, the California Family Rights Act (CFRA), (*i.e.*, employers with five or more employees) must conspicuously post this notice, which summarizes employee rights to leave under the CFRA as well as to leave for a pregnancy-related disability. Employers with a workforce of more than 10% non-English speaking employees must also post in the appropriate foreign language.[307]

[305] 41 C.F.R. § 60-1.35(c). This poster is available at https://www.dol.gov/agencies/ofccp/posters.

[306] 29 C.F.R. §§ 10.29, 23.290. The poster, referencing both Executive Orders, is available at https://www.dol.gov/whd/regs/compliance/posters/mw-contractors.htm.

[307] CAL. CODE REGS. tit. 2, §§ 11049, 11095. This poster is available in English at https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2023/01/CFRA-and-Pregnancy-Leave_ENG.pdf. It is also available in Chinese, Korean, Spanish, Tagalog, and Vietnamese, at https://calcivilrights.ca.gov/family-medical-pregnancy-leave/.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
Benefits & Leave: Paid Sick Leave	All employers must post notice informing employees about their rights and obligations under the California statewide paid sick leave law.[308]
Benefits & Leave: Pregnancy Disability Leave	Employers covered by the state's pregnancy disability leave law (*i.e.*, employers with five or more employees) must conspicuously post this notice, which summarizes the rights and obligations of pregnant employees. Employers with a workforce of more than 10% non-English speaking employees must also post in the appropriate foreign language. In addition, employers should make reasonable efforts to give either verbal or written notice to any pregnant employee who is not proficient in English or in any language in which notice has been posted.[309]
Benefits & Leave: Time Off To Vote Poster	No less than 10 days prior to any statewide election, all employers must conspicuously post notice informing employees of their right to take time off for voting purposes and related topics.[310]
Child Labor: Agriculture	Farms that employ, as agricultural labor, any parent or guardian having minor children in such person's immediate care and custody must post an additional notice. The notice must state that minor children are not allowed to work upon the premises unless legally permitted and unless permits to work have been secured. All such notices must be printed in both English and Spanish.[311]
Fair Employment Practices: Discrimination & Harassment Are Prohibited	All employers must conspicuously post this notice, which summarizes various state laws prohibiting forms of discrimination and harassment in employment. Employers with a workforce of more than 10% non-English speaking employees must also post in the appropriate foreign language.[312]
Fair Employment Practices: Local Ordinances	As discussed in **3.11(a)(v)**, numerous cities and counties in California, have adopted local fair employment practices ordinances. Some of

[308] CAL. LAB. CODE § 247. This poster is available at https://www.dir.ca.gov/dlse/publications/paid_sick_days_poster_template_(11_2014).pdf.

[309] CAL. CODE REGS. tit. 2, §§ 11049, 11096. This poster is available in English at https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2023/01/Your-Rights-and-Obligations-as-a-Pregnant-Employee_ENG.pdf and in various other languages at https://calcivilrights.ca.gov/family-medical-pregnancy-leave/.

[310] CAL. ELEC. CODE § 14001. This poster is available in English at http://elections.cdn.sos.ca.gov//pdfs/tov-english.pdf. It is also available in Spanish, Chinese, Hindi, Japanese, Khmer, Korean, Tagalog, Thai, and Vietnamese at http://www.sos.ca.gov/elections/time-vote-notices/.

[311] CAL. EDUC. CODE § 49140; *see also* CAL. LAB. CODE § 1393 (concerning applications for exemptions to employ minors in agricultural packing plants).

[312] CAL. GOV'T CODE § 12950; CAL. CODE REGS. tit. 2, § 11013. This poster is available in English https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2023/01/Workplace-Discrimination-Poster_ENG.pdf and in Spanish, Chinese, Korean, Tagalog, and Vietnamese at https://calcivilrights.ca.gov/posters/.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
	these ordinances include a posting requirement. Employers should consult the relevant local ordinances for further details.
Fair Employment Practices: Transgender Rights	All employers must post a poster regarding transgender rights in a prominent and accessible location in the workplace.[313]
Farm Labor Contractors	Licensed farm labor contractors must post notice prominently, at the worksite where work is performed and on all vehicles, informing employees of the applicable pay rates. Notice must be at least 12 inches high and 10 inches wide and must be written in English and Spanish.[314]
Human Trafficking Hotline	Certain employers are required to post notice concerning human trafficking and related hotlines. Notice is required for on-sale public premises licensees under the Alcoholic Beverage Control Act, adult or sexually-oriented businesses, airports, intercity passenger rail or light rail stations, bus stations, truck stops, emergency rooms, urgent care centers, pediatric care centers, farm labor contractors, job recruitment centers, roadside rest areas, certain businesses that offer massage or bodywork services for compensation, hotels, motels, bed and breakfast inns, hair, nail, electrolysis, skin care, and other related businesses. Notice must be posted in English, Spanish, and in one other language that is the most widely spoken language in the county where the establishment is located and for which translation is mandated by the federal Voting Rights Act. An establishment in a county where a language other than English or Spanish is the most widely spoken language need not print the notice in more than one language in addition to English and Spanish.[315]
Immigration Agency Inspection Notice	Employers are required to post notice when they receive notice of any inspections of I-9 Employment Eligibility Verification forms or other employment records to be conducted by an immigration agency. The notice must be posted within 72 hours of receiving the notice of inspection.[316]
Income Tax: Notification of VITA,	Employers that provide unemployment insurance to employees are required to notify all of their employees of the federal and state Earned

[313] CAL. GOV'T CODE § 12950. The poster is available in English, Chinese, and Korean at https://calcivilrights.ca.gov/posters/.

[314] CAL. LAB. CODE § 1695. A sample notice is provided for reference at http://www.dir.ca.gov/dlse/DLSE-445.pdf, but it may not be large enough to satisfy the posting requirement.

[315] CAL. CIV. CODE § 52.6. This poster is available in English, Spanish, Traditional Chinese, Simplified Chinese, Tagalog, Vietnamese, Hindi, Japanese, Korean, Khmer, and Thai at http://oag.ca.gov/human-trafficking/sb1193/counties. The website also indicates which posters are relevant to which counties.

[316] CAL. LAB. CODE § 90.2.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
CalFile, and EITC eligibility	Income Tax Credits (EITCs). An employer must notify all employees that they may be eligible for VITA, CalFile, and state and federal antipoverty tax credits, including the federal and the California EITC, within one week before or after, or at the same time, that the employer provides an annual wage summary, including, but not limited to, a Form W-2 or a Form 1099, to any employee. The employer must provide the notifications by handing them directly to the employee or mailing them to the employee's last known address. An employer must send a second notification to all employees during the month of March of the same year in which the employer notified employees above. This notice may be sent electronically. *Posting a notice does not satisfy the requirements of this law.*[317]
Public Works Contracts	Employers involved in public works contracts must post, at each jobsite, a notice informing employees about the prevailing wage rate.[318]
Unemployment Compensation: Notice to Employees Concerning Unemployment Benefits and/or Disability Benefits	Employers must use one of two forms to satisfy this posting requirement concerning employee rights to unemployment compensation. Employers subject only to the unemployment law use Form DE 1857D.[319] Employers with employees covered by the unemployment insurance law and the disability insurance law must use Form DE 1857A.[320]
Wage & Hour Documents: Local Minimum Wage Ordinances	As discussed in **3.3(b)(v)**, numerous cities and counties in California, including Los Angeles and San Francisco, have adopted minimum wage ordinances. Most of these ordinances include a posting requirement. Employers should consult the relevant local ordinances for further details.
Wage & Hour Documents: Local Paid Sick Leave Ordinances	As discussed in **3.9(b)(iv)**, numerous cities, including Los Angeles, San Diego, and San Francisco, have adopted paid sick leave ordinances. California employers should consult the relevant local ordinances for further information and details about any posting requirements.

[317] CAL. REV. & TAX CODE §§ 19851 to 19854. The language of the required notice can be found at section 19854.

[318] CAL. LAB. CODE § 1773.2. Additional information is available at http://www.dir.ca.gov/oprl/DPreWageDetermination.htm.

[319] CAL. UNEMP. INS. CODE § 2706; CAL. CODE REGS. tit. 22, § 1089-1. This poster is available at http://www.edd.ca.gov/pdf_pub_ctr/de1857d.pdf. It is also available in Spanish at http://www.edd.ca.gov/pdf_pub_ctr/de1857ds.pdf.

[320] CAL. UNEMP. INS. CODE § 2706; CAL. CODE REGS. tit. 22, § 1089-1. This poster is available at http://www.edd.ca.gov/pdf_pub_ctr/de1857a.pdf. It is also available in Spanish, Chinese, and Vietnamese at http://www.edd.ca.gov/Unemployment/Forms_and_Publications.htm.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
Wages, Hours & Payroll: Local Predictive Scheduling Ordinances	Certain cities— Berkeley, Emeryville, San Francisco, San Jose, and Los Angeles (and Los Angeles County, effective July 1, 2025)—have adopted predictive scheduling ordinances, which may carry their own poster or notice requirements. See **3.5(c)** for additional details.
Wages, Hours & Payroll: Minimum Wage Order	All employers must post notice annually, informing employees of the state minimum wages, meal and lodging credits, and other information.[321]
Wages, Hours & Payroll: Payday Notice	All employers must post notice informing employees of the designated regular paydays and the time and place of payment. Employers may use a template provided by the state or may prepare their own forms if compliant and understandable.[322]
Wages, Hours & Payroll: Wage Order	All employers must post a copy of the wage order(s) applicable to their establishment or industry.[323] The Department of Industrial Relations maintains a reference list on its website for employees to identify and download the appropriate wage order.[324]
Website Privacy Policy	An operator of a commercial website or online service that collects personally identifiable information through the internet about individual consumers residing in California must post a privacy policy on its website.[325]
Whistleblower Protection Notice	All employers must prominently post notice, in at least 14-type font, listing employee rights and responsibilities under the whistleblower laws. Notice must also include the telephone number for the whistleblower hotline maintained by the state. A sample posting is available, although employers may develop their own posting.[326]
Workers' Compensation: Notice of Carrier and Coverage	All employers must post conspicuous notice informing employees of the workers' compensation carrier, their rights, and how to report injuries. Notice must be displayed in English and Spanish, where there are Spanish-speaking employees. Employers with an existing medical provider network (MPN) or those that are implementing, changing, or

[321] CAL. LAB. CODE § 1182.13. This poster is available at http://www.dir.ca.gov/wpnodb.html.

[322] CAL. LAB. CODE § 207. The template poster is available at http://www.dir.ca.gov/dlse/PaydayNotice.pdf.

[323] CAL. LAB. CODE § 1183(d). This poster is available at http://www.dir.ca.gov/wpnodb.html.

[324] Additional information is available at http://www.dir.ca.gov/wp.asp and http://www.dir.ca.gov/IWC/WageOrderIndustries.htm.

[325] CAL. BUS. & PROF. CODE § 22575(a).

[326] CAL. LAB. CODE § 1102.8. This poster is available at http://www.dir.ca.gov/dlse/WhistleblowersNotice.pdf.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
	terminating an MPN must create a complete MPN notice and post it next to the "Notice to Employees—Injuries Caused by Work" poster.[327]
Workers' Compensation: Notice To All Employers—Injuries Caused By Work Poster	All employers must post this notice, which informs employees of available benefits, what to do if they are injured, MPN information, and who to contact with questions. Employers may also obtain professionally printed copies of the poster and workers' compensation claim form from their claims administrator.[328]
Workplace Safety: Access To Medical & Exposure Records	Employers with hazardous or toxic substances present in the workplace must post notice providing information about the rights of employees to exposure records and safety data sheets.[329]
Workplace Safety: Emergency Telephone Numbers Poster	All employers must complete and post this notice, which lists contact numbers of emergency services (ambulance, fire, etc.) and others. Notice must be posted near the telephone at the worksite, or otherwise made available to employees if no job site telephone exists.[330]
Workplace Safety: Workplace Heat Illness Prevention Plan (HIPP)	Employers must maintain a workplace heat illness prevention plan (HIPP) for indoor workplaces. An employer may integrate the HIPP into the employer's existing injury and illness prevention program or maintain it in a separate document. These HIPP requirements apply to all employers in the state whose indoor work areas reach or exceed temperatures of 82 degrees when employees are present. Worksites where employees are working remotely, working in emergency operations to protect life or property, prisons or detention facilities are excluded. Worksites where an employee may incidentally be exposed to temperatures between 82 and 95 degrees are also excluded, unless this incidental exposure occurs in vehicles without air conditioning or in shipping containers. Employers subject to the rule's requirements must implement and maintain a HIPP. The plan must be in writing and made available in

[327] CAL. LAB. CODE § 3550; CAL. CODE REGS. tit. 8, § 9881. Employers may obtain the poster from their workers' compensation insurance carrier.

[328] CAL. CODE REGS. tit. 8, § 9810; CAL. LAB. CODE § 3600(9). This poster is available at http://www.dir.ca.gov/dwc/NoticePoster.pdf.

[329] CAL. CODE REGS. tit. 8, § 3204. This poster is available at http://www.dir.ca.gov/dosh/dosh_publications/Access_En.pdf. Additional information is also available at http://www.dir.ca.gov/wpnodb.html.

[330] CAL. CODE REGS. tit. 8, § 1512. This poster is available at http://www.dir.ca.gov/dosh/dosh_publications/s500pstr.pdf. If there is no telephone at the worksite, notice must be made available to employees in another manner.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
	English as well as any other language understood by the majority of employees. Employers must provide the plan to employees. Covered employers must incorporate each of the following protocols into the HIPP: • **Drinking water:** Employees must have access to potable drinking water located as close as practicable to working areas. This water must be fresh, cool, and provided free of charge. In circumstances where an employer cannot continuously supply the work area with water, it must provide each affected employee with at least one quart of water per hour of work at the beginning of their applicable work shift. Employers must encourage the frequent consumption of water. • **Cool-down areas:** Employers must maintain one or more cool-down areas large enough to accommodate the number of employees on rest or meal periods. These areas must be sized so that all employees taking rest or meal periods onsite can sit in normal posture without touching one another. Cool-down areas must be less than 82 degrees, unless an employer can show that this is not feasible. Employees must be allowed to use cool-down areas at all times. If an employee takes a preventative cool-down rest, the employer must: ▪ monitor the employee; ▪ ask the employee if they are experiencing symptoms of heat illness; ▪ encourage the employee to remain in the cool-down area; ▪ not order the employee back to work after less than five minutes or until any symptoms have abated; and ▪ provide first aid or emergency response measures if the employee reports or shows symptoms of heat illness. • **Emergency response procedures:** Employers must implement emergency response measures, including all of the following: ▪ ensuring communication is maintained so that employees can contact supervisors or emergency services if necessary; ▪ responding to signs and symptoms of heat illness, including specific first aid, monitoring, and supervisor response; ▪ contacting emergency medical services, including transportation when necessary; and ▪ ensuring that precise directions to the worksite can be provided to emergency personnel if needed.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
	• **Acclimatization:** Employees must be closely observed by supervisors or designees during a heat wave unless the employer uses effective controls to maintain an appropriate indoor temperature. These effective controls may include air conditioning, fans, swamp coolers, mist fans, or other mechanisms for keeping the temperature down.[331]
Workplace Safety: No Smoking Signs	While numerous exceptions exist, smoking is generally prohibited in California in enclosed workplaces. If smoking is prohibited, an employer must post clear and prominent "No Smoking" signs.[332]
Workplace Safety: Occupational Illnesses and Injuries	Employers with 11 or more employees in the previous year, unless covered under the California low-hazard exception, must post the log and summaries for recordable injuries and illnesses.[333]
Workplace Safety: Operating Rules for Industrial Trucks	Employers that operate forklifts and other types of industrial trucks or tow tractors must post this notice summarizing applicable safety rules.[334]
Workplace Safety: Safety & Health Protection On the Job	All employers must post the "Safety and Health Protection on the Job" notice, concerning basic requirements and procedures for compliance with health and safety laws. The poster should be posted in both English and Spanish.[335]
Workplace Safety: Smoking Permitted	If smoking is permitted by law at a worksite, the employers must post notice that clearly states: "WARNING: This facility permits smoking and tobacco smoke is known to the State of California to cause cancer."[336]

3.1(b) *Record-Keeping Requirements*

3.1(b)(i) *Federal Guidelines on Record Keeping*

Table 7 summarizes the federal record-keeping requirements.

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[331] CAL. CODE REGS. tit. 8, § 3396.

[332] CAL. LAB. CODE § 6404.5.

[333] CAL. CODE REGS. tit. 8, §§ 14300 *et seq*.; CAL. CODE REGS. tit. 8, § 1509. These forms are available at http://www.dir.ca.gov/wpnodb.html.

[334] CAL. CODE REGS. tit. 8, § 3664. This poster is available in English at http://www.dir.ca.gov/dosh/dosh_publications/IndTrucks_Eng.pdf and in Spanish at http://www.dir.ca.gov/dosh/dosh_publications/IndTrucks_Spa.pdf.

[335] CAL. LAB. CODE § 6328; CAL. CODE REGS. tit. 8, § 340. This poster is available in English at http://www.dir.ca.gov/dosh/dosh_publications/shpstreng012000.pdf and in Spanish at https://www.dir.ca.gov/dosh/dosh_publications/Spanish/shpstrspanish012000.pdf. Additional information is also available at http://www.dir.ca.gov/wpnodb.html.

[336] CAL. CODE REGS. tit. 27, § 25601; CAL. LAB. CODE § 6404.5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Age Discrimination in Employment Act (ADEA): Payroll Records	*Covered employers must maintain the following payroll or other records for each employee:* • employee's name, address, and date of birth; • occupation; • rate of pay; and • compensation earned each week.[337]	At least 3 years from the date of entry.
Age Discrimination in Employment Act (ADEA): Personnel Records	*Employers that maintain the following personnel records in the course of business are required by the ADEA to keep them for the specified period of time:* • job applications, resumes, or other forms of employment inquiry, including records pertaining to the refusal to hire any individual; • promotion, demotion, transfer, selection for training, recall, or discharge of any employee; • job orders submitted by the employer to an employment agency or labor organization for recruitment of personnel for job openings; • test papers completed by applicants which disclose the results of any employment test considered by the employer; • results of any physical examination considered by the employer in connection with a personnel action; and • any advertisements or notices relating to job openings, promotions, training programs, or opportunities to work overtime.[338]	At least 1 year from the date of the personnel action to which any records relate.
Age Discrimination in Employment (ADEA): Benefit Plan Documents	*Employer must keep on file any:* • employee benefit plans, such as pension and insurance plans; and • copies of any seniority systems and merit systems in writing.[339]	For the full period the plan or system is in effect, and for at least 1 year after its termination.
Title VII & the Americans with Disabilities Act (ADA): Personnel Records	*Employers must preserve any personnel or employment record made, including:* • requests for reasonable accommodation; • application forms submitted by applicants;	At least 1 year from the date the records were made, or from the date of the

[337] 29 U.S.C. § 626; 29 C.F.R. § 1627.3(a).

[338] 29 C.F.R. § 1627.3(b).

[339] 29 C.F.R. § 1627.3(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• other records having to do with hiring, promotion, demotion, transfer, lay-off, or termination; • rates of pay or other terms of compensation; and • selection for training or apprenticeship.[340]	personnel action involved, whichever is later.
Title VII & the Americans with Disabilities Act (ADA): Complaints of Discrimination	*When a charge of discrimination has been filed or an action brought against the employer, it must:* • make and keep such records relevant to the determination of whether unlawful employment practices have been or are being committed, including personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person; and • retain application forms or test papers completed by unsuccessful applicants or candidates for the position.[341]	Until final disposition of the charge or action (*i.e.*, until the statutory period for bringing an action has expired or, if an action has been brought, the date the litigation is terminated).
Title VII & the Americans with Disabilities Act (ADA): Other	An employer must keep and maintain its Employer Information Report (EEO-1).[342]	Most recent form must be retained for 1 year.
Employee Polygraph Protection Act (EPPA)	*Records pertaining to a polygraph test must be maintained for the specified time period including, but not limited to, the following:* • a copy of the statement given to the examinee regarding the time and place of the examination and the examinee's right to consult with an attorney; • the notice to the examiner identifying the person to be examined; • copies of opinions, reports, or other records given to the employer by the examiner; • where the test is conducted in connection with an ongoing investigation involving economic loss or injury, a statement setting forth the specific incident or activity under investigation and the basis for testing the particular employee; and	At least 3 years following the date on which the polygraph examination was conducted.

[340] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

[341] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

[342] 29 C.F.R. § 1602.7.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• where the test is conducted in connection with an ongoing investigation of criminal or other misconduct involving loss or injury to the manufacture, distribution, or dispensing of a controlled substance, records specifically identifying the loss or injury in question and the nature of the employee's access to the person or property that is the subject of the investigation.[343]	
Employee Retirement Income Security Act (ERISA)	Employers that sponsor an ERISA-qualified plan must maintain records that provide in sufficient detail the information from which any plan description, report, or certified information filed under ERISA can be verified, explained, or checked for accuracy and completeness. This includes vouchers, worksheets, receipts, and applicable resolutions.[344]	At least 6 years after documents are filed or would have been filed but for an exemption.
Equal Pay Act	Covered employers must maintain the records required to be kept by employers under the Fair Labor Standards Act (29 C.F.R. part 516).[345]	3 years.
Equal Pay Act: Other	*Covered employers must maintain any additional records made in the regular course of business relating to:* • payment of wages; • wage rates; • job evaluations; • job descriptions; • merit and seniority systems; • collective bargaining agreements; and • other matters which describe any pay differentials between the sexes.[346]	At least 2 years.
Fair Labor Standards Act (FLSA): Payroll Records	*Employers must maintain the following records with respect to each employee subject to the minimum wage and/or overtime provisions of the FLSA:* • full name and any identifying symbol used in place of name on time or payroll records; • home address with zip code; • date of birth, if under 19;	3 years from the last day of entry.

[343] 29 U.S.C. §§ 2001 *et seq.*; 29 C.F.R. § 801.30.

[344] 29 U.S.C. § 1027.

[345] 29 C.F.R. § 1620.32(a).

[346] 29 C.F.R. § 1620.32(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• sex and occupation in which employed; • time of day and day of week on which the employee's workweek begins; • regular hourly rate of pay for any workweek in which overtime compensation is due; • basis on which wages are paid (pay interval); • amount and nature of each payment excluded from the employee's regular rate; • hours worked each workday and total hours worked each workweek; • total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation; • total premium pay for overtime hours; • total additions to or deductions from wages paid each pay period, including employee purchase orders or wage assignments; • total wages paid each pay period; • date of payment and the pay period covered by the payment; • records of retroactive payment of wages, including the amount of such payment to each employee, the period covered by the payment, and the date of the payment; and • for employees working on a fixed schedule, the schedule of daily and weekly hours the employee normally works (instead of hours worked each day and each workweek).[347] The record should also indicate for each week whether the employee adhered to the schedule and, if not, show the exact number of hours worked each day each week.	
Fair Labor Standards Act (FLSA): Tipped Employees	*Employers must maintain and preserve all Payroll Records noted above as well as:* • a symbol, letter, or other notation on the pay records identifying each employee whose wage is determined in part by tips;	

[347] 29 C.F.R. §§ 516.2, 516.5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• weekly or monthly amounts reported by the employee to the employer of tips received (*e.g.*, information reported on Internal Revenue Service Form 4070); • amount by which the wages of each tipped employee have been deemed to be increased by tips as determined by the employer (not in excess of the difference between $2.13 and the applicable federal minimum wage); • hours worked each workday in which an employee does not receive tips, and total daily or weekly straight-time payment made by the employer for such hours; and • hours worked each workday in occupations in which the employee receives tips, and total daily or weekly straight-time earnings for such hours.[348]	
Fair Labor Standards Act (FLSA): White Collar Exemptions	*For bona fide executive, administrative, and professional employees and outside sales employees (e.g., white collar employees) the following information must be maintained:* • full name and any identifying symbol used in place of name on time or payroll records; • home address with zip code; • date of birth if under19; • sex and occupation in which employed; • time of day and day of week on which the employee's workweek begins; • total wages paid each pay period; • date of payment and the pay period covered by the payment; and • basis on which wages are paid in sufficient detail to permit calculation for each pay period of the employee's total remuneration for employment including fringe benefits and prerequisites.[349]	3 years from the last day of entry.
Fair Labor Standards Act (FLSA):	*In addition to payroll information, employers must preserve agreements and other records, including:*	At least 3 years from the last effective date.

[348] 29 C.F.R. § 516.28.

[349] 29 C.F.R. §§ 516.2, 516.3. Presumably the regulation's reference to "prerequisites" is an error and should refer to "perquisites."

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Agreements & Other Records	• collective bargaining agreements and any amendments or additions; • individual employment contracts or, if not in writing, written memorandum summarizing the terms; • written agreements or memoranda summarizing special compensation arrangements under FLSA sections 7(f) or 7(j); • certain plans and trusts under FLSA section 7(e); • certificates and notices listed or named in the FLSA; and • sales and purchase records.[350]	
Fair Labor Standards Act (FLSA): Other Records	*In addition to other FLSA requirements, employers must preserve supplemental records, including:* • basic time and earning cards or sheets; • wage rate tables; • order, shipping, and billing records; and • records of additions to or deductions from wages.[351]	At least 2 years from the date of last entry.
Family and Medical Leave Act (FMLA)	*Covered employers must make, keep, and maintain records pertaining to their compliance with the FMLA, including:* • basic payroll and identifying employee data, including name, address, and occupation; • rate or basis of pay and terms of compensation; • daily and weekly hours per pay period; • additions to or deductions from wages and total compensation paid; • dates FMLA leave is taken by FMLA-eligible employees (leave must be designated in records as FMLA leave, and leave so designated may not include leave required under state law or an employer plan not covered by FMLA); • if FMLA leave is taken in increments of less than one full day, the hours of the leave; • copies of employee notices of leave furnished to the employer under the FMLA, if in writing; • copies of all general and specific notices given to employees in accordance with the FMLA;	At least 3 years.

[350] 29 C.F.R. § 516.5.

[351] 29 C.F.R. § 516.6.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• any documents that describe employee benefits or employer policies and practices regarding the taking of paid and unpaid leave; • premium payments of employee benefits; and • records of any dispute between the employer and an employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and the disagreement. *Covered employers with no eligible employees must only maintain the following records:* • basic payroll and identifying employee data, including name, address, and occupation; • rate or basis of pay and terms of compensation; • daily and weekly hours worked per pay period; • additions to or deductions from wages; and • total compensation paid. *Covered employers in a joint employment situation must keep all the records required in the first series with respect to any primary employees, and must keep the records required by the second series with respect to any secondary employees.* *Also, if an FMLA-eligible employee is not subject to the FLSA record-keeping requirements for minimum wage and overtime purposes (i.e., not covered by, or exempt from FLSA) an employer does not need to keep a record of actual hours worked, provided that:* • FMLA eligibility is presumed for any employee employed at least 12 months; and • with respect to employees who take FMLA leave intermittently or on a reduced leave schedule, the employer and employee agree on the employee's normal schedule or average hours worked each week and reduce their agreement to a written, maintained record. *Medical records also must be retained.* Specifically, records and documents relating to certifications, re-certifications, or medical histories of employees or employees' family members, created for purposes of	

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	FMLA, must be maintained as confidential medical records in separate files/records from the usual personnel files. If the ADA is also applicable, such records must be maintained in conformance with ADA-confidentially requirements (subject to exceptions). If the Genetic Information Nondiscrimination Act of 2008 (GINA) is applicable, records and documents created for purposes of FMLA containing family medical history or genetic information as defined in GINA must be maintained in accordance with the confidentiality requirements of Title II of GINA.[352]	
Federal Insurance Contributions Act (FICA)	*Employers must keep FICA records, including:* • copies of any return, schedule, or other document relating to the tax; • records of all remuneration (cash or otherwise) paid to employees for employment services. The records must show with respect to each employee receiving such remuneration: ▪ name, address, and account number of the employee and additional information when the employee does not provide a Social Security card; ▪ total amount and date of each payment of remuneration (including any sum withheld as tax or for any other reason) and the period of services covered by such payment; ▪ amount of each such remuneration payment that constitutes wages subject to tax; ▪ amount of employee tax, or any amount equivalent to employee tax, collected with respect to such payment, and, if collected at a time other than the time such payment was made, the date collected; and ▪ if the total remuneration payment and the amount thereof which is taxable are not equal, the reason for this; • the details of each adjustment or settlement of taxes under FICA; and	At least 4 years after the date the tax is due or paid, whichever is later.

[352] 29 U.S.C. § 2616; 29 C.F.R. § 825.500.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• records of all remuneration in the form of tips received by employees, employee statements of tips under section 6053(a) (unless otherwise maintained), and copies of employer statements furnished to employees under section 6053(b).[353]	
Immigration	Employers must retain all completed Form I-9s.[354]	3 years after the date of hire or 1 year following the termination of employment, whichever is later.
Income Tax: Accounting Records	*Any taxpayer required to file an income tax return must maintain accounting records that will enable the filing of tax returns correctly stating taxable income each year, including:* • regular books of account or records, including inventories, sufficient to establish the amount of gross income, deductions, credits, or other matters required to be shown by such person in any return of such tax or information.[355]	Required to be maintained for "so long as the contents [of the records] may become material in the administration of any internal revenue law;" this could be as long as 15 years in some cases.
Income Tax: Employee Payment Records	*Employers are required to maintain records reflecting all remuneration paid to each employee, including:* • employee's name, address, and account number; • total amount and date of each payment; • the period of services covered by the payment; • the amount of remuneration that constitutes wages subject to withholding; • the amount of tax collected and, if collected at a time other than the time the payment was made, the date collected; • an explanation for any discrepancy between total remuneration and taxable income;	4 years after the return is due or the tax is paid, whichever is later.

[353] 26 C.F.R. §§ 31.6001-1, 31.6001-2.

[354] 8 C.F.R. § 274a.2.

[355] 26 U.S.C. § 3402; 26 C.F.R. § 1.6001-1.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• the fair market value and date of each payment of noncash remuneration for services performed as a retail commissioned salesperson; and • other supporting documents relating to each employee's individual tax status.[356]	
Income Tax: W-4 Forms	Employers must retain all completed Form W-4s.[357]	As long as it is in effect and at least 4 years thereafter.
Unemployment Insurance	*Employers are required to maintain all relevant records under the Federal Unemployment Tax Act, including:* • total amount of remuneration paid to employees during the calendar year for services performed; • amount of such remuneration which constitutes wages subject to taxation; • amount of contributions paid into state unemployment funds, showing separately the payments made and not deducted from the remuneration of its employees, and payments made and deducted or to be deducted from employee remuneration; • information required to be shown on the tax return and the extent to which the employer is liable for the tax; • an explanation for any discrepancy between total remuneration paid and the amount subject to tax; and • the dates in each calendar quarter on which each employee performed services not in the course of the employer's trade or business, and the amount of the cash remuneration paid for those services.[358]	At least 4 years after the later of the date the tax is due or paid for the period covered by the return.
Workplace Safety / the Fed-OSH Act: Exposure Records	*Employers must preserve and retain employee exposure records, including:*	At least 30 years.

[356] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

[357] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

[358] 26 C.F.R. § 31.6001-4.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• environmental monitoring or measuring of a toxic substance or harmful physical agent, including personal, area, grab, wipe, or other form of sampling, as well as related collection and analytical methodologies, calculations, and other background data relevant to an interpretation of the results obtained; • biological monitoring results which directly assess the absorption of a toxic substances or harmful physical agent by body specimens; and • Material Safety Data Sheets (MSDSs), or in the absence of these documents, a chemical inventory or other record reveling the identity of a toxic substances or harmful physical agent and where and when the substance or agent was used. *Exceptions to this requirement include:* • background data to workplace monitoring need only be retained for 1 year provided that the sampling results, collection methodology, analytic methods used, and a summary of other background data is maintained for 30 years; • MSDSs need not be retained for any specified time so long as some record of the identity of the substance, where it was used and when it was used is retained for at least 30 years; and • biological monitoring results designated as exposure records by a specific Fed-OSH Act standard should be retained as required by the specific standard.[359]	
Workplace Safety / the Fed-OSH Act: Medical Records	*Employers must preserve and retain "employee medical records," including:* • medical and employment questionnaires or histories; • results of medical examinations and laboratory tests; • medical opinions, diagnoses, progress notes, and recommendations; • first aid records; • descriptions of treatments and prescriptions; and • employee medical complaints. *"Employee medical record" does not include:*	Duration of employment plus 30 years.

[359] 29 C.F.R. § 1910.1020(d).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• physical specimens; • records of health insurance claims maintained separately from employer's medical program; • records created solely in preparation for litigation that are privileged from discovery; • records concerning voluntary employee assistance programs, if maintained separately from the employer's medical program and its records; and • first aid records of one-time treatment which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job, if made on-site by a nonphysician and maintained separately from the employer's medical program and its records.[360]	
Workplace Safety: Analyses Using Medical and Exposure Records	*Employers must preserve and retain analyses using medical and exposure records*, including any compilation of data, or other study based on information collected from individual employee exposure or medical records, or information collected from health insurance claim records, provided that the analysis has been provided to the employer or no further work is being done on the analysis.[361]	At least 30 years.
Workplace Safety: Injuries and Illnesses	*Employers must preserve and retain records of employee injuries and illnesses, including:* • OSHA 300 Log; • the privacy case list (if one exists); • the Annual Summary; • OSHA 301 Incident Report; and • old 200 and 101 Forms.[362]	5 years following the end of the calendar year that the record covers.
Additional record-keeping requirements apply to government contractors. The list below, while nonexhaustive, highlights some of these obligations.		
Affirmative Action Programs (AAP)	*Contractors required to develop written affirmative action programs must maintain:* • current AAP and documentation of good faith effort; and	Immediately preceding AAP year.

[360] 29 C.F.R. § 1910.1020(d).

[361] 29 C.F.R. § 1910.1020(d).

[362] 29 C.F.R. §§ 1904.33, 1904.44.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• AAP for the immediately preceding AAP year and documentation of good faith effort.[363]	
Equal Employment Opportunity: Personnel & Employment Records	*Government contractors covered by Executive Order No. 11246 and those required to provide affirmative action to persons with disabilities and/or disabled veterans and veterans of the Vietnam Era must retain the following records:* • records pertaining to hiring, assignment, promotion, demotion, transfer, lay off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship; • other records having to do with requests for reasonable accommodation, the results of any physical examination, job advertisements and postings, applications, resumes; and • any and all expressions of interest through the internet or related electronic data technologies as to which the contractor considered the individual for a particular position, such as on-line resumes or internal resume databases, records identifying job seekers contacted regarding their interest in a particular position, regardless of whether the individual qualifies as an internet applicant under 41 C.F.R. § 60–1.3, tests and test results, and interview notes; ▪ for purposes of record keeping with respect to internal resume databases, the contractor must maintain a record of each resume added to the database, a record of the date each resume was added, the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used and the date of the search;	3 years recommended; regulations state "not less than two years from the date of the making of the record or the personnel action involved, whichever occurs later." If the contractor has fewer than 150 employees or does not have a contract of at least $150,000, the minimum retention period is one year from the date of making the record or the personnel action, whichever occurs later.

[363] 41 C.F.R. § 60-1.12(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	▪ for purposes of record keeping with respect to external resume databases, the contractor must maintain a record of the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used, the date of the search, and the resumes of job seekers who met the basic qualifications for the particular position who are considered by the contractor). *Additionally, for any record the contractor maintains pursuant to 41 C.F.R. § 60-1.12, it must be able to identify:* • gender, race, and ethnicity of each employee; and • where possible, the gender, race, and ethnicity of each applicant or internet applicant.[364]	
Equal Employment Opportunity: Complaints of Discrimination	*Where a complaint of discrimination has been filed, an enforcement action commenced, or a compliance review initiated, employers must maintain:* • personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person; and • application forms or test papers completed by unsuccessful applicants and candidates for the same position as the aggrieved person applied and was rejected.[365]	Until final disposition of the complaint, compliance review or action.
Minimum Wage Under Executive Orders Nos. 13658 (contracts entered into on or after January 1, 2015), 14026 (contracts entered into on or after January 30, 2022)	*Covered contractors and subcontractors performing work must maintain for each worker:* • name, address, and Social Security number; • occupation(s) or classification(s); • rate or rates of wages paid; • number of daily and weekly hours worked; • any deductions made; and • total wages paid. These records must be available for inspection and transcription by authorized representatives of the Wage and Hour Division (WHD) of the U.S. Department of Labor.	3 years.

[364] 41 C.F.R. §§ 60-1.12, 60-300.80, and 60-741.80.

[365] 41 C.F.R. §§ 60-1.12, 60-741.80.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	The contractor must also permit authorized representatives of the WHD to conduct interviews with workers at the worksite during normal working hours.[366]	
Paid Sick Leave Under Executive Order No. 13706	*Contractors and subcontractors performing work subject to Executive Order No. 13706 must keep the following records:* • employee's name, address, and Social Security number; • employee's occupation(s) or classification(s); • rate(s) of wages paid (including all pay and benefits provided); • number of daily and weekly hours worked; • any deductions made; • total wages paid (including all pay and benefits provided) each pay period; • a copy of notifications to employees of the amount of accrued paid sick leave; • a copy of employees' requests to use paid sick leave (if in writing) or (if not in writing) any other records reflecting such employee requests; • dates and amounts of paid sick leave used by employees (unless a contractor's paid time off policy satisfies the EO's requirements, leave must be designated in records as paid sick leave pursuant to the EO); • a copy of any written responses to employees' requests to use paid sick leave, including explanations for any denials of such requests; • any records relating to the certification and documentation a contractor may require an employee to provide, including copies of any certification or documentation provided by an employee; • any other records showing any tracking of or calculations related to an employee's accrual and/or use of paid sick leave; • the relevant covered contract; • the regular pay and benefits provided to an employee for each use of paid sick leave; and	During the course of the covered contract as well as after the end of the contract.

[366] 29 C.F.R. § 23.260.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• any financial payment made for unused paid sick leave upon a separation from employment intended to relieve a contractor from its reinstatement obligation.[367]	
Davis-Bacon Act	*Davis-Bacon Act contractors or subcontractors must maintain the following records with respect to each employee:* • name, address, and Social Security number; • work classification; • hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents); • daily and weekly number of hours worked; and • deductions made and actual wages paid. *Contractors employing apprentices or trainees under approved programs must maintain written evidence of:* • registration of the apprenticeship programs; • certification of trainee programs; • the registration of the apprentices and trainees; • the ratios and wage rates prescribed in the program; and • worker or employee employed in conjunction with the project.[368]	At least 3 years after the work.
Service Contract Act	*Service Contract Act contractors or subcontractors must maintain the following records with respect to each employee:* • name, address, and Social Security number; • work classification; • rates of wage; • fringe benefits; • total daily and weekly compensation; • the number of daily and weekly hours worked; • any deductions, rebates, or refunds from daily or weekly compensation; • list of wages and benefits for employees not included in the wage determination for the contract;	At least 3 years from the completion of the work records containing the information.

[367] 29 C.F.R. § 13.25.

[368] 29 C.F.R. § 5.5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• any list of the predecessor contractor's employees which was furnished to the contractor by regulation; and • a copy of the contract.[369]	
Walsh-Healey Act	*Walsh-Healey Act supply contractors must keep the following records:* • wage and hour records for covered employees showing wage rate, amount paid in each pay period, hours worked each day and week; • the period in which each employee was engaged on a government contract and the contract number; • name, address, sex, and occupation; • date of birth of each employee under 19 years of age; and • a certificate of age for employees under 19 years of age.[370]	At least 3 years from the last date of entry.

3.1(b)(ii) *State Guidelines on Record Keeping*

California law mandates separate record-keeping requirements under a variety of laws and regulations including the Healthy Workplaces, Healthy Families Act (the statewide paid sick leave law);[371] the Fair Employment and Housing Act;[372] the California Fair Pay Act;[373] public works contracts laws;[374] unemployment insurance laws;[375] wage and hour and payroll laws;[376] workers' compensation laws;[377] and occupational safety and health laws.[378]

Table 8 summarizes the state record-keeping requirements.

[369] 29 C.F.R. § 4.6.

[370] 41 C.F.R. § 50-201.501.

[371] CAL. LAB. CODE § 247.5.

[372] CAL. GOV'T CODE § 12946; CAL. CODE REGS. tit. 2, § 11013.

[373] CAL. LAB. CODE § 1197.5.

[374] CAL. LAB. CODE §§ 1776, 1812.

[375] CAL. UNEMP. INS. CODE § 1085; CAL. CODE REGS. tit. 22, §§ 1085-2(a)-(c), 1085-5.

[376] CAL. LAB. CODE §§ 227, 1174, and 1198.5; California Wage Orders.

[377] CAL. CODE REGS. tit. 8, §§ 10101.1, 10102, and 10103.2.

[378] CAL. CODE REGS. tit. 8, §§ 14300.1, 14300.33, and 14300.44 (illness and injury records); CAL. LAB. CODE § 6401.7(d); CAL. CODE REGS. tit. 8, § 3203 (illness and injury prevention plans); CAL. CODE REGS. tit. 8, § 3204 (employee exposure records).

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Benefits & Leave: Paid Sick Leave	Covered employees must maintain records documenting the hours worked and paid sick days accrued and used by an employee.[379]	At least 3 years.
Fair Employment Practices: Applications & Records	*It is unlawful for California employers to fail to maintain:* • all applications; and • all personnel, membership, or employment referral records and files.[380]	4 years
Fair Employment Practices: Applicant Data	*Unless otherwise prohibited by law, all employers must preserve data regarding:* • the race, sex, and national origin of each applicant; and • the job for which the individual applied. This information should be maintained separately from the personnel file.[381]	4 years
Fair Employment Practices: California Employer Information Report (CEIR)	Covered employers (*i.e.*, those with 100 or more employees) must maintain records necessary for completion of the CEIR.[382] Sample forms and guidelines are available from the Civil Rights Department. Appropriate federal forms (*i.e.*, EEO-1) may be substituted for the CEIR, but all supporting documents must be retained.	2 years from date of preparation.
Fair Employment Practices: Complaints of Discrimination	*If a complaint has been filed, employers must preserve any related records and files, including:* • personnel or employment records relating to the complaining party and to other employees holding similar positions; and • applications, forms, or test papers completed by the complainant and other candidates for the same position.[383]	All records and files must be maintained and preserved until the later of the following:

[379] CAL. LAB. CODE § 247.5.

[380] CAL. GOV'T CODE § 12946.

[381] CAL. CODE REGS. tit. 2, § 11013(b).

[382] CAL. CODE REGS. tit. 2, § 11013(a).

[383] CAL. GOV'T CODE § 12946; CAL. CODE REGS. tit. 2, § 11013.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
		• the first date after the period of time for filing a civil action has expired; or • the first date after the complaint has been fully and finally disposed of and all administrative proceedings, civil actions, appeals or related proceedings have terminated.
Fair Employment Practices: Equal Pay Act	*Every employer must maintain records of the following for each employee:* • wages; • wage rate histories; • job classifications; and • other terms and conditions of employment.[384]	Duration of employment plus 3 years.
Fair Employment Practices: Harassment Training	*To track compliance of required harassment training and education, employers must keep documentation of the training provided, including but not limited to:* • names of supervisory employees trained; • date of training; • sign in sheet; • a copy of all certificates of attendance or completion issued; • type of training; • name of the training provider; and	2 years.

[384] CAL. LAB. CODE § 1197.5(e); 432.3.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• a copy of all written or recorded materials that comprise the training. If the training is a webinar, the employer must retain a copy of the webinar, all written materials used by the trainer, all written questions submitted during the webinar, and all written responses or guidance the trainer provided during the webinar. A trainer providing e-learning must maintain all written questions received and all written responses or guidance provided.[385]	
Paid Sick Leave (Healthy Workplaces, Healthy Workplaces Act)	• Hours worked and paid sick days accrued and used by employee[386]	At least 3 years
****COVID-19 Supplemental Paid Sick Leave Requirements****	• Under the requirements of the Food Sector Worker Supplemental Paid Sick Leave and Supplemental Paid Sick Leave for Other Workers, a hiring entity must maintain records documenting hours worked, leave provided and leave used by employees.[387]	At least 3 years.
Public Works Contracts	*Each contractor and subcontractor must keep accurate payroll records for each worker, including:* • name, address, and Social Security number; • work classification; • straight time and overtime hours worked each day and week; and • actual per diem wages paid to each journeyman, apprentice, worker, or other employee. Payroll records must contain a written declaration under penalty of perjury stating that the information is true and correct, and that the employer has complied with other specified requirements.[388]	None specified.

[385] CAL. CODE REGS. tit. 2 § 11024.

[386] CAL. LAB. CODE § 247.5.

[387] CAL. LAB. CODE §§ 247.5.

[388] CAL. LAB. CODE §§ 1776, 1812.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Right to Recall for Laid-Off Workers[389]	*Employers must keep the following records for each laid-off employee:* • employee's full legal name; • job classification at the time of separation from employment; • employee's date of hire; • employee's last known address and telephone number; and • a copy of the written notices regarding the lay-off provided to the employee and all records of communications between the employer and employee concerning offers of employment made to the employee. *Note: This law does not generally apply to all California employees. It generally applies to hotels, private clubs, event centers, airport hospitality operations, airport service providers, and janitorial, building management and security services provided to office, retail, and other commercial buildings.*	At least 3 years from the written notice regarding the lay-off.
Unemployment Compensation: Covered Employers	*Each covered employer must keep and maintain records, for each worker, that include:* • period covered by the pay period; • name and Social Security number; • date hired, rehired, or returned to work after a temporary layoff; • status of employee (*e.g.*, employed, on lay-off, on leave of absence); • last date when services were performed; • place of work; • remuneration, showing separately money paid, cash value of other remuneration, and special payments; • disbursement records showing payments to anyone who performed services; and • other information that may be necessary to determine the worker's total remuneration earned each week.[390]	4 years after the date contributions are due or are paid, whichever is later.
Unemployment Compensation:	*If the employing unit does not consider itself to be an employer or asserts that it is exempt from the*	8 years.

[389] CAL. LAB. CODE §§142-1434.

[390] CAL. UNEMP. INS. Code § 1085; CAL. CODE REGS. tit. 22, § 1085-2(a)-(c).

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Exempt Employers	*unemployment law, it must retain proper records to support that position. Records must include:* • the number of employees employed during each week; • identification of employees; and • particular days of each week on which services have been rendered. The employer bears the burden of proving exemption.[391]	
Wages, Hours & Payroll: General	*Employers, in general, must keep and maintain payroll records, for each employee, including the following:* • full name and address of all employees; • last four digits of Social Security number (or an employee identification number); • inclusive dates of the period for which the employee is paid; • hours worked daily; • total hours worked (except for salaried, overtime-exempt employees); • wages paid (*i.e.*, net wages earned); • gross wages earned; • all deductions (provided that all deductions made on written orders of the employee may be aggregated and shown as one item); • minors' ages; • employer name and address (if a farm labor contractor, name and address of the legal entity that secured its services); • all applicable hourly rates in effect during the pay period and corresponding number of hours worked at each rate; and • for piece-rate workers, the number of piece-rate units earned and any applicable piece rate.[392]	3 years. Recommended retention for 4 years, however, given the limitations period for wage claims.[394]

[391] CAL. CODE REGS. tit. 22, § 1085-5.

[392] CAL. LAB. CODE §§ 227, 1174.

[394] CAL. BUS. & PROF. CODE § 17208.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	Temporary service employers must include rate of pay and the total hours worked for each temporary services assignment.[393]	
Wage & Hour Documents: Local Minimum Wage Ordinances	As discussed in **0**, numerous cities and counties in California, including Los Angeles and San Francisco, have adopted minimum wage ordinances. Most of these ordinances include a record-keeping and/or wage statement requirement. Employers should consult the relevant local ordinances for further details.	
Wage & Hour Documents: Local Paid Sick Leave Ordinances	As discussed in **3.9(b)(iv)**, numerous cities, including Los Angeles, San Diego, and San Francisco, have adopted paid sick leave ordinances. California employers should consult the relevant local ordinances for further information and details about any record-keeping requirements.	
Wages, Hours & Payroll: Local Predictive Scheduling Ordinances	Certain cities— Berkeley, Emeryville, San Francisco, San Jose, and Los Angeles (and Los Angeles County, effective July 1, 2025)—have adopted predictive scheduling ordinances, which may carry their own record-keeping requirements. See **3.5(c)** for additional details.	
Wages, Hours & Payroll: Janitorial Workers	*An employer (with at least one employee) that enters into contracts, subcontracts, or franchise agreements to provide janitorial services must maintain accurate records for each employee, including:* • name and address; • hours worked daily, including start and end times; • wages and wage rates paid each payroll period; • age of any minor employee; and • any other conditions of employment.[395]	3 years.
Wages, Hours & Payroll: Personnel Records	Employers must retain each employee's personnel records.[396]	Not less than 3 years after termination of employment.
Wages, Hours & Payroll:	*Employers subject to a wage order must maintain the following payroll records, for each employee:* • full name and address;	3 years. Recommended retention for 4

[393] CAL. LAB. CODE § 227.

[395] CAL. LAB. CODE §§ 1420 to 1434.

[396] CAL. LAB. CODE § 1198.5.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Wage Order Requirements	• occupation; • Social Security number; • birth date, if under 18and designation as a minor; • time records showing when the employee began and ended each work period; • meal periods (including starting and ending time); • split shift intervals; • total daily hours worked; • total wages paid each period (including value of board, lodging, or other compensation furnished to the employee); • total hours worked in a pay period and applicable rates; and • for piece-rate workers, piece rates or an explanation of incentive plan formula (employer must retain an accurate production record).[397]	years, however, given the limitations period for wage claims.[398]
Wage Transparency[399]	Employer must retain the following: • records of job titles; and • wage rate history.	Duration of employment plus 3 years.
Workers' Compensation: Claims Files	*Every claims administrator (i.e., self-administered self-insured employer or self-insured employer) must maintain a claim file of each work-injury claim including claims that have been denied. The file must contain:* • Employee's Claim for Workers' Compensation Benefits (DWC Form 1), or if the employee did not return the form, documentation that the employer provided a claim form to the employee; • a copy of the Employer's Report of Occupational Injury or Illness (DLSR 5020) or documentation of reasonable attempts to obtain it; • a copy of every notice or report sent to the Division of Workers' Compensation; • a copy of every Doctor's First Report Of Occupational Illness or Injury (DLSR Form 5021) or documentation of reasonable attempts to obtain it;	Maintained until the latest of the following dates: • 5 years from date of injury; • 1 year from date compensation last provided; • all compensation due or which may be due has been paid; or

[397] CAL. LAB. CODE § 1198.5; California Wage Orders.

[398] CAL. BUS. & PROF. CODE § 17208.

[399] CAL. LAB. CODE § 432.3.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• the original or a copy of every medical report pertaining to the claim, or documentation of reasonable attempts to obtain them; • all orders or awards of the Workers' Compensation Appeals Board or the Rehabilitation Unit pertaining to the claim; • a record of payment of compensation; • a copy of the application(s) for adjudication of claim filed with the Workers' Compensation Appeals Board, if any; • copies of the following notices sent to the employee: benefit notices, including vocational rehabilitation notices, and notices related to the Qualified Medical Evaluation process; • documentation sufficient to determine the injured worker's average weekly earnings, including: ▪ whether the employee received tips, commissions, bonuses, etc. and the fair market value of each; ▪ documentation of concurrent earnings from employment other than that in which the injury occurred, or a statement that there were no concurrent earnings; ▪ if earnings at the time of injury were irregular, documentation of earnings from all sources of employment for one year prior to the injury; and ▪ if the foregoing information results in less than maximum earnings, documentation of the worker's earning capacity, including any increase of earnings likely to have occurred but for the injury; and • notes, correspondence, and documentation related to: ▪ the provision, delay, or denial of benefits; ▪ any utilization review process; ▪ to a return to regular, modified, or alternative work; ▪ the legal, factual, or medical basis for nonpayment or delay in payment of compensation benefits or expenses; and	• when the findings of an audit have become final.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	▪ telephone conversation(s) relating to the claim that are significant to claims handling, with descriptions including the dates of calls, substance of calls, and identification of parties to the calls.[400]	
Workers' Compensation: Injury Logs	*Every claims administrator (i.e., self-administered self-insured employer or self-insured employer) also must maintain an annual claim log of all work-injury claims, open and closed. The log must include:* • name of injured employee; • claims administrator's claim number; • date of injury; • indication of whether work-injury claim is an indemnity or medical-only claim; • an entry if all liability for a claim has been denied at any time; • if the claim log is for a self-insured employer and a Certificate of Consent to Self-Insure has been issued, the name of the corporation employing the injured worker; and • if the claim has been transferred from one adjusting location to another, the address of the new location must be identified on the initial location's log.[401]	At least 5 years from the end of the year covered.
Workplace Safety: Analyses Using Exposure and Medical Records	All employers must preserve and maintain analyses using employee exposure and medical records. Such records include any compilation of data, or other study based on information collected from individual employee exposure or medical records, or information collected from health insurance claim records, provided that the analysis has been provided to the employer or no further work is being done on the analysis.[402]	At least 30 years.
Workplace Safety: Employee Exposure Records	*All employers must preserve and maintain employee exposure records, which must include:* • environmental monitoring or measuring;	Duration of employment plus 30 years.

[400] CAL. CODE REGS. tit. 8, §§ 10101.1, 10102.

[401] CAL. CODE REGS. tit. 8, § 10103.2.

[402] CAL. CODE REGS. tit. 8, § 3204(d).

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• biological monitoring results that directly assess the absorption of a toxic substance or harmful physical agent by body systems (but not including results that assess the biological effect of a substance or that assess an employee's use of drugs or alcohol); • Material Safety Data Sheets (MSDSs); • in the absence of the above documents, a chemical inventory or other record revealing the identity of a toxic substances or harmful physical agent and where and when the substance or agent was used; and • for certain health care employees, records of employee exposure to Aerosol Transmissible Diseases. Background data to workplace monitoring or measuring need only be retained for one year provided that the sampling results, collection methodology, analytic methods used, and a summary of other background data is maintained for 30 years. Where MSDSs are destroyed, a record of the identity of the substance, where it was used, and when it was used must be retained for at least 30 years.[403]	
Workplace Safety: Employee Medical Records	*All employers must preserve and maintain employee medical records, which must include:* • medical and employment questionnaires or histories; • results of medical examinations and laboratory tests; • medical opinions, diagnoses, progress notes, and recommendations; • first aid records; • descriptions of treatments and prescriptions; and • employee medical complaints. For these purposes, *medical records* do not include: • physician specimens that are routinely discarded; • records of health insurance claims maintained separately from employer's medical program and not accessible to the employer;	Duration of employment plus 30 years.

[403] CAL. CODE REGS. tit.8, §§ 3204(c)-(d), 5199(j).

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• records created solely in preparation for litigation which are protected from discovery; and • records concerning voluntary employee assistance programs if maintained separately from employer's medical program. First aid records of one-time treatment and subsequent observation, made on-site by a nonphysician, need not be retained for any specified period. Medical records of employees who have been employed for less than one year for the employer need not be retained if provided to the employee upon termination.[404]	
Workplace Safety: Injury and Illness Prevention Plans	*All employers (with exceptions) must establish and maintain an Injury and Illness Prevention Program. Appropriate records must be kept of steps taken to implement the program.* *With respect to scheduled and periodic inspections, the records should include:* • person(s) conducting the inspection; • unsafe conditions and the work practices identified; and • action taken to correct unsafe conditions and work practices.[405] For employers with 10 or fewer employees, inspection records must be retained only until the hazard is corrected. *Employers that elect to use a labor/management safety and health committee to comply with these requirements must keep the written committee meetings records.*[406] *Employers must also keep documentation of safety and health training, for each employee, including:* • name of employee (or other identifier); • training dates; • types of training; and	1 year.

[404] CAL. CODE REGS. tit. 8, § 3204(c), (d).

[405] CAL. LAB. CODE § 6401.7(d); CAL. CODE REGS. tit. 8, § 3203(b).

[406] CAL. CODE REGS. tit. 8, § 3203(c).

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• training providers. Training records for employees who have worked less than one year need not be retained beyond the term of employment, if provided to the employee at termination. Employers with fewer than 10 employees can substantially comply by maintaining a log of instructions provided to the employee with respect to unique hazards of the job. Written documentation also may be limited for certain employers with fewer than 20 employees and employers in certain industries.[407]	
Workplace Safety: Injury and Illness Records	*Most employers must preserve injury and illness records, including:* • Cal-OSHA Forms 300, 300A, and 301; • the privacy case list, if any; and • old Form 200 and supplementary records. Employers with 10 or fewer employees at all times during the last calendar year are exempt, as are employers in certain low hazard industries.[408]	5 years following the end of the calendar year that the records cover.
Workplace Safety: Workplace Violence Prevention Safety Requirements	***Effective July 1, 2024**, covered employers must keep various records specified, including:* • records of workplace violence hazard identification, evaluation and correction; • training records; • a violent incident log for every workplace violence incident; and • records of workplace violence incident investigation.[409]	5 years.

3.1(c) *Personnel Files*

3.1(c)(i) *Federal Guidelines on Personnel Files*

Federal law does not address access to personnel files for private-sector employees.

[407] CAL. CODE REGS. tit. 8, § 3203(b), (c).

[408] CAL. CODE REGS. tit. 8, §§ 14300.1, 14300.33, and 14300.44.

[409] CAL. LAB. CODE § 6401.9; S.B. 553 (Cal. 2023).

3.1(c)(ii) *State Guidelines on Personnel Files*

California has enacted a personnel records access statute, which entitles current and former employees to inspect and copy their records.

Contents. The personnel records access statute itself does not define the required contents of an employee's personnel file. California's record retention requirements, see **3.1(b)(ii)**, are instructive, however. In addition, the Division of Labor Standards Enforcement recommends that employers include in a personnel file all documents that are used or have been used to determine an employee's qualifications for hiring, promotion, additional compensation, or disciplinary action, including termination.[410] Employers are required to retain personnel files for all employees for a period of three years following the termination of employment.[411]

While the personnel records access statute does not specify documents to be included in a personnel file, it specifically excludes several categories of documents. The following documents need not be included in an employee's personnel file:

- records relating to the investigation of a possible criminal offense;
- letters of reference;
- ratings, reports, or records that were obtained prior to the employee's employment, prepared by identifiable examination committee members, and obtained in connection with a promotional examination;[412]
- records of employees who are subject to the Public Safety Officers Procedural Bill of Rights;[413] and
- records of employees of agencies subject to the Information Practices Act of 1977.[414]

Right of Access. Employees, former employees, or their representatives have the right to inspect or copy the personnel records that the employer maintains relating to the employee or former employee's performance or to any grievance concerning the employee.[415] In addition, upon request, an employee or applicant must be given copies of any instrument that the individual has signed "relating to the obtaining or holding of employment," as well as any payroll records pertaining to their employment.[416] In addition to personnel files, employees and former employees must also be allowed to inspect and copy payroll records, including paid sick leave accrual and usage records.[417]

Form of Request. A request to inspect or receive a copy of personnel records must be made in either of the following ways:

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[410] California Div. of Labor Standards Enforcement, *Personnel Files and Records*, *available at* http://www.dir.ca.gov/dlse/faq_righttoinspectpersonnelfiles.htm.

[411] CAL. LAB. CODE § 1198.5(a).

[412] CAL. LAB. CODE § 1198.5(h).

[413] CAL. GOV'T CODE §§ 3300 *et seq*.

[414] CAL. CIV. CODE §§ 1798 *et seq*.

[415] CAL. LAB. CODE § 1198.5(a).

[416] CAL. LAB. CODE §§ 226(b), (c), 432, and 1198.5.

[417] CAL. LAB. CODE §§ 226, 247.5.

- written and submitted by the current or former employee or the employee's representative; or
- written and submitted by the current or former employee or the employee's representative by completing an employer-provided form. An employer-provided form must be made available to the employee or the employee's representative upon verbal request to the employee's supervisor or, if known to the employee or the employee's representative at the time of the request, to the individual the employer designates under this section to receive a verbal request for the form.[418]

Frequency of Access. An employer is not required to comply with more than 50 requests for a copy of the records filed by a representative or representatives of employees in one calendar month,[419] and no more than one request per year by a former employee to inspect or to receive a copy of the individual's personnel file.[420]

There are some exceptions to the rules governing the frequency with which an individual may access their personnel records. These restrictions do not apply to an employee covered by a valid collective bargaining agreement if the agreement provides, among other things, for a procedure for inspection and copying of personnel records.[421] Likewise, if an employee or former employee files a lawsuit related to a personnel matter, the right to inspect or copy personnel records stops while the lawsuit is ongoing.[422]

Inspection of the File. An employer must make personnel files available at reasonable intervals and reasonable times to employees, former employees or their representatives.[423] The California Department of Labor Standards Enforcement takes the position that *reasonable times* means during the regular business hours of the office where the personnel records are usually maintained, or during the employee's regular shift, and that *reasonable intervals* means once a year unless there is reasonable cause to establish a need for more frequent inspections.[424]

The individual may also request that the employer provide a copy of the personnel records, which the employer must provide at a charge not to exceed the actual cost of reproduction.[425] Copies of payroll records, by contrast, may be charged to the employee.[426] In addition, the employer must do all of the following:

- Make a current employee's personnel records available for inspection, and, if requested by the employee or the employee's representative, provide a copy thereof, at the place where the employee reports to work, or at another location agreeable to the employer and the requester. If the employee is required to inspect or receive a copy at a location other than the

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[418] CAL. LAB. CODE § 1198.5(b).

[419] CAL. LAB. CODE § 1198.5(p).

[420] CAL. LAB. CODE § 1198.5(d).

[421] CAL. LAB. CODE § 1198.5(q).

[422] CAL. LAB. CODE § 1198.5(n).

[423] CAL. LAB. CODE § 1198.5(b).

[424] California Div. of Labor Standards Enforcement, *Personnel Files and Records*, *available at* http://www.dir.ca.gov/dlse/faq_righttoinspectpersonnelfiles.htm.

[425] CAL. LAB. CODE § 1198.5(b).

[426] CAL. LAB. CODE §§ 226, 247.5.

place where the individual reports to work, no loss of compensation to the employee is permitted. Except as provided above, the employer is not required to make the records available during time periods when the employee is actually on duty.

- Make a former employee's personnel records available for inspection, and, if requested by the employee or the employee's representative, provide a copy thereof, at the location where the employer stores the records, unless the parties mutually agree in writing to a different location. A former employee may receive a copy by mail if the individual reimburses the employer for actual postal expenses.[427]

If a former employee seeking to inspect their personnel records was terminated for violating the law or an employment-related policy involving harassment or workplace violence, the employer may comply with the records request by:

- making the personnel records available to the former employee for inspection at a location other than the workplace that is within a reasonable driving distance of the former employee's residence; or
- providing a copy of the personnel records by mail.[428]

3.1(c)(iii) *State Guidelines on Employee Medical Records*

The California Confidentiality of Medical Information Act (CMIA) restricts dissemination of medical information in the custody of health care providers, and, of interest to employers, strictly limits an employer's use and disclosure of employee medical information.[429] An employer must establish appropriate procedures to ensure the confidentiality of employee medical information and its protection from unauthorized use and disclosure. Such procedures may include instructions regarding confidentiality to employees handling files or the use of security systems to restrict access to such files.[430]

The CMIA prohibits employers from using, disclosing, or knowingly permitting employees to use or disclose medical information in the employer's possession without the employees having first signed an authorization permitting such use or disclosure.[431] An authorization for disclosure of medical information is valid if it complies with all of the following:

- is handwritten by the person who signs it or is in typeface no smaller than 14-point type;
- is clearly separate from any other language present on the same page and is executed by a signature that serves no purpose other than to execute the authorization;
- is signed and dated by the employee;
- states the limitations, if any, on the types of medical information to be disclosed;
- states the name or functions of the employer or person authorized to disclose the medical information;

[427] CAL. LAB. CODE § 1198.5(c)(2), (3).

[428] CAL. LAB. CODE § 1198.5(c)(3)(B).

[429] CAL. CIV. CODE §§ 56 *et seq*.

[430] CAL. CIV. CODE § 56.20(a).

[431] CAL. CIV. CODE § 56.20(c).

- states the names or functions of the persons or entities authorized to receive the medical information;
- states the limitations, if any, on the use of the medical information by the individuals or entities authorized to receive it;
- states a specific date after which the employer is no longer authorized to disclose the information; and
- advises the person who signed the authorization of the right to receive a copy of it.[432]

The employer is also required to provide a copy of the authorization to the signer upon demand.[433]

This statute may be particularly troublesome for employers that are monitoring an employee's disability or workers' compensation leave. In order to review an employee's medical records to evaluate a leave request or fitness to return to work, an employer must first obtain the employee's written authorization.[434] Without such authorization releasing the employee's medical records, employers are entitled only to notice as to whether an employee can perform essential job functions.[435]

Under certain circumstances, the CMIA exempts an employer from obtaining employee authorization for release of medical records. Exemptions apply:

- if the information is compelled by judicial or administrative process (*i.e.*, a valid subpoena);
- if the information is relevant in a lawsuit, arbitration, grievance, or other claim or challenge to which the employer and employee are parties and in which the employee has placed at issue their medical history, medical or physical condition, or treatment;
- if needed for administering and maintaining employee benefit plans or workers' compensation, and for determining eligibility for paid and unpaid leave from work for medical reasons; or
- where, if disclosed to a health care provider, it will aid the diagnosis or treatment of the patient where the patient is unable to authorize a disclosure.[436]

3.2 Privacy Issues for Employees

3.2(a) *Background Screening of Current Employees*

3.2(a)(i) *Federal Guidelines on Background Screening of Current Employees*

For information on federal law related to background screening of current employees, see **1.3**.

3.2(a)(ii) *State Guidelines on Background Screening of Current Employees*

Certain of California's laws pertaining to pre-hire background screening also apply in the post-hire context. With respect to criminal background checks, state law prohibits an employer from accessing information concerning arrest records for which there were no resulting conviction to be used in making a decision

[432] CAL. CIV. CODE § 56.21.

[433] CAL. CIV. CODE § 56.22.

[434] *Pettus v. Cole*, 57 Cal. Rptr. 2d 46 (Cal. Ct. App. 1996).

[435] 57 Cal. Rptr. 2d 46.

[436] CAL. CIV. CODE § 56.20(c).

regarding continued employment, promotion, termination, and the like.[437] However, an employer may ask an employee about an arrest for which the individual is out on bail or on personal recognizance pending trial.[438] Likewise, the state's laws regarding credit history usage restrictions, employer access to employees' social media accounts, and polygraph testing restrictions also apply to both job applicants and current employees.[439] For more information on background screenings, see **1.3**.

3.2(b) *Drug & Alcohol Testing of Current Employees*

3.2(b)(i) *Federal Guidelines on Drug & Alcohol Testing of Current Employees*

For information on federal laws requiring drug testing of current employees, see **1.3(e)(i)**.

3.2(b)(ii) *State Guidelines on Drug & Alcohol Testing of Current Employees*

As discussed in **1.3(e)**, in determining whether drug testing is permissible, an employer's interest in maintaining a drug-free workplace must be balanced against an employee's constitutional right to privacy.[440] In *Loder v. City of Glendale*, the California Supreme Court evaluated the propriety of conducting suspicionless drug testing on current employees, as opposed to prospective employees. The court reasoned:

> An employer generally need not resort to suspicionless drug testing to determine whether a current employee is likely to be absent from work or less productive or effective as a result of current drug or alcohol abuse: an employer can observe the employee at work, evaluate his or her work product and safety record, and check employment records to determine whether the employee has been excessively absent or late.[441]

The court concluded that "an employer has a greater need for, and interest in, conducting suspicionless drug testing of job applicants than it does in conducting such testing of current employees."[442] The court then struck down the drug testing policy in question as it applied to current employees.

Unfortunately, the *Loder* court did not provide any guidance regarding the circumstances under which suspicionless drug testing of existing employees was acceptable under the state constitution. In fact, the only direction on this issue was the following statement, buried in a footnote of the court's opinion:

> [W]e believe it is appropriate to observe that, in our view, the court of appeal in this case set forth too restrictive a standard in holding that [suspicionless testing] is permissible only for positions in which an employee's inability to perform his or her duties could have an immediate disastrous consequence upon public safety or security.[443]

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[437] CAL. LAB. CODE § 432.7; CAL. CODE REGS. tit. 2, § 11017.

[438] CAL. LAB. CODE § 432.7.

[439] CAL. CIV. CODE §§ 1785.1 *et seq*. (credit checks); CAL. LAB. CODE §§ 432.2 (polygraph testing), 980 (social media).

[440] *Hill v. Nat'l Collegiate Athletic Ass'n*, 26 Cal. Rptr. 2d 834 (Cal. 1994); *Loder v. City of Glendale*, 59 Cal. Rptr. 2d 696, 729 (Cal. 1997).

[441] *Loder*, 59 Cal. Rptr. 2d at 719.

[442] 59 Cal. Rptr. 2d at 729.

[443] 59 Cal. Rptr. 2d at 730 n.25.

In light of *Hill* and *Loder*, therefore, it appears that an employer considering suspicionless drug testing must carefully balance the intrusiveness of the testing against its necessity for conducting the testing. As noted in *Loder*, this balancing involves:

- a consideration of the status of the person being tested (*i.e.*, applicant or existing employee), the type of job at issue (*i.e.*, whether it is safety sensitive);
- the testing procedure being used (*i.e.*, whether urine is being collected, blood is being drawn, pupillary reaction is being tested, etc.);
- whether the individual being tested can and is being required to submit to a medical exam (the extent to which the results of the test are being revealed to the employer); and
- a host of other factors.[444]

Consistent with this guidance, California courts have condoned suspicionless drug testing of current employees only for safety-sensitive or security-sensitive positions.[445] Employers must inform employees in such positions that they are part of the pool of employees who may be subject to random testing.

Suspicionless, random drug testing of employees working in other types of positions (that is, not safety- or security-sensitive) is not permitted because the employee's right to privacy presumably outweighs the employer's asserted need for a drug-free workplace. Suspicionless, nonrandom testing (*i.e.*, perhaps based on testing an entire shift or location) is also not advised.

Employers should be aware that different rules may apply to testing conducted in other scenarios. For example, a different analysis might govern testing performed post-accident or based on the reasonable suspicion of an employee's drug or alcohol use. The permissibility of testing may also vary depending on the type of screening sought; urine testing, for example, is considered very intrusive and a greater privacy concern.

3.2(b)(iii) *Local Guidelines on Drug & Alcohol Testing of Current Employees*

San Francisco Drug Testing Ordinance. In addition to state and federal laws concerning employee testing, employers operating in the City and County of San Francisco must also comply with a local ordinance.[446] The ordinance prohibits, under all circumstances, the random or company-wide testing of current employees, using blood, urine, or encephalographic testing. It also bans employers from imposing or requesting blood, urine, or encephalographic testing as a condition of continued employment. The

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[444] *See Leonel v. American Airlines, Inc*., 400 F.3d 702 (9th Cir. 2005) (applicants who consented to preemployment blood tests could state a claim for invasion of privacy if they demonstrated that their blood samples were subjected to specific tests the applicants did not reasonably expect or foresee); *American Fed. of Labor v. Unemp. Ins. Appeals Bd*., 28 Cal. Rptr. 2d 210 (Cal. Ct. App.1994) (California Court of Appeal held that an employee who refused to submit to a drug test was discharged for misconduct and, therefore, was ineligible for unemployment insurance benefits). *But see Kraslawsky v. Upper Deck*, 65 Cal. Rptr. 2d 297 (Cal. Ct. App. 1997) (court rejected the employer's contention that the secretary's privacy claim lacked merit because the company's drug testing policy, and the fact that the secretary had been tested prior to being hired, precluded her from having a "reasonable expectation" that she would not be tested).

[445] *See, e.g.*, *Smith v. Fresno Irrigation Dist.*, 84 Cal. Rptr. 2d 775, 779-81, 785-88 (Cal. Ct. App. 1999) (discussing safety concerns in work performed by construction and maintenance worker and concluding that his job was safety-sensitive for purposes of random drug testing).

[446] S.F., CAL., LAB. & EMP. CODE § 51.5.

ordinance allows individualized testing of a current employee if: (1) the employee appears impaired on the job; (2) any such impairment, given the employee's position, "presents a clear and present danger to the physical safety of the employee, another employee," or the public; and (3) the employer grants the employee, at its expense, an opportunity to have the sample re-tested and to explain the results.[447] Notably, the San Francisco ordinance does not restrict other methods of testing (*i.e.*, hair samples) and does not protect applicants.

3.2(c) *Marijuana Laws*

3.2(c)(i) *Federal Guidelines on Marijuana*

Under federal law, it is illegal to possess or use marijuana.[448]

3.2(c)(ii) *State Guidelines on Marijuana*

In contrast to federal law, California permits recreational marijuana use and the use of medical marijuana for certain qualified individuals.

Currently, the state's antidiscrimination law, however, does *not* include prohibitions on discrimination against medical marijuana users. An applicant or employee who uses medical marijuana is not protected as a qualified individual under the Fair Employment and Housing Act (FEHA) where the employer takes action on the basis of such use, and questions about current illegal drug use are not considered prohibited disability-related inquiries.[449] Beginning January 1, 2024, however, the FEHA will contain certain marijuana-related protections for covered employees.

Workplace Accommodation & Restrictions. The California Compassionate Use Act permits the use of medical marijuana by registered patients with a serious medical condition. However, the law does not require accommodation of medical use of marijuana on the property or premises of any place of employment or during the hours of employment.[450] The California Supreme Court has observed that "the [Fair Employment and Housing Act] does not require employers to accommodate the use of illegal drugs."[451] Additionally, it noted that "nothing in the [Compassionate Use Act's] text or history indicates the voters intended to articulate any policy concerning marijuana in the employment context, let alone a fundamental public policy requiring employers to accommodate marijuana use by employees."[452] Moreover, a private or any other health insurance provider or health care service plan is not required to be liable for any claim for reimbursement for the medical use of marijuana.[453]

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[447] S.F., CAL., LAB. & EMP. CODE § 51.5. The employer must also try to limit any permissible testing so that it measures and reveals only chemical substances that are "likely to affect the ability of the employee to perform safely his or her duties while on the job."

[448] 21 U.S.C. §§ 811-12, 842*et seq*.

[449] CAL. CODE REGS. tit. 2, § 11071. *But see Shepherd v. Kohl's Dep't Stores*, 2016 WL 4126705 (E.D. Cal. Aug. 2, 2016) (denying employer summary judgment, after it fired an employee for testing positive for marijuana, where the employee had a medical marijuana prescription and the employer's policy stated that there would be no penalty for having such a prescription or for testing positive for marijuana).

[450] CAL. HEALTH & SAFETY CODE § 11362.785.

[451] *Ross v. RagingWire Telecomms., Inc.*, 70 Cal. Rptr. 3d 382, 387(Cal. 2008).

[452] 70 Cal. Rptr. 3d at 392.

[453] CAL. HEALTH & SAFETY CODE § 11362.785.

Recreational use of marijuana is legal in California. However, employers are not required to "permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growth of marijuana in the workplace."[454] Employers may still prohibit the use of marijuana by employees or prospective employees.[455]

Fair Employment and Housing Act Amendments. Beginning on January 1, 2024, the FEHA will contain a new law that addresses marijuana use.[456] Under the new law, employers cannot request information form a person regarding the person's prior use of cannabis and cannot discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalize a person, if the discrimination is based upon any of the following:

- The person's use of cannabis off the job and away from the workplace. Note, however, employers can discriminate or penalize a person based on scientifically valid preemployment drug screening conducted through methods that do not screen for nonpsychoactive cannabis metabolites.
- An employer-required drug screening test that has found the person to have nonpsychoactive cannabis metabolites in their urine, hair, blood, or bodily fluids.

The law contains numerous exceptions:

- Employees cannot possess, be impaired by, or use, cannabis on the job.
- Employers may inquire about or consider a person's prior cannabis use obtained from the person's criminal history only to the extent that Cal. Gov't Code § 12952 or other state or federal law allows the employer to consider or inquire about a person's criminal history.
- The law does not affect employers' rights or obligations of an employer to maintain a drug- and alcohol-free workplace per California Health and Safety Code Section 11362.45 or any other employer rights or obligations specified by federal law or regulation.
- The law does not apply to:
  - An employee in the building and construction trades.
  - Applicants or employees hired for positions that require a federal government background investigation or security clearance in accordance with regulations issued by the United States Department of Defense per Part 117 of Title 32of the Code of Federal Regulations, or equivalent regulations applicable to other agencies.
  - The law does not preempt state or federal laws requiring applicants or employees to be tested for controlled substances, including laws and regulations requiring applicants or employees to be tested, or the manner in which they are tested, as a condition of receiving federal funding or federal licensing-related benefits or entering into a federal contract.

[454] CAL. HEALTH & SAFETY CODE § 11362.45(f).

[455] CAL. HEALTH & SAFETY CODE §§ 11362.1, 11362.45.

[456] CAL. GOV'T CODE § 12954.

3.2(d) *Data Security Breach*

3.2(d)(i) *Federal Data Security Breach Guidelines*

Federal law does not contain a data security breach notification statute. However, of interest to employers that provide identity theft protection services to individuals affected by a data security breach, whether voluntarily or as required by state law:

- An employer providing identity protection services to an employee whose personal information may have been compromised due to a data security breach is not required to include the value of the identity protection services in the employee's gross income and wages.
- An individual whose personal information may have been compromised in a data breach is not required to include in their gross income the value of the identity protection services.
- The value of the provided identity theft protection services is not required to be reported on an information return (such as Form W-2 or Form 1099-MISC) filed with respect to affected employees.[457]

The tax relief provisions above do not apply to:

- cash provided in lieu of identity protection services;
- identity protection services provided for reasons other than as a result of a data breach, such as identity protection services received in connection with an employee's compensation benefit package; or
- proceeds received under an identity theft insurance policy.[458]

3.2(d)(ii) *State Data Security Breach Guidelines*

There are several laws in California, including the state constitution, that pertain to the protection of employee information (see, for example, **3.1(c)(ii)** and **3.1(c)(iii)**, respectively, for information on employee personnel and medical files). This section briefly addresses the notification due individuals, including employees, in the event of a data security breach. Employers should be aware, however, that there may be multiple other state laws implicated with respect to protecting employees' data privacy.

California's data security statute requires a covered entity to provide notice to affected individuals when the entity discovers or is notified of a breach and the personal unencrypted information was, or is reasonably believed to have been, acquired by an unauthorized person.[459] The statute defines *security breach* as the unauthorized acquisition of data that compromises the security, confidentiality, or integrity of personal information maintained by the covered entity.[460] *Personal information* means Social security number; driver's license number or California identification card number, a tax identification number, passport number, military identification number, or other unique identification number issued on a government document commonly used to verify the identity of a specific individual; account number or

[457] I.R.S. Announcement 2015-22, *Federal Tax Treatment of Identity Protection Services Provided to Data Breach Victims* (Aug. 14, 2015), *available at* https://www.irs.gov/pub/irs-drop/a-15-22.pdf.

[458] I.R.S. Announcement 2015-22, *Federal Tax Treatment of Identity Protection Services Provided to Data Breach Victims* (Aug. 14, 2015).

[459] CAL. CIV. CODE § 1798.82(a).

[460] CAL. CIV. CODE § 1798.82(g).

credit or debit card number, in combination with any required security code, access code, or password that would permit access to an individual's financial account; medical information; health insurance information; information or data collected through the use or operation of an automated license plate recognition system; genetic data; a username or email address, in combination with a password or security question and answer that would permit access to an online account; unique biometric data generated from measurements or technical analysis of human body characteristics, such as a fingerprint, retina, or iris image, used to authenticate a specific individual; or genetic information, such as DNA, RNA, or chromosomes. Unique biometric data does not include a physical or digital photograph, unless used or stored for facial recognition purposes.[461]

Coverage & Exceptions. An employer is a covered entity within the meaning of the statute if the employer conducts business in California and: (1) owns or licenses computerized data that includes personal information; or (2) maintains computerized data that includes personal information that the person or business does not own.[462]

Certain entities are not subject to the statute's notification requirements. An entity subject to the federal Health Insurance Portability and Accountability Act (HIPAA) will be deemed compliant with the notification requirement if any data security breach notice complies with the federal Health Information Technology for Economic and Clinical Health Act (HITECH Act).[463]

Form of Notice. Generally, notice may be provided in one of the following formats:

- written notice;
- electronic mail, if the notice is consistent with the federal e-sign act; or
- substitute notice, if the covered entity demonstrates that:
  - the cost of providing notice would exceed $250,000;
  - the affected class of persons to be notified exceeds 500,000; or
  - the covered entity does not have sufficient contact information.

Substitute notice must consist of all of the following:

- email notice when the covered entity has an email address for the subject persons;
- notification by statewide media; and
- conspicuous posting of the notice on the website of the covered entity, if the covered entity maintains a website. The notice must be posted on the website for a minimum of 30 days. *Conspicuous posting* means providing a link to the notice on the home page or first significant page after entering the website that is in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks that call attention to the link.[464]

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[461] CAL. CIV. CODE § 1798.82(a).

[462] CAL. CIV. CODE § 1798.82(a).

[463] CAL. CIV. CODE § 1798.82(e).

[464] CAL. CIV. CODE § 1798.82(j).

In addition, entities seeking substitute notice must also notify the Office of Privacy Protection within the State and Consumer Services Agency.

Special delivery requirements apply to certain types of online breaches. When a system security breach occurs involving personal information *for an online account only* (but no other personal information), the covered entity may comply by providing "notification in electronic or other form that directs the person whose personal information has been breached promptly to change his or her password and security question or answer, . . . or to take other steps appropriate to protect the online account . . . and all other online accounts" that use the same username, email address, password, or security question.[465]

When a system security breach occurs involving personal information *for login credentials of an email account furnished by the person or business*, the person or business cannot comply by providing notification to the breached email address. Instead, it may comply by providing notice via another permitted method (*e.g.*, written notice) or via online by clearly and conspicuously delivering the notice to the affected person when the person "is connected to the online account from an [IP] address or online location from which the person or business knows the [individual] customarily accesses the account."[466]

When the breach occurs involving personal information including biometric data, the notification must also include instructions on how to notify other entities that used the same type of biometric data as an authenticator to no longer rely on data for authentication purposes.[467]

Content of Notice. The security breach notification must be written in plain language, must be titled "Notice of Data Breach," and must present the required information under the following headings:

1. "What Happened,"
2. "What Information Was Involved,"
3. "What We Are Doing,"
4. "What You Can Do," and
5. "For More Information."[468]

The security breach notification must include, at a minimum, the following information:

- the name and contact information of the reporting person or business;
- a list of the types of personal information that were or are reasonably believed to have been the subject of a breach;
- if the information is possible to determine at the time the notice is provided, then any of the following:
    - date of the breach;

[465] CAL. CIV. CODE § 1798.82(j)(4).

[466] CAL. CIV. CODE § 1798.82(j)(5).

[467] CAL. CIV. CODE § 1798.82(j).

[468] CAL. CIV. CODE § 1798.82(d)(1).

  - estimated date of the breach; or
  - the date range within which the breach occurred.
- the date of the notice;
- whether notification was delayed as a result of a law enforcement investigation, if that information is possible to determine at the time the notice is provided;
- a general description of the breach incident, if that information is possible to determine at the time the notice is provided;
- the toll-free telephone numbers and addresses of the major credit reporting agencies, if the breach exposed a social security number or a driver's license or California identification card number; and
- "if the person or business providing the notification was the source of the breach, an offer to provide appropriate identity theft prevention and mitigation services, if any, [must] be provided at no cost to the affected person for not less than 12 months along with all information necessary to take advantage of the offer to any person whose information was or may have been breached if the breach exposed or may have exposed personal information."[469]

At the discretion of the covered entity, the security breach notification may also include any of the following:

- information about what the person or business has done to protect individuals whose information has been breached; and
- advice on steps that the person whose information has been breached may take to protect themselves.[470]

Timing of Notice. Notice must be given in the most expedient time and manner possible without unreasonable delay.[471] However, notification may be delayed if a law enforcement agency determines that the disclosure will impede a criminal investigation. Notification must be made promptly after the law enforcement agency determines that disclosure will not compromise the investigation.[472]

Additional Provisions. In addition to notifying individuals affected by the breach, the statute requires that a covered entity must notify 500 or more California residents of a security breach, an electronic sample copy of the notice must be sent to the state's attorney general, excluding any personally identifiable information.[473]

[469] CAL. CIV. CODE § 1798.82(d)(2). A model security breach notification form is provided at CAL. CIV. CODE § 1798.82(d)(1)(D).

[470] CAL. CIV. CODE § 1798.82(d)(3).

[471] CAL. CIV. CODE § 1798.82(a).

[472] CAL. CIV. CODE § 1798.82(c).

[473] CAL. CIV. CODE § 1798.82(f).

3.2(e) *The California Consumer Protection Act*

The California Consumer Protection Act (CCPA) generally applies to all "personal information" of "consumers." [474] *Consumers* are defined as California residents, and *personal information* is any individually identifiable information about them. However, the following categories of California residents' personal information is treated differently under the law, see Table 3, **0**:

- HR data;
- emergency contacts; and
- third-party benefits information.[475]

The CCPA establishes a process that allows California residents to recover between $100 and $750 in statutory damages for certain information security breaches. For the process to apply, the breach must have two characteristics.

First, it must involve the "unauthorized access and exfiltration, theft, or disclosure of" any of the following categories of personal information when computerized, unencrypted, and, in combination with the individual's first name or initial and last name: (a) Social Security number; (b) driver's license number or California identification card number; (c) account number, credit or debit card number, in combination with any required security code, access code, or password that would permit access to an individual's financial account; (d) medical information; or (e) health insurance information (collectively "Trigger Data"). Any such breach would trigger the obligation under California's breach notification law to notify affected individuals and, if the breach were to involve more than 500 California residents, to notify California's attorney general.

Second, the breach must result from "the business's violation of the duty to implement and maintain reasonable security procedures and practices appropriate to the nature of the information." The CCPA itself does not define "reasonable security procedure and policies." However, in its California Data Breach Report, California's attorney general stated that the "20 controls in the Center for Internet Security's Critical Security Controls identify a minimum level of information security that all organizations that collect or maintain personal information should meet." The attorney general went so far as to take the position that "[t]he failure to implement all the Controls that apply to an organization's environment constitutes a lack of reasonable security."[476]

Further, the CCPA requires mandatory notice to Workforce Members regarding data collection. *Workforce Members* are defined to include California residents in their capacity as job applicants, employees, individuals who are independent contractors, corporate officers and directors, individuals with a majority ownership interest in a business, and physicians, surgeons, and dentists who are medical staff members. Workforce members must be informed "as to the categories of personal information to be collected and the purposes for which the categories of personal information shall be used." This information must be provided "at or before the point of collection." In addition, the CCPA requires a new notice when previously collected personal information is used for a previously undisclosed purpose.

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[474] CAL. CIV. CODE § 1798.100.

[475] CAL. CIV. CODE § 1798.100.

[476] CAL. CIV. CODE § 1798.100; Cal. Dep't of Justice, Kamala D. Harris, *California Data Breach Report* (Feb. 2016), *available at* https://oag.ca.gov/sites/all/files/agweb/pdfs/dbr/2016-data-breach-report.pdf.

Employers cannot lose sight of their CCPA compliance obligations other than in their capacity as employers. Most personal information collected from California residents who are not Workforce Members or from Workforce Members other than in that capacity — for example, from an employee in their capacity as a website user or customer — will be subject to all of the CCPA's compliance requirements. In brief, these requirements include: (1) posting a website privacy policy that includes the content listed in the CCPA; and (2) timely responding to requests by individuals to exercise their rights under the CCPA, including California residents' rights to access and delete their personal information; to receive supplemental information about the disclosure of their personal information; and to opt out of the sale of their personal information.[477]

3.3 Minimum Wage & Overtime

3.3(a) *Federal Guidelines on Minimum Wage & Overtime*

The primary source of federal wage and hour regulation is the Fair Labor Standards Act (FLSA). The FLSA establishes minimum wage, overtime, and child labor standards for covered employers. The FLSA applies to businesses that have: (1) annual gross revenue exceeding $500,000; and (2) employees engaged in commerce or in the production of goods for commerce, or employees that handle, sell, or otherwise work on goods or material that have been moved in or produced for commerce. For more information on this topic, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

As a general rule, federal wage and hour laws do not preempt state laws.[478] Thus, an employer must determine whether the FLSA or state law imposes a more stringent minimum wage, overtime, or child labor obligation and, if so, apply the more stringent of the two standards. If an employee is exempt from either federal or state law, but not both, then the employee must be paid for work in accordance with whichever law applies.

3.3(a)(i) *Federal Minimum Wage Obligations*

The current federal minimum wage is $7.25 per hour for most nonexempt employees.[479]

Tipped employees are paid differently. If an employee earns sufficient tips, an employer may take a maximum tip credit of up to $5.12 per hour. Therefore, the minimum cash wage that a tipped employee must be paid is $2.13 per hour. Note that if an employee does not make $5.12 in tips per hour, an employer must make up the difference between the wage actually made and the federal minimum wage of $7.25 per hour. An employer bears the burden of proving that it is not taking a tip credit larger than the amount of tips actually received by the employee.[480]

An employer cannot keep tips received by employees for any purpose, including allowing managers or supervisors to keep a portion of employees' tips, regardless of whether the employer takes a tip credit.[481]

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[477] CAL. CIV. CODE § 1798.100.

[478] 29 U.S.C. § 218(a).

[479] 29 U.S.C. § 206.

[480] 29 U.S.C. §§ 203, 206.

[481] 29 U.S.C. § 3(m)(2)(B).

3.3(a)(ii) *Federal Overtime Obligations*

Nonexempt employees must be paid one-and-a-half times their regular rate of pay for all hours worked over 40 in a workweek.[482] For more information on exemptions to the federal minimum wage and/or overtime obligations, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

3.3(b) *State Guidelines on Minimum Wage Obligations*

As a general rule, federal wage and hour laws are less restrictive than California's laws. California regulates minimum wage, overtime, and meal and rest break obligations under the state Labor Code and the Wage Orders issued by the California Industrial Welfare Commission (IWC). There are 17 Wage Orders applicable to various categories of industries; a list and accompanying descriptions are available on the IWC website.[483] Generally, all of an employer's operations will be covered by the Wage Order that best describes an employer's business. Private employers are subject to all of the provisions of the Labor Code and the Wage Orders unless specifically exempted from such provisions. Out-of-state employees who work in California for an entire day or week are subject to California's overtime requirements and potentially other requirements as well.[484]

California wage and hour laws are enforced by the Division of Labor Standards Enforcement (DLSE), which is headed by the state Labor Commissioner. The Labor Commissioner has the authority to issue regulations that interpret the state's laws.

3.3(b)(i) *State Minimum Wage*

Under the FLSA, a nonexempt employee, with very few exceptions, may not be paid less than the federal minimum wage, which is currently set at $7.25 per hour. Because California's minimum wage is higher than the federal minimum wage, California nonexempt employees must be paid at least the state minimum wage.

As of January 1, 2024, the minimum wage is $16.00 per hour.[485] On each subsequent January 1, the state will adjust the minimum wage rate based on changes to the consumer price index, *e.g.*, on January 1, 2025, it will increase to $16.50.

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[482] 29 U.S.C. § 207.

[483] *See* http://www.dir.ca.gov/iwc/wageorderindustries.htm.

[484] *Sullivan v. Oracle Corp.*, 127 Cal. Rptr. 3d 185 (2011), *rev'd in part, aff'd in part by* 662 F.3d 1265 (9th Cir. 2011).

[485] CAL. LAB. CODE § 1182.12. The state labor department issued guidance on how to determine whether an employer has 26 or more, or 25 or fewer, employees. The statute does not specify how to calculate, but a court or the department will likely focus on the pay period(s) in which a violation is alleged. All employees will be counted, including exempt employees, regardless of hours worked or their location. Employers must make a reasonable, good faith determination, which should consider that the law is generally interpreted to favor workers. In joint employment scenarios, all individuals under an employer's control should be counted. If workers are provided by a staffing agency, an employer should count those individuals as employees. *See* California Dep't of Indus. Relations, *New Minimum Wage Phase in Requirement 2017-2023 SB 3 Frequently Asked Questions*, *available at:* http://www.dir.ca.gov/dlse/SB3_FAQ.htm.

3.3(b)(ii) *Tipped Employees*

California law prohibits employers from taking a tip credit.[486] Tipped employees in California receive the state minimum wage as set forth in **3.3(b)(i)**.

3.3(b)(iii) *Minimum Wage Exceptions & Rates Applicable to Specific Groups*

The general state minimum wage provisions do not apply to certain categories of workers. California's general Minimum Wage Order and industry-specific Wage Orders exempt outside salespersons, individuals who are the parent, spouse, or children of the employer, and apprentices regularly indentured under the State Division of Apprenticeship Standards.[487] A few other categories of workers may receive sub-minimum wage or no compensation at all if their jobs meet certain criteria, including learners, volunteers, and interns:

- **Learners**. Learners of any age may be paid a lower wage during the first 160 hours of employment in a role for which they have no previous experience, similar experience or related experience. The minimum wage for learners is 85% of the California minimum wage, rounded to the nearest nickel.[488]
- **Volunteers.** In determining whether a worker is a volunteer or an employee, the DLSE examines the intent of the parties.[489] Volunteers who meet the following criteria are not considered "employees" under the California wage and hour laws and are therefore not required to be paid minimum wage. The volunteer's work must be performed:
  - without contemplation of pay;
  - for public service, religious, or humanitarian objectives; and
  - for a religious, charitable, or similar nonprofit corporation.[490]
- **Interns.** With respect to interns, the California Labor Code and Wage Orders assume the existence of an employment relationship in order for the minimum wage law to apply. There is no statutory provision or any provision in the Wage Orders specifically governing the application of the state minimum wage to internships. The DLSE takes the position that internships that meet certain criteria do not constitute an employment relationship, and therefore, employers with such internship programs are not required to compensate interns participating in the program.[491] The DLSE applies the test articulated by the U.S. Department of Labor for purposes of the FLSA[492] to determine whether an individual is an intern and whether an internship meets the criteria for a permissible unpaid internship program.[493]

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[486] CAL. LAB. CODE § 351.

[487] California Minimum Wage Order, MW-2014.

[488] CAL. LAB. CODE § 1192; California Wage Orders.

[489] California Div. of Labor Standards Enforcement, Op. Ltr. 1988-10-27.

[490] California Div. of Labor Standards Enforcement, Op. Ltr. 1988-10.27.

[491] California Div. of Labor Standards Enforcement, Op. Ltr. 2010-04-07.

[492] U.S. Dep't of Labor, Wage & Hour Div., *Fact Sheet No. 71: Internship Programs Under the FLSA* (April 2010); *see also Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528 (2d Cir. 2015).

[493] California Div. of Labor Standards Enforcement, Op. Ltr. 2010-04-07.

3.3(b)(iv) *Minimum Wage Applicable in the Healthcare Industry*

Beginning on October 16, 2024, California Labor Code sections 1182.14 and 1182.15, as amended by section 1182.16, will establish the minimum wage that covered employees must receive.[494] In addition to the laws establishing who is a covered employee, the minimum wage rates will vary due to an employer's "tier."

- Tier 1: Health care facility with 10,000 or more full-time equivalent employees; Health care facility that is a part of an integrated health care delivery system or health care system with 10,000 or more full-time equivalent employees; Health care facility that is a dialysis clinic (Cal. Health & Safety § 1204(b)) or that is a person that owns, controls, or operates a dialysis clinic; Health facility owned, affiliated, or operated by a county with a population of more than 5,000,000.
- Tier 2: Hospital with a high governmental payor mix; Independent hospital with an elevated governmental payor mix; Rural independent covered health care facility; Health care facility that is owned, affiliated, or operated by a county with a population of less than 250,000 as of January 1, 2023.
- Tier 3: Clinic (Cal. Health & Safety Code § 1206(h)) that is not operated by or affiliated with a Clinic (Cal. Health & Safety Code § 1206(b)); Community clinic licensed under Cal. Health & Safety Code § 1204(a) and any associated intermittent clinic exempt from licensure under Cal. Health & Safety Code § 1206(b); Rural health clinic (42 U.S.C. § 1396d(l)(1) that is not license-exempt.; Urgent care clinic that is owned by or affiliated with a facility identified above.
- Tier 4: All other covered health care facility employers.
- Tier 5: Licensed skilled nursing facility (Cal. Health & Safety Code § 1250(c)) that is not covered by Section 1182.14; Only takes effect when a patient care minimum spending requirement applicable to skilled nursing facilities is in effect.

Following a minimum wage reaching $25 per hour, on or before August 1 of the following year, and on or before each August 1 thereafter, the Director of Finance must calculate an adjusted minimum wage. The calculation must increase the health care worker minimum wage by the lesser of 3.5 percent or the applicable rate of inflation, with the result rounded to the nearest ten cents. Each adjusted health care worker minimum wage increase takes effect on the following January 1. If the rate of change is negative, there is no increase or decrease.

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[494] *See* Jyoti Mittal and Elizabeth Staggs Wilson, *California Raises Health Care Minimum Wage, Expands to Affect More Positions*, Littler Insight (Pct. 25, 2023), *available at* https://www.littler.com/publication-press/publication/california-raises-health-care-minimum-wage-expands-affect-more. As amended by California Labor Code section 1182.16, the start date for the initial minimum wage rates – originally set for June 1, 2024, then delayed to July 1, 2024 – were delayed until either the Finance Department determines that agency cash receipts for July 1 through September 30, 2024 are at least three percent higher than projected for that period (in which case the rates will begin on October 15, 2024) or the Department of Health Care Services determines the state as an employer of healthcare workers can sustain the increases (in which case the rates will begin 15 days after the determination or on January 1, 2025, whichever is earlier).

Table 9. Healthcare Employee Minimum Wage Rates					
Date	**Tier 1**	**Tier 2**	**Tier 3**	**Tier 4**	**Tier 5**
TBD	$23.00	$18.00	$21.00	$21.00	$21.00
July 1, 2025	$24.00	Previous + 3.5%			
July 1, 2026	$25.00	Previous + 3.5%	$22.00	$23.00	$23.00
July 1, 2027		Previous + 3.5%	$25.00		
January 1, 2028	TBD				
July 1, 2028		Previous + 3.5%		$25.00	$25.00
January 1, 2029	TBD		TBD		
July 1, 2029		Previous + 3.5%			
January 1, 2030	TBD		TBD	TBD	TBD
July 1, 2030		Previous + 3.5%			
January 1, 2031	TBD		TBD	TBD	TBD
July 1, 2031		Previous + 3.5%			
January 1, 2032	TBD		TBD	TBD	TBD
July 1, 2032		Previous + 3.5%			
January 1, 2033	TBD		TBD	TBD	TBD
July 1, 2033		$25.00			
January 1, 2034	TBD		TBD	TBD	TBD
January 1, 2035	TBD	TBD	TBD	TBD	TBD

3.3(b)(v) *Minimum Wage Applicable in the Fast Food Industry*

Beginning April 1, 2024, California Labor Code section 1475 will establish the minimum wage that covered fast food employees must receive: $20.00 per hour. Generally, this standalone, industry-specific minimum wage will apply to employees who work for a *fast food restaurant*, which is a limited-service restaurant in California that is part of a national fast food chain. Moreover, a *national fast food chain* is a set of limited-service restaurants consisting of more than 60 establishments nationally that share a common brand, or that are characterized by standardized options for decor, marketing, packaging, products, and services, and which are primarily engaged in providing food and beverages for immediate consumption on or off premises where patrons generally order or select items and pay before consuming, with limited or no table service.

However, the law does not apply to the following restaurants:

- a restaurant that is located and operates within a grocery establishment (Cal. Lab. Code § 2502(d)) and the grocery establishment employer employs the individuals working in the restaurant;
- an establishment that on September 15, 2023, operates a bakery that produces for sale on the establishment's premises bread (21 C.F.R. ch. I, subch. B., pt. 136) so long as it continues to operate such a bakery. This applies only where the establishment produces for sale bread as a stand-alone menu item and does not apply if the bread is available for sale solely as part of another menu item;
- a restaurant located in an airport (Cal. Pub. Utilities Code § 21013), excluding any military base or federally operated facility;
- a restaurant connected to or operated in conjunction with a hotel (a residential building that is designated or used for lodging and other related services for the public and includes any contracted, leased, or sublet premises connected to or operated in conjunction with the building's purpose, or providing services at the building);
- a restaurant connected to or operated in conjunction with an event center (a publicly or privately owned structure of more than 20,000 square feet or 1,000 seats that is used for the purposes of public performances, sporting events, business meetings, or similar events, and includes concert halls, stadiums, sports arenas, racetracks, coliseums, and convention centers; also includes any contracted, leased, or sublet premises connected to or operated in conjunction with the event center's purpose);
- a restaurant connected to or operated in conjunction with a theme park (a commercially operated, admission-based grounds or enclosure featuring amusement park rides of a permanent or semipermanent nature, shows, and attractions that are presented, shown, staged, or offered to the public, along with games, merchandise, and food offered for sale in the park, and any contracted, leased, or sublet premises that are connected to, located within, or operated in conjunction with that park, whether or not an admissions ticket is required for entry);
- a restaurant connected to or operated in conjunction with a public or private museum (Cal. Civil Code § 1899.1);
- a restaurant connected to or operated in conjunction with a gambling establishment (Cal. Bus. & Prof. Code § 19805(o));
- a restaurant that is all of the following:
  - located in and operated in conjunction with a building, group of buildings, or campus used for office purposes primarily or exclusively by a single, for-profit corporation and its affiliates;
  - primarily or exclusively serves employees of that corporation or its affiliates rather than the general public;
  - is part of, or subject to, a concession or food service contract covering the building, group of buildings, or campus; and
- a restaurant located on land owned by the state, a city or county, or other political subdivision of the state, that is part of a port district or land managed by a port authority or port

commission, a public beach, public pier, state park, municipal or regional park, or historic district, and is operated pursuant to a concession agreement or food service contract.[495]

Corresponding standards – including those not related to the minimum wage – will be determined by the Fast Food Council, which may also establish the minimum wage for fast food restaurant employees on an annual basis, beginning on January 1, 2025. The law dictates how the minimum wage could change due to inflation, while, like the general minimum law, permitting, under certain circumstances, for an upcoming rate change to be paused due to economic conditions. Additionally, it empowers the Fast Food Council to set minimum wage standards statewide or on a regional basis.[496]

3.3(b)(vi) *Local Minimum Wage Ordinances*

California law permits local governments to regulate employees' compensation. Many local jurisdictions have used this authority to establish local minimum wage rates. The local minimum wage ordinances often include their own notice and record-keeping requirements, so employers with operations in those localities must be aware of their overlapping state and local compliance obligations. Table 10 includes local jurisdictions that have enacted minimum wage ordinances. Basic information, such as current rates and scheduled increases, are included; more in-depth detail, however, such as rules relating to different rates for types of employees (*e.g.*, learners) or types of employers (*e.g.*, nonprofit organizations) are beyond the scope of this publication.

Table 10. Local Minimum Wage Ordinances

Jurisdiction	Hourly Minimum Wage Rate	Additional Requirements
Alameda	$17.00 per hour. Annually, on July 1, the rate increases based on changes to the consumer price index.[497]	• workplace poster; and • records retention
Belmont	$17.35 per hour. Annually, on January 1, the rate increases based on changes to the consumer price index, *e.g.*, on January 1, 2025, it will increase to $17.95.[498]	• written notice to current employees and at time of hire; • workplace poster; and • records retention
Berkeley	$18.67 per hour. Annually, on July 1, the rate increases based on changes to the consumer price index.[499]	• written notice at hire; • workplace poster; and • records retention.
Burlingame	$17.03 per hour. Annually, on January 1, the rate increases based on changes to the consumer price index.[500]	• written notice at hire and generally; • workplace poster; and • records retention.

[495] CAL. LAB. CODE § 1474(i)-(k).

[496] A.B. 1228 (Cal. 2023).

[497] ALAMEDA, CAL. MUN. CODE §§ 4-60.10 *et seq*.

[498] BELMONT, CAL. MUN. CODE §§ 32-1 *et seq*.

[499] BERKELEY, CAL. MUN. CODE §§ 13.99.010 *et seq*.

[500] CUPERTINO, CAL., MUN. CODE §§ 3.37.030 *et seq.*

Table 10. Local Minimum Wage Ordinances		
Jurisdiction	**Hourly Minimum Wage Rate**	**Additional Requirements**
Cupertino	$17.75 per hour. Annually, on January 1, the rate increases based on changes to the consumer price index.[501]	• written notice at hire; • workplace poster; and • records retention.
Daly City	$16.62 per hour. Annually, on January 1, the rate increases based on changes to the consumer price index.[502]	• written notice at hire; • workplace poster; and • records retention
East Palo Alto	$17.00 per hour. Annually, on January 1, the rate increases based on changes to the consumer price index, *e.g.*, on January 1, 2025, it will increase to $17.45.[503]	• written notice at hire and generally; • workplace poster; and • records retention.
El Cerrito	$17.92 per hour. Annually, on January 1, the rate increases based on changes to the consumer price index, *e.g.*, on January 1, 2025, it will increase to $18.34.[504]	• written notice at hire; • workplace poster; and • records retention.
Emeryville	$19.36 per hour. Annually, on July 1, the rate increases based on changes to the consumer price index.	• written notice at hire; • workplace poster; and • records retention.
Foster City	$17.00 per hour. Annually, on January 1, the rate increases based on changes to the consumer price index.[505]	• written notice at hire and generally; • workplace poster; and • records retention.
Fremont	$17.30 per hour. Annually, on July 1, the rate increases based on changes to the consumer price index.[506]	• written notice at hire; • workplace poster; and • records retention.
Half Moon Bay	$17.01 per hour. Annually, on January 1, the rate increases based on changes to the consumer price index.[507]	• workplace poster; and • records retention.
Hayward	$16.90 per hour for employers with 26 or more employees, and $16.00 per hour – the state minimum wage – applies to employers with 25	• written notice at hire; • workplace poster; and • records retention.

[501] CUPERTINO, CAL., MUN. CODE §§ 3.37.030 *et seq.*

[502] DALY CITY, CAL. MUN. CODE §§ 8.76.010 *et seq*.

[503] EAST PALO ALTO, CAL. MUN. CODE §§ 5.10.010 *et seq.*

[504] EL CERRITO, CAL., MUN. CODE §§ 6.95.010 *et seq*.

[505] FOSTER CITY, CAL., MUN. CODE §§ 5.73.010 *et seq*.

[506] FREMONT, CAL., MUN. CODE §§ 5.30.010 *et seq*.

[507] HALF MOON BAY, CAL., MUN. CODE §§ 3.300.010 *et seq.*

Table 10. Local Minimum Wage Ordinances		
Jurisdiction	**Hourly Minimum Wage Rate**	**Additional Requirements**
	or fewer employees because the local rate is lower. Annually, on January 1, the rate increases based on changes to the consumer price index.[508]	
Los Altos	$17.75 per hour. Annually, on January 1, the rate increases based on changes to the consumer price index, *e.g.*, on January 1, 2025, it will increase to $18.20.[509]	• written notice at hire; • workplace poster; and • records retention.
City of Los Angeles	$17.28 per hour. Annually, on July 1, the rate increases based on changes to the consumer price index. [510]	• written notice at hire; • notice about federal earned income tax credit; • workplace poster; and • records retention.
Los Angeles County (unincorporated areas of Los Angeles County only)	$17.27 per hour. Annually, on July 1, the rate increases based on changes to the consumer price index. [511]	• written notice at hire; • workplace poster; • wage statement requirements; and • records retention.
Malibu	$17.27 per hour. Annually, on July 1, the rate increases based on changes to the consumer price index. [512]	No requirements.
Menlo Park	$16.70 per hour. Annually, on January 1, the rate increases based on changes to the consumer price index.[513]	• written notice at hire; • workplace poster; and • records retention.
Milpitas	$17.70 per hour. Annually, on July 1, the rate increases based on changes to the consumer price index.[514]	• written notice at hire; • workplace poster; and • records retention.
Mountain View	$18.75 per hour. Annually, on January 1, the rate increases based on changes to the	• written notice at hire; • workplace poster; and

[508] HAYWARD, CAL. MUN. CODE §§ 6-15.00 *et seq*.

[509] LOS ALTOS, CAL., MUN. CODE §§ 3.50.030 *et seq*.

[510] LOS ANGELES, CAL., MUN. CODE §§ 187.01 *et seq*.

[511] LOS ANGELES CTY., CAL., CODE §§ 8.100.010 *et seq*.

[512] MALIBU, CAL., MUN. CODE §§ 5.36.010 *et seq*.

[513] MENLO PARK, CAL., MUN. CODE §§ 5.76.010 *et seq*.

[514] MILPITAS, CAL., MUN. CODE §§ 31-1.00 *et seq*.

Table 10. Local Minimum Wage Ordinances		
Jurisdiction	**Hourly Minimum Wage Rate**	**Additional Requirements**
	consumer price index, *e.g.*, on January 1, 2025, it will increase to $19.20.[515]	• records retention.
Novato	For very large employers (100+ employees), $16.86 per hour; for large employers (26-99 employees), $16.60 per hour; and for small employers (25 or fewer employees), $16.04 per hour. Annually, on January 1, the rate increases based on changes to the consumer price index.[516]	• written notice at hire, generally, and annually; • workplace poster; and • records retention.
Oakland	$16.50 per hour. Annually, on January 1, the rate increases based on changes to the consumer price index.[517]	• written notice at hire; • written notice of annual increase; • workplace poster; and • records retention.
Palo Alto	$17.80 per hour. Annually, on January 1, the rate increases based on changes to the consumer price index, *e.g.*, on January 1, 2025, it will increase to $18.20.[518]	• written notice at hire; • workplace poster; and • records retention.
Pasadena	$17.50 per hour. Annually, on July 1, the rate increases based on changes to the consumer price index. [519]	• written notice at hire; • workplace poster; and • records retention.
Petaluma	$17.45 per hour. Annually, on January 1, the rate increases based on changes to the consumer price index, *e.g.*, on January 1, 2025 it will increase to $17.97.[520]	• written notice (including posting) within one week of employment starting; • separate written notice at hire and annually; • separate workplace poster (potentially); and • records retention.

[515] MOUNTAIN VIEW, CAL., CITY CODE §§ 42.11 *et seq*.

[516] NOVATO, CAL., MUN. CODE §§ 2-30.1 *et seq*.

[517] OAKLAND, CAL., MUN. CODE §§ 5.92.010 *et seq*.

[518] PALO ALTO, CAL., MUN. CODE §§ 4.62.010 *et seq*.

[519] PASADENA, CAL., MUN. CODE §§ 5.02.010 *et seq*.

[520] PETALUMA, CAL. MUN. CODE §§ 8.35.010 *et seq.*

Table 10. Local Minimum Wage Ordinances		
Jurisdiction	**Hourly Minimum Wage Rate**	**Additional Requirements**
Redwood City	$17.70 per hour. Annually, on January 1, the rate increases based on changes to the consumer price index.[521]	• written notice at hire; • workplace poster; and • records retention.
Richmond	$17.20 per hour. Annually, on January 1, the rate increases based on changes to the consumer price index.[522] Although certain employers may claim up to a $1.50 per hour credit for certain medical benefit plan contributions they make, in 2024 the full amount cannot be claimed due to the state minimum wage.	• workplace poster; and • records retention.
San Carlos	$16.87 per hour. Annually, on January 1, the rate increases based on changes to the consumer price index, *e.g.*, on January 1, 2025 it will increase to $17.32.	• written notice at hire and generally; • workplace poster; and • records retention.
San Diego	$16.85 per hour. Annually, on January 1, the rate increases based on changes to the consumer price index.[523]	• written notice at hire; • workplace poster; and • records retention.
San Francisco	$18.67 per hour. Annually, on July 1, the rate increases based on changes to the consumer price index. A lower rate, $16.51, may be paid to certain government supported employees; rate is also annually adjusted.[524]	• written notice at hire; • workplace poster; and • records retention.
San Jose	$17.55 per hour. Annually, on January 1, the rate increases based on changes to the consumer price index. A separate lower rate is available for youth training program participants, but the rate is determined by the enforcement agency based on an employer's application.[525]	• written notice at hire; • workplace poster; and • records retention.

[521] REDWOOD CITY, CAL. MUN. CODE §§ 46.010 *et seq*.

[522] RICHMOND, CAL., MUN. CODE §§ 7.108.010 *et seq*.

[523] SAN DIEGO, CAL., MUN. CODE §§ 39.0101 *et seq*.

[524] SAN FRANCISCO, CAL., LAB. & EMP. CODE §§ 1.1 *et seq*.

[525] SAN JOSE, CAL., MUN. CODE §§ 4.100.010 *et seq*.

Table 10. Local Minimum Wage Ordinances		
Jurisdiction	**Hourly Minimum Wage Rate**	**Additional Requirements**
San Mateo	$17.35 per hour. Annually, on January 1, the rate increases based on changes to the consumer price index, *e.g.*, on January 1, 2025, it will increase to $17.95.[526]	• written notice at hire; • workplace poster; and • records retention.
San Mateo County (unincorporated areas of San Mateo County only)	$17.06 per hour. Annually, on January 1, the rate increases based on changes to the consumer price index, *e.g.*, on January 1, 2025, it will increase to $17.46.	• written notice at hire and/or generally; • workplace poster; and • records retention.
Santa Clara	$17.75 per hour. Annually, on January 1, the rate increases based on changes to the consumer price index, *e.g.*, on January 1, 2025 it will increase to $18.20.[527]	• written notice at hire; • workplace poster; and • records retention.
Santa Monica	$17.27 per hour. Annually, on July 1, the rate increases based on changes to the consumer price index.[528]	• written notice at hire; • workplace poster; and • records retention.
Santa Rosa	$17.45 per hour. Annually, on January 1, the rate increases based on changes to the consumer price index.[529]	• written notice at hire, generally, and annually; • workplace poster; and • records retention.
Sonoma	For large employers (26+ employees), $17.60 per hour.[530] For small employers (25 or fewer employees), $16.56 per hour. Annually, on January 1, the rate increases based on changes to the consumer price index.	• written notice at hire, generally, and/or annually; • workplace poster; and • records retention.
South San Francisco	$17.25 per hour. Annually, on January 1, the rate increases based on changes to the consumer price index.[531]	• written notice at hire (and generally); • workplace poster; and

[526] SAN MATEO, CAL., MUN. CODE §§ 5.92.010 *et seq*. Before 2020, certain nonprofit employers were subject to a rate; however, as of January 1, 2020, one rate applies to all businesses.

[527] SANTA CLARA, CAL., CITY CODE §§ 3.20.010 *et seq*.

[528] SANTA MONICA, CAL., CODE §§ 4.62.010 *et seq*.

[529] SANTA ROSA, CAL. MUN. CODE §§ 10-45.010 *et seq*.

[530] SONOMA, CAL. CODE §§ 2.80.010 *et seq.*

[531] SOUTH SAN FRANCISCO, CAL., MUN. CODE §§ 8.71.010 *et seq*.

Table 10. Local Minimum Wage Ordinances		
Jurisdiction	**Hourly Minimum Wage Rate**	**Additional Requirements**
		• records retention.
Sunnyvale	$18.55 per hour. Annually, on January 1, the rate increases based on changes to the consumer price index.	• written notice at hire; • workplace poster; and • records retention.
West Hollywood	$19.61 for hotels and related entities. Annually, on July 1, the rate increases based on changes to the consumer price index. $19.08 for all other employers. Annually, on January 1, the rate increases based on changes to the consumer price index, *e.g.*, on January 1, 2025, it will increase to $19.65.[532]	• written notice at hire (and generally); • workplace poster; and • records retention.

Additionally, over 20 cities and a handful of counties in California have enacted living wage ordinances that require employers that contract with the city or county to pay a higher minimum wage than the state hourly rate. The local ordinances regarding construction work are often sponsored by the local construction and service unions. Where the ordinance is drafted to closely follow local union agreements, the ordinance may be preempted by the National Labor Relations Act (NLRA) or the Employee Retirement Income Security Act (ERISA).[533]

3.3(c) *State Guidelines on Overtime Obligations*

In California, employers must pay nonexempt employees one-and-one-half times their regular rate for all hours worked over eight in a day or 40 in a week.[534] Additionally, nonexempt employees must be paid one-and-one-half times their regular rate for the first eight hours worked on the seventh day worked in a single workweek.[535] Employers must also pay double time for all hours worked over 12 in a day, and for all hours worked in excess of eight on the seventh consecutive day of work in a single workweek.[536]

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[532] WEST HOLLYWOOD, CAL. MUN. CODE §§ 5.130.010 *et seq*.

[533] *See, e.g.*, *Chamber of Commerce of the U.S. v. Bragdon*, 64 F.3d 497 (9th Cir. 1995); *Associated Builders & Contractors, Golden Gate Chapter, Inc. v. Baca*, 769 F. Supp. 1537 (N.D. Cal. 1991), *aff'd sub nom.*, *Chamber of Commerce of U.S. v. Bragdon*, 64 F.3d 497 (9th Cir. 1995); *Martinez v. Combs*, 109 Cal. Rptr. 3d 514 (Cal. 2010); *Futrell v. Payday Cal., Inc.*, 119 Cal. Rptr. 3d 513 (Cal. Ct. App. 2010), *rev. denied* 119 Cal. Rptr. 3d 513 (Cal. Mar. 30, 2011).

[534] CAL. LAB. CODE § 510; California Wage Orders, § 3. *See also, e.g.*, *Morales v. Factor Surfaces L.L.C.*, 285 Cal. Rptr. 3d 310 (Cal. Ct. App. 2021) (affirming bench trial verdict for non-exempt salaried employee who earned commissions, and method court used to calculate employee's regular rate—dividing total pay by 40 hours; employer did not have records demonstrating portion of pay attributable to commissions and hours worked, and did not propose a manner to accurately estimate commission payments).

[535] CAL. LAB. CODE § 510; California Wage Orders, § 3.

[536] CAL. LAB. CODE § 510; California Wage Orders, § 3.

California law does not require employers to pay both daily and weekly overtime when doing so would result in paying overtime on hours that are already being compensated at an overtime premium. Overtime must only be paid once and at whichever overtime rate is higher.[537]

3.3(d) *State Guidelines on Overtime Exemptions*

Most employees in California are covered by the FLSA's and California's minimum wage law and must be paid overtime if they work more than 40 hours in a workweek.

Exceptions from Overtime. The following is a nonexhaustive list of the types of employees whose overtime rate represents an exception to the generally applicable overtime rate in California.

- **Agricultural Employees.** Agricultural employees need only receive overtime after 10 hours of work in a day and after six days of work in a workweek. Double time must be paid for all hours of work in excess of eight on a seventh consecutive day of work in a single workweek.[538] Employers must carefully distinguish between employees involved in agricultural activities, who are subject to the relaxed overtime standard, and those employees involved in processing agricultural products for market on the farm, who are subject to the eight-hour-per-day and 40-hour-per-week overtime rules. These two groups of employees are covered by different Wage Orders.[539]
- **Motion Picture Industry "Extras."** Extra players in the motion picture industry who are must be paid double time for all hours of work in excess of 10 in a day. Minors must be paid overtime for a sixth day of work in a workweek.[540]
- **Camp Counselors.** Camp counselors may not work more than 54 hours in a workweek or six days in a workweek except in case of a *bona fide* emergency, and must then be paid overtime.[541] Counselors may also be exempt under federal law.[542]
- **Domestic Work Employees.** Domestic workers employed by private homeowners are exempt from all of the provisions of the state's Wage Orders except the provisions regarding the applicability of the Wage Order, the definitions used in the Wage Order, the minimum wage, credits against the minimum wage, and penalties for failing to pay wages.[543] California's Domestic Worker Bill of Rights requires that these workers must be paid overtime for hours worked in excess of more than nine hours in any workday or more than 45 hours in any workweek.[544] Limited exceptions exist for casual babysitters and certain other employees.
- **Child Care Employees.** Employees with direct responsibility for children and others not emancipated from the foster care system who are receiving 24-hour care are entitled to

[537] CAL. LAB. CODE § 510; California Wage Orders, § 3. Additional rules apply when calculating an overtime pay rate when the employee has earned a flat sum bonus during a single pay period. *See Alvarado v. Dart Container Corp. of Cal.*, 4 Cal. 5th 542 (Cal. 2018).

[538] California Wage Order 14.

[539] Workers employed in industries preparing agricultural products for market are covered under Wage Order 13.

[540] California Wage Order 12.

[541] CAL. LAB. CODE § 1182.4; California Wage Order 5.

[542] 29 U.S.C. § 213(a)(3).

[543] California Wage Order 15.

[544] CAL. LAB. CODE §§ 1450–1454.

overtime after 40 hours of work in a workweek, and double time after 48 hours of work in a workweek and after 16 hours of work in a day.[545]

- **Employees of Ski Areas.** Employees of ski establishments are to have regularly scheduled workweeks of 48 hours or less during any month of the year during which skiing activities are being conducted. Overtime must be paid for all hours of work in excess of 10 in a day or 48in a workweek.[546]
- **Employees of Hospitals or Residential Care Facilities.** An employer that operates a hospital or an establishment that is primarily engaged in the residential care of the sick, aged, or mentally ill or disabled can pay overtime for hours worked in excess of 80 in a 14-day period of time if the facility pays overtime for all hours of work in excess of eight in one day.[547] A specific agreement or understanding with the employee to use such a pay plan is a prerequisite to its use.

Exemptions from Overtime. Further, both the FLSA and California law provide limited exemptions from the requirement to pay overtime for "white collar" employees (executives, administrators, and professionals), certain commissioned and outside sales employees, and employees in particular industries and occupations.[548] If employees are exempt, it simply means that the overtime rules (and, in certain cases, minimum wage rules) do not apply to them. Employers may, however, still be required to comply with other wage-related laws for exempt employees. To be exempt from the overtime requirements, an employee in California must qualify to be exempt under both state and federal law.[549] Unfortunately, California's overtime exemptions do not correspond with exemptions in federal law. In addition, not all of the state's overtime exemptions are found in every Wage Order.[550] To ascertain whether a particular exemption can be used, an employer must first make sure that the exemption is found in the Wage Order that applies to the employer's business.

The following list sets forth categories of exemptions from overtime requirements applicable to employees in California. The major exemptions will be discussed in fuller detail in subsequent sections.

- **White Collar Workers.** Salaried executive, administrative, and professional employees are overtime exempt.[551] In addition, certain professional employees may be paid on an hourly basis and still be considered overtime exempt under state law: computer professionals who are paid at least $55.58 per hour[552] and physicians and surgeons (excluding residents and interns) who are paid at least $101.22 per hour.[553] The Labor Code directs the state Division of Labor Statistics and Research to modify annually the rate for computer software

[545] California Wage Order 5.

[546] California Wage Order 10.

[547] California Wage Order 5.

[548] 29 U.S.C. §§ 203(e)(2)-(3), 213; CAL. LAB. CODE § 515; California Wage Orders, § 3.

[549] 29 C.F.R. § 778.5; CAL. LAB. CODE § 515; California Wage Orders, § 3.

[550] For example, Wage Orders 14 and 17 have different white collar exemption tests than some of the other Wage Orders.

[551] California Wage Order 4.

[552] CAL. LAB. CODE § 515.5; California Wage Orders 1 to 13, 15, and 17, § 1. If the employee is paid on a salaried basis, the employee must earn an annual salary of not less than $112,065.20 for full-time employment, which is paid at least once a month and in a monthly amount of not less than $9,338.78.

[553] CAL. LAB. CODE § 515.6.

employees, physicians, and surgeons by the "percentage increase" in the California Consumer Price Index for Urban Wage Earners and Clerical Workers.[554]

- **Commercial Fishing Employees.** Commercial fishing employees are subject to all of the terms of Wage Orders 10 and 14 *except* the overtime requirement. Under Wage Order 14 commercial fishing employees are licensed crew members of commercial fishing vessels. Under Wage Order 10, commercial fishing employees are crew members of licensed commercial passenger fishing boats.
- **Employees Covered by a Collective Bargaining Agreement.** California's overtime requirement does not apply to an employee covered by a valid collective bargaining agreement if the agreement expressly provides for the wages, hours of work, and working conditions of the employees, and if the agreement provides premium wage rates for all overtime hours worked and a regular hourly rate of pay for those employees of not less than 30% more than the state minimum wage.[555]
- **Inside Salespeople.** The overtime exemption for inside sales employees requires such employees to be primarily engaged in sales, to have total compensation that is at least one and one-half times the minimum wage, and have compensation that is comprised at least one half of commissions.[556] Employers should be aware that the federal overtime exemption for commission-paid employees is, in many regards, narrower than that which is provided by Wage Orders 4 and 7.
- **Instructor for a Course or Laboratory at a Higher Education Institution**. Individuals employed to provide instruction for a course or laboratory at an independent institution of higher education are employed in a professional capacity if primarily engaged in an occupation commonly recognized as a learned or artistic profession, they customarily and regularly exercises discretion and independent judgment in the performance of duties, and are paid on a salary basis and receives a certain level of compensation.[557]
- **Pharmaceutical Salespeople.** Pharmaceutical salespeople are considered outside salespeople under the FLSA.[558] California employers will also need to ensure that their outside sales employees qualify under California's slightly different test for the outside sales exemption, discussed in **3.3(d)(v)**.
- **Private School Teachers.** The overtime exemption for teachers in private elementary and secondary schools is limited to employees whose primary duty is teaching and who customarily and regularly exercise independent judgment and discretion.[559] The exemption excludes teachers' aides and other nonteaching positions.
- **Recruiters.** Employment recruiters were found to come within the overtime exemption for commissioned employees under Wage Order 4. Offering a candidate employee's services to

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[554] CAL. LAB. CODE §§ 515.5, 515.6.

[555] CAL. LAB. CODE 514.

[556] California Wage Order 4; California Wage Order 7.

[557] CAL. LAB. CODE § 515.7. An *independent institution of higher education* is a nonpublic, higher education institution that grants undergraduate degrees, graduate degrees, or both. It must have been formed as a nonprofit corporation before January 1, 2023 and be accredited by the U.S. Department of Education.

[558] *Christopher v. SmithKline Beecham Corp*. 132S. Ct. 2156 (2012).

[559] CAL. LAB. CODE § 515.8.

a client in exchange for a payment of money from the client meets the ordinary definition of "sell," so the recruiters were therefore engaged in sales.[560]

- **Shepherds.** Shepherds, whose working conditions were once virtually unregulated, are now covered by comprehensive wage payment regulations under the Labor Code.[561]

3.3(d)(i) *Executive Exemption*

Under California law, an employee is covered by the executive exemption if the employee meets all of these requirements:

- earns a monthly salary equivalent of not less than two times the state minimum wage for full-time employment or effective April 1, 2024, for certain fast food workers, two times the applicable state minimum wage for full-time employment,[562] or, as of October 16, 2024, for certain healthcare workers, earns a monthly salary equivalent to no less than 150% of the health care worker minimum wage (when it applies) or 200% of the general minimum wage, whichever is greater, for full-time employment;
- duties and responsibilities involve the management of the employing enterprise, or of a customarily recognized department or subdivision;
- customarily and regularly directs the work of two or more other employees;
- has the authority to hire or fire other employees, or whose suggestions and recommendations concerning the hiring or firing and as to the advancement and promotion or any other change of status of other employees is given particular weight;
- customarily and regularly exercises discretion and independent judgment; and
- primarily engages in the above referenced exempt duties.[563]

3.3(d)(ii) *Administrative Exemption*

An employee is covered by the administrative exemption in California if the employee meets these requirements:

- earns a monthly salary equivalent of not less than two times the state minimum wage for full-time employment or effective April 1, 2024, for certain fast food workers, two times the applicable state minimum wage for full-time employment,[564] or, as of October 16, 2024, for certain healthcare workers, earns a monthly salary equivalent to no less than 150% of the

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[560] *Muldrow v. Surrex Solutions Corp.*, 136 Cal. Rptr. 3d 382 (2012), *vacated on other grounds*, 143 Cal. Rptr. 3d 528 (Cal. 2012), *substituted opinion*, 146 Cal. Rptr. 3d 447 (Cal. Ct. App. 2012).

[561] CAL. LAB. CODE § 2695.1.

[562] Until the Fast Food Council convenes, issues standards or guidance, etc., we assume that the general standard applies but will use the Fast Food Minimum Wage rather than the General Minimum Wage. At this time the answer is unknown. Accordingly, this information could change once the council weighs in.

[563] CAL. LAB. CODE § 515; *see generally* California Wage Orders, § 1. For certain healthcare workers, CAL. LAB. CODE §§ 1182.14, 1182.15.

[564] Until the Fast Food Council convenes, issues standards or guidance, etc., we assume that the general standard applies but will use the Fast Food Minimum Wage rather than the General Minimum Wage. At this time the answer is unknown. Accordingly, this information could change once the council weighs in.

health care worker minimum wage (when it applies) or 200% of the general minimum wage, whichever is greater, for full-time employment; and

- duties and responsibilities involve either:
  - performance of office or nonmanual work directly related to management policies or general business operations of the employer or its customers; or
  - performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision, in work directly related to the academic instruction or training; and
- customarily and regularly exercises discretion and independent judgment; and
- either:
  - regularly and directly assists a proprietor, or an employee employed in a *bona fide* executive or administrative capacity (as those terms are defined by state law); or
  - performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge; or
  - executes under only general supervision special assignments and tasks; and
- primarily engages in the above referenced exempt duties.[565]

3.3(d)(iii) *Professional Exemption*

Under California law, an employee is covered by the professional exemption if the employee meets these requirements:

- licensed or certified by the State of California and is primarily engaged in the practice of one of the following recognized professions: law, medicine, dentistry, optometry, architecture, engineering, teaching, or accounting; or
- primarily engaged in an occupation commonly recognized as a "learned or artistic profession," *i.e.*, an employee who is primarily engaged in the performance of:
  - work requiring knowledge of an advanced type in a field or science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study (as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or work that is an essential part of or necessarily incident to any of the above work); or
  - work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee or work that is an essential part of or necessarily incident to any of the above work; and
  - whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output

[565] CAL. LAB. CODE § 515; *see generally* California Wage Orders, § 1. For certain healthcare workers, CAL. LAB. CODE §§ 1182.14, 1182.15.

produced or the result accomplished cannot be standardized in relation to a given period of time.

- customarily and regularly exercises discretion and independent judgment in the performance of the above referenced duties; and
- earns a monthly salary equivalent of not less than two times the state minimum for full-time employment or effective April 1, 2024, for certain fast food workers, two times the applicable state minimum wage for full-time employment,[566]or, as of October 16, 2024, for certain healthcare workers, earns a monthly salary equivalent to no less than 150% of the health care worker minimum wage (when it applies) or 200% of the general minimum wage, whichever is greater, for full-time employment.[567]

To qualify for the licensed physician exemption, a licensed physician must earn an hourly rate of not less than $101.22 per hour.[568] Due to the licensure requirement, the professional exemption for licensed physicians does not apply to an employee employed in a medical internship or residency program.[569] In addition, the exemption does not apply to a physician employee covered by a valid collective bargaining agreement pursuant to Labor Code section 514.[570]

Pharmacists employed in the practice of pharmacy and registered nurses employed in nursing are not exempt professional employees, nor exempt from overtime requirements, *unless* they also individually meet the criteria for the executive or administrative exemption. However, the inapplicability of the professional exemption does not apply to certain types of nurses if additional requirements are met, as in the case of certified nurse midwives, certified nurse anesthetists, and certified nurse practitioners.[571]

While the absence of a license precludes the application of the professional exemption for a variety of licensed occupations, including certified public accountants and lawyers, the absence of a license does not preclude the use of the other requirement of the learned professional exemption.[572] That requirement provides that an employee must be primarily engaged in work that is "predominantly intellectual and varied in character" and requires a "prolonged course" of intellectual instruction and study.[573] Under the federal FLSA regulations, that phrase restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession—*e.g.*, professions for which the possession of an appropriate academic degree is required.[574]

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[566] Until the Fast Food Council convenes, issues standards or guidance, etc., we assume that the general standard applies but will use the Fast Food Minimum Wage rather than the General Minimum Wage. At this time the answer is unknown. Accordingly, this information could change once the council weighs in.

[567] CAL. LAB. CODE § 515; *see generally* California Wage Orders, § 1. For certain healthcare workers, CAL. LAB. CODE §§ 1182.14, 1182.15.

[568] CAL. LAB. CODE § 515.6(a).

[569] CAL. LAB. CODE § 515.6(b).

[570] CAL. LAB. CODE § 515.6(b).

[571] CAL. LAB. CODE § 515(f).

[572] *Campbell v. PriceWaterhouseCoopers, L.L.P.*, 642 F.3d 820 (9th Cir. 2011); *Zelasko-Barrett v. Brayton-Purcell, L.L.P.*, 131 Cal. Rptr. 3d 114 (Cal. Ct. App. 2011).

[573] S*ee generally* California Wage Orders, § 1.

[574] 29 C.F.R. § 541.301(d).

3.3(d)(iv) *Computer Professional Exemption*

Under California law, an employee in the computer software field is covered by the computer professional exemption if all of these requirements are met:

- primarily engages in work that is intellectual or creative and that requires the exercise of discretion and independent judgment;
- primarily engages in duties that consist of one or more of the following:
  - application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;
  - design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; or
  - documentation, testing, creation, or modification of computer programs related to the design of software or hardware for computer operating systems.
- highly skilled and proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, or software engineering (a job title is not determinative of the exemption's applicability); and
- the employee's hourly rate of pay is not less than $55.58 per hour or, if the employee is paid on a salaried basis, the employee earns an annual salary of not less than $115,763.35 for full-time employment, which is paid at least once a month and in a monthly amount of not less than $9,646.96.[575]

The computer professional exemption does not apply to various computer employees, *e.g.*, trainees and entry-level position employees, and employees engaged in computer manufacturing, repair, or maintenance.[576]

3.3(d)(v) *Commissioned Sales & Outside Sales Exemptions*

California law also includes overtime exemptions for commissioned salespeople and outside salespeople. Overtime provisions do not apply to any employee whose earnings exceed 1.5 times the state minimum wage, if more than half of that employee's compensation represents commissions.[577] Neither do the overtime provisions apply to an "outside salesperson," which is defined as any person, 18 years of age or over, who customarily and regularly works more than half the working time away from the employer's place of business selling tangible or intangible items or obtaining orders or contracts for products, services, or use of facilities.[578]

[575] CAL. LAB. CODE § 515.5; *see generally* California Wage Orders, § 1.

[576] CAL. LAB. CODE § 515.5(b).

[577] *See generally* California Wage Order Nos. 4 & 7, § 3.

[578] *See generally* California Wage Orders, § 1.

3.4 Meal & Rest Period Requirements

3.4(a) *Federal Meal & Rest Period Guidelines*

3.4(a)(i) *Federal Meal & Rest Periods for Adults*

Federal law contains no generally applicable meal period requirements for adults. Under the FLSA, *bona fide* meal periods (which do not include coffee breaks or time for snacks and which ordinarily last 30 minutes or more) are not considered "hours worked" and can be unpaid.[579] Employees must be completely relieved from duty for the purpose of eating regular meals. Employees are *not* relieved if they are required to perform any duties—active or inactive—while eating. It is not necessary that employees be permitted to leave the premises if they are otherwise completely freed from duties during meal periods.

Federal law contains no generally applicable rest period requirements for adults. Under the FLSA, rest periods of short duration, running from five to 20 minutes, must be counted as "hours worked" and must be paid.[580]

3.4(a)(ii) *Federal Meal & Rest Periods For Minors*

The FLSA does not include any generally applicable meal and rest period requirements for minors. The principles described above as to what constitutes "hours worked" for meal and rest periods applies to minors as well as to adults.

3.4(a)(iii) *Lactation Accommodation Under Federal Law*

The Providing Urgent Maternal Protections for Nursing Mothers Act ("PUMP Act"), which expands the FLSA's lactation accommodation provisions, applies to most employers.[581] Under the FLSA, an employer must provide a reasonable break time for an employee to express breast milk for the employee's nursing child for one year after the child's birth, each time the employee needs to express milk. The employer is not required to compensate an employee receiving reasonable break time for any time spent during the workday for the purpose of expressing milk unless otherwise required by federal, state, or local law. Under the PUMP Act, break time for expressing milk is considered hours worked if the employee is not completely relieved from duty during the entirety of the break.[582] An employer must also provide a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.[583] Exemptions apply for smaller employers and air carriers.[584]

The Pregnant Workers Fairness Act (PWFA), enacted in 2022, also impacts an employer's lactation accommodation obligations. The PWFA requires employers of 15 or more employees to make reasonable accommodations for a qualified employee's known limitations related to pregnancy, childbirth, or related

[579] 29 C.F.R. § 785.19.

[580] 29 C.F.R. § 785.18.

[581] 29 U.S.C. § 218d.

[582] 29 U.S.C. § 218d(b)(2).

[583] 29 U.S.C. § 218d(a).

[584] 29 U.S.C. § 218d(c), (d).

medical conditions.[585] Lactation is considered a related medical condition.[586] Reasonable accommodation related to lactation includes, but is not limited to breaks, space for lactation, and accommodations related to pumping and nursing during work hours.[587] For more information on these topics, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

3.4(b) *State Meal Period Guidelines*

3.4(b)(i) *State Meal Periods for Adults*

Under California law, an employer may not employ a person for more than five hours without providing a meal period of at least 30 minutes, subject to newer exceptions[588] for certain types of employees. A second 30-minute meal period is required for employees who work more than 10 hours in a day.[589] A first meal period must be provided no later than the fifth hour of work;[590] a second meal period must be provided no later than the end of the tenth hour of work. An employer cannot require an employee to work during a meal period required by state law.[591]

The California Supreme Court's 2012 decision in *Brinker Restaurant Corp. v. Superior Court* limits an employer's obligation to "provide" meal periods and does not require an employer to "ensure" the meal periods are taken.[592] "[A]n employer's obligation is to relieve its employee of all duty, with the employee thereafter at liberty to use the meal period for whatever purpose he or she desires, but the employer need not ensure that no work is done."[593] An employer cannot coerce, create incentives for, or encourage employees to skip meal periods. Further, the employer must take the active step of "afford[ing] an off-

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[585] 42 U.S.C. § 2000gg–1.

[586] 29 C.F.R. § 1636.3.

[587] 29 C.F.R. § 1636.3.

[588] A commercial driver employed by a motor carrier transporting nutrients and byproducts from a commercial feed manufacturer subject to section 15051 of the Food and Agricultural Code to a customer located in a remote rural location may commence a meal period after 6 hours of work if the driver's regular rate of pay is no less than 1.5times the state minimum wage and the driver receives overtime compensation in accordance with Labor Code section 510. CAL. LAB. CODE § 512(b)(2). Also, specific meal period standards for emergency ambulance employees will apply. *See* CAL. LAB. CODE §§ 885-889.

[589] CAL. LAB. CODE §§ 226.7 & 512; California Wage Orders Nos. 1-15, § 11, No. 16, § 10, No. 17, § 9.

[590] *See, e.g.*, *Carrington v. Starbucks Corp.*, 241 Cal. Rptr. 3d 647 (Cal. Ct. App. 2018) (Employees that were scheduled to work a shift of 5 hours or less but actually worked "slightly more" than 5 hours were owed a meal period and the failure to provide triggered obligation to pay a 226.7 meal period premium. Providing a meal period later than the end of employee's fifth hour of work violated section 512 and triggered obligation to pay a 226.7 meal period premium).

[591] CAL. LAB. CODE §§ 226.7 & 512; California Wage Orders Nos. 1-15, § 11, No. 16, § 10, No. 17, § 9.

[592] 139 Cal. Rptr. 3d 315 (Cal. 2012); *see also* CAL. LAB. CODE § 886(a)(2) (emergency ambulance provider must manage staffing at levels sufficient to provide enough inactivity in a work shift for emergency ambulance employees to meet applicable meal period requirements); *Furry v. E. Bay Publ*, 242 Cal. Rptr. 3d 144 (Cal. Ct. App. 2018) (affirming in part bench trial holding that employee failed to prove employer knew about missed meal periods); *David v. Queen of the Valley Med. Ctr.*, 264 Cal. Rptr. 3d 279 (June 8, 2020) (plaintiff did not demonstrate employer did not provide her meal breaks as required by law). *See also, e.g.*, *Serrano v. Aerotek, Inc.*, 230 Cal. Rptr. 3d 802 (Cal. Ct. App. 2018) (staffing agency satisfied its duty to provide meal periods).

[593] 139 Cal. Rptr. 3d at 324.

duty meal-period," which means "actually relieving an employee of all duty" and "relinquish[ing] control over their activities" without "pressuring employees to perform their duties in ways that omit breaks."[594]

If an employer permits an employee to work for five hours it must either:

- provide an off-duty meal period;
- agree to a mutually-agreed upon waiver if the employee will work six or fewer hours; or
- obtain the employee's written agreement to an on-duty meal period if circumstances permit.[595]

With respect to the third option, an "on duty" meal period is permitted only when the nature of the work prevents an employee from being relieved of all duty.[596] Additionally, a written agreement between an employer and employee is required for on duty meal periods, and such agreement must state that the employee can revoke the agreement in writing at any time.[597] Per a state appellate court, examining on-duty meal periods under Wage Order 5 (Health Care Industry) and generally, employees are entitled to an on-duty meal period of at least 30 minutes.[598] It noted an on-duty meal period is not the functional equivalent of no meal period at all; instead, it is an intermediate category requiring more of employees than off-duty meal periods but less of employees than their normal work. Accordingly, absent a waiver, the employer must provide a meal period, whether off- or on-duty, of at least 30 minutes any time an employee worked at least five hours. Employers cannot engage in the practice of rounding time punches by adjusting the hours that an employee has actually worked to the nearest preset time increment.[599] Time records that show noncompliant meal periods that are not at least 30 minutes raise a rebuttable presumption of meal period violations.[600]

An employer that provides an employee the opportunity to take a timely, off-duty meal period must still pay the employee the employee's regular wage for the meal period if the employer knew or reasonably should have known that the employee worked through the meal period.[601] The duty to pay an employee an additional hour of pay for failure to authorize and permit rest breaks in accordance with these laws

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[594] 139 Cal. Rptr. 3d at 343.

[595] 139 Cal. Rptr. 3d at 342.

[596] *But see Kaanaana v. Barrett Bus. Servs., Inc.*, 240 Cal. Rptr. 3d 636 (Cal. Ct. App. 2018) ("[A] truncated meal period is not in every case the equivalent of an on-duty meal period.").

[597] *See generally*, California Wage Orders, § 11; *see also Naranjo v. Spectrum Sec. Servs., Inc.*, 253 Cal. Rptr. 3d 248 (2019) (meal period premium was owed because the on-duty meal period policy lacked an employee's written agreement for on-duty meal periods and written notice of an employee's right to revoke that agreement); *Kane v. Valley Slurry Seal Co.*, 2018 WL 2126752 (May 8, 2018) (blanket on-duty meal period unlawful; blanket on-duty meal period agreement lawful, but could only be used on qualifying days); *Driscoll v. Granite Rock Co.*, 2017 WL 4929921 (Oct. 31, 2017).

[598] *L'Chaim House, Inc. v. Div. of Labor Standards Enf't*, 251 Cal. Rptr. 3d 413 (Cal. Ct. App. 2019).

[599] *Donohue v. AMN Services, LLC*, 275 Cal. Rptr. 3d 422 (Cal. 2021).

[600] 275 Cal. Rptr. 3d 422 at 438.

[601] *See, e.g.*, *Kaanaana v. Barrett Bus. Servs., Inc.*, 240 Cal. Rptr. 3d 636 (Cal. Ct. App. 2018) (In addition to meal period premium, employees are entitled to recover wages for time worked during meal period. "[T]he right to be free from employer control for a 30-minute meal period, and the right to be paid for time worked during that meal period, are distinct rights with distinct remedies. . . . But we find no persuasive basis in legal authorities to support plaintiffs' claim that their remedy for time worked during the meal period is payment of wages for the full 30-minute meal period, rather than payment of wages for the three to five minutes actually worked.").

arises immediately and therefore should be paid on the paycheck for the pay period when the failure to authorize and permit the rest break occurred. An employer's duty to pay does not depend on when an employee requests the pay.[602] An employee may base a valid unfair competition claim "on a practice of not paying premium wages for missed, shortened, or delayed meal breaks attributable to the employer's instructions or undue pressure, and unaccompanied by a suitable employee waiver or agreement."[603] However, liability for premium pay does not attach simply because there is proof an employer knew that employees worked though meal periods. As the California Supreme Court explained, "employees cannot manipulate the flexibility granted them by employers to use their breaks as they see fit to generate such liability."[604]

Employers must also be cautious with respect to on-premises meal periods: "When an employer directs, commands, or restrains an employee from leaving the work place during his or her lunch hour and thus prevents the employee from using the time effectively for his or her own purposes, that employee remains subject to the employer's control" and the employee must be paid.[605] According to the California Division of Labor Standards Enforcement (DLSE), employees "who were not paid for meal periods during which they were prohibited from leaving the employer's premises, notwithstanding the fact that they were relieved from all duty during those meal periods, are entitled to compensation for their unpaid meal periods."[606]

3.4(b)(ii) *State Meal Period Exceptions*

The meal period provisions do not apply to an employee if the individual works in certain specified industries and is covered by a valid collective bargaining agreement that:

> expressly provides for the wages, hours of work, and working conditions of employees, and expressly provides for meal periods for those employees, final and binding arbitration of disputes concerning application of its meal period provisions, premium wage rates for all overtime hours worked, and a regular hourly rate of pay of not less than 30 percent more than the state minimum wage rate.[607]

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[602] *Safeway, Inc. v. Superior Court (Esparza)*, 190 Cal. Rptr. 3d 131 (Cal. Ct. App. 2015).

[603] *Esparza*, 190 Cal. Rptr. 3d at 144-45. *But see Esparza v. Safeway, Inc.*, 247 Cal. Rptr. 3d 875 (Cal. Ct. App. 2019) (affirming summary judgment for employer, employees failed to submit evidence raising a triable issue of material fact regarding whether company's no-premium-wages policy harmed employees in a manner entitling them to restitution under California's unfair competition law).

[604] *Brinker Rest. Corp. v. Superior Court*, 139 Cal. Rptr. 3d 315, 343 (Cal. 2012).

[605] *Bono Enters., Inc. v. Bradshaw*, 38 Cal. Rptr. 2d 549 (Cal. Ct. App. 1995), *abrogated on other grounds by Tidewater Marine W., Inc. v. Bradshaw*, 59 Cal. Rptr. 2d 186 (Cal. 1996) (holding that the DLSE guidance at issue was in fact a new regulation, not just an interpretation). In *Rodriguez v. Taco Bell Corp.*, 896 F.3d 957 (9th Cir. 2018), the plaintiff unsuccessfully argued that, because her employer required a discounted meal to be eaten in the restaurant, the employer exerted sufficient control over employees to make the meal period compensable. However, the trial and appellate courts held that purchasing a discounted meal was voluntary and employees were otherwise free to use the meal period in any way they wished, so the employer relieved employees of all duties during the meal break period and exercised no control over their activities. Therefore, the plaintiff's claims failed. Note that, although federal court decisions are not binding on state courts, they may be considered persuasive.

[606] California Div. of Labor Standards Enforcement, Op. Ltr. 2001.01.12.

[607] CAL. LAB. CODE § 512(e).

This exemption applies to:

- employees employed in a construction occupation;
- employees employed as commercial drivers;
- employees employed in the security services industry as a registered security officer who are employed by a registered private patrol operator; and
- employees employed by an electrical corporation, a gas corporation, or a local publicly owned electric utility.[608]

The following employees are also exempt from the meal period requirements:

- employees in the wholesale bakery industry who are covered by a valid collective bargaining agreement providing for a 35-hour workweek consisting of five seven-hour days, payment of 1.5 times the regular rate of pay for time worked in excess of seven hours per day, and a rest period of not less than 10 minutes every two hours;
- employees in the motion picture or broadcast industries (see Wage Orders 11 & 12) who are covered by a valid collective bargaining agreement that provides for meal periods and includes a monetary remedy if a meal period required by the CBA is not received; meal period terms and penalties in the collective bargaining agreement apply in lieu of statutory and regulatory requirements and penalties; [609] and
- employees that provide instruction for a course or laboratory at an independent institution of higher education who are employed in a professional capacity (see Wage Orders 4-2001 or 5-2001) and all of the following apply: (1) the employee is primarily engaged in an occupation commonly recognized as a learned or artistic profession; (2) the employee customarily and regularly exercises discretion and independent judgment in the performance of duties; and (3) the employee is paid on a salary basis and receives certain minimum compensations.[610]

The law is less clear concerning overtime-exempt employees. The term "employee" is not defined in California Labor Code section 512. Moreover, the general definitions statute, California Labor Code section 500, does not contain a definition of "employee." The Wage Orders, however, expressly state that their meal and rest period requirements do not apply to exempt administrative, executive, professional, or outside sales employees.[611] The state labor department, recognizing the difference, states that it "would appear that [these] exempt employees are also entitled to meal periods" *per Labor Code section 512*, but would not receive premium pay pursuant to California Labor Code section 226.7 for noncompliant meal periods *under the Wage Orders*.[612]

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[608] CAL. LAB. CODE § 512(f).

[609] CAL. LAB. CODE § 512(c), (d).

[610] CAL. LAB. CODE § 515.7.

[611] *See* generally, California Wage Orders, § 1.

[612] California Div. of Labor Standards Enforcement, *Enforcement Policies and Interpretations Manual*, § 45.2.2. Under California Labor Code section 226.7(c), a failure to provide a meal or rest or recovery period in accordance with "state law," includes, but is not limited to, "an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health."

3.4(b)(iii) *State Meal Period Waivers*

California law permits employees to waive their right to a meal period. A meal period may be waived by mutual consent if no more than six hours will complete the day's work.[613] The second meal period may be waived by mutual consent if the total hours that day are not more than 12 and first meal period was not waived.[614] Though there is no statutory requirement that a meal period waiver must be in writing,[615] employers are encouraged to obtain written waivers.

Separate rules apply to employees in the health care industry working shifts that exceed eight total hours in a workday.[616]

3.4(b)(iv) *State Meal Periods for Minors*

California law does not have meal period provisions specific to minor employees. Therefore, employers generally should apply the meal break requirements for adults to minor employees. Special rules apply, however, to minors in the entertainment industry.[617]

3.4(c) *State Rest Period Guidelines*

3.4(c)(i) *State Rest Periods for Adults*

An employer must "authorize and permit" employees to take a ten-minute rest break for each four hours or major fraction thereof worked.[618] A rest period is not required when the employee's total daily work time is less than three and a half hours. As with the required meal periods, an employer cannot require an employee to work during a rest break required by state law.[619] Note, however, that certain employee-specific requirements may apply in certain industries.[620]

Breaks should occur in the middle of each work period insofar as practicable, and need not be provided before a meal period is provided.[621] The California Court of Appeal examined rest period timing during an eight-hour shift and discussed whether two ten-minute rest periods could be combined and provided before a meal period. The court held the phrase "insofar as practicable" directs "employers to implement

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[613] CAL. LAB. CODE § 512. *See, e.g.*, *Ehret v. Winco Foods*, 236 Cal. Rptr. 3d 572 (Cal. Ct. App. 2018) (Waiver via collective bargaining agreement upheld "because it specifically mentioned meal breaks and it was irreconcilable with the statutory right to a meal break during a shift of more than five but not more than six hours." For a waiver to be effective, the word "waiver," "waived," or "waiving" is not required to be used.).

[614] CAL. LAB. CODE § 512. *See, e.g.*, *Fayerweather v. Comcast Corp.*, 2014 WL 4251135, *6 (Aug. 28, 2014) ("[E]mployer must obtain a waiver if it requires an employee to work through the time that would otherwise be allotted for the second meal.").

[615] California Div. of Labor Standards Enforcement, *Enforcement Policies and Interpretations Manual*, § 45.2.3.1.

[616] *See* California Wage Orders 4 & 5, § 11(D).

[617] *See* CAL. CODE REGS. tit. 8, § 11761.

[618] California Wage Order Nos. 1-15, § 12, No. 16, § 11; *Brinker Rest. Corp. v. Superior Ct.*, 139 Cal. Rptr. 3d 315 (Cal. 2012). *See also, e.g.*, *Donohue v. Amn Servs.*, 241 Cal. Rptr. 3d 111 (Cal. Ct. App. 2018) (Plaintiff did not demonstrate employer had a uniform policy or practice of denying rest periods); *David v. Queen of the Valley Med. Ctr.*, 264 Cal. Rptr. 3d 279 (June 8, 2020) (plaintiff did not demonstrate employer did not provide her rest breaks as required by law).

[619] CAL. LAB. CODE § 226.7.

[620] Specific rest period standards for emergency ambulance employees apply. *See* CAL. LAB. CODE §§ 885-889.

[621] California Wage Order Nos. 1-15, § 12, No. 16, § 11; *Brinker*, 139 Cal. Rptr. 3d at 335-36.

the specified rest break schedule absent an adequate justification why such a schedule is not capable of being put into practice, or is not feasible as a practical schedule."[622] It concluded "a departure from the preferred schedule is permissible only when the departure (1) will not unduly affect employee welfare and (2) is tailored to alleviate a material burden that would be imposed on the employer by implementing the preferred schedule."[623] Moreover, the court found:

> [A] departure from the preferred schedule that is merely advantageous to the employer cannot satisfy the requirement . . . as the existence of such an advantage does not, by itself, show that the preferred schedule is not capable of being put into practice. . . . [T]he departure must be predicated on facts demonstrating that the preferred schedule would impose a material burden on the employer, and that the departure is necessary to alleviate such burden.[624]

The number of rest periods to which an employee is entitled depends on how many hours the individual works, as outlined in Table 11.[625]

Table 11. Number of Rest Periods per Hours Worked

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

Rest breaks are paid. A rest period required by state law counts as hours worked, so employees must be paid for rest period time and time spent on breaks should not be deducted from employees' wages.[626] Piece-rate employees must be paid for rest breaks separate from any piece-rate compensation, and must be paid the higher of their average hourly rate or the minimum wage.[627] Employees paid on a semi-monthly basis must be paid at least the minimum wage for rest and recovery periods for the payroll period in which the rest and recovery periods occurred. Any additional pay required for employees paid using the average hourly rate is payable no later than the payday for the next regular payroll period.[628]

The issue of whether employees must be permitted to leave, or can be required to stay on, an employer's premises during rest period has not been definitely resolved, so it is recommended employees be allowed to leave. The California Supreme Court held that the Wage Orders and Labor Code section 226.7 require that "employers relinquish any control over how employees spend their break time" and found that:

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[622] *Rodriguez v. E.M.E., Inc.*, 201 Cal. Rptr. 3d 337 (Cal. Ct. App. 2016).

[623] 201 Cal. Rptr. 3d at 348.

[624] 201 Cal. Rptr. 3d at 348.

[625] California Wage Order Nos. 1-15, § 12, No. 16, § 11.

[626] California Wage Order Nos. 1-15, § 12, No. 16, § 11; CAL. LAB. CODE § 226.7.

[627] CAL. LAB. CODE § 226.7.

[628] CAL. LAB. CODE § 226.7.

> one cannot square the practice of compelling employees to [be] tethered by time and policy to particular locations . . . with the requirement to relieve employees of all work duties and employer control during 10-minute rest periods. . . . [E]mployees must not only be relieved of work duties, but also be freed from employer control over how they spend their time.[629]

However, the court further noted that because of the short duration of rest periods (*i.e.*, 10 minutes), an employee's movement is limited and employees will "ordinarily have to remain onsite or nearby." The court held that this constraint was insufficient to establish employer control.[630]

In interpreting the California Supreme Court's decision in Augustus, the state labor department contends that an employer "cannot impose any restraints not inherent in the rest period requirement itself," and therefore cannot require that an employee stay on the work premises during a rest period.[631]

Note that exceptions may exist under Wage Order 5 (Public Housekeeping Industry) for certain employees at 24-hour residential care facilities.

If an employer fails to provide an employee a required rest period, the employee is entitled to premium pay as described in **3.4(d)**.[632]

3.4(c)(ii) *State Rest Periods for Minors*

California law does not have rest period provisions specific to minor employees. Therefore, employers generally should apply the rest break requirements for adults to minor employees. Special rules apply, however, to minors in the entertainment industry.[633]

3.4(d) *State Enforcement, Remedies & Penalties*

If an employer fails to provide an employee a required meal or rest break, the employee is entitled to premium pay—one additional hour of pay at the employee's regular rate of compensation for each workday that the period is missed.[634] The California Supreme Court has held that the term "regular rate of compensation" under Labor Code section 226.7(c), like "regular rate of pay" for overtime purposes,

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[629] *Augustus v. ABM Sec. Servs.*, 211 Cal. Rptr. 3d 634, 645 (Cal. 2016).

[630] 211 Cal. Rptr. 3d 634 (citations omitted).

[631] California Div. of Labor Standards Enforcement, *Rest Periods/Lactation Accommodation* (rev. Nov. 2017), Question 5, available at http://www.dir.ca.gov/dlse/faq_restperiods.htm; *see also, e.g.*, *Bell v. Home Depot U.S.A., Inc.*, 2017 WL 1353779, at *2 (E.D. Cal. Apr. 11, 2017) (not specifically adopting employer's "interpretation that Augustus affirmatively condones on-premises rest breaks."); *Lopes v. Kohl's Dep't Stores*, No. RG08380189 (Alameda Cty. Feb. 28, 2017) (rejecting plaintiff's argument that, under the facts of the case, the employer's on-premises rest period requirement rendered the break worktime); *Diaz v. Medline Industries, Inc.*, No. STK-CV-UOE-0006551 (San Joaquin County Nov. 13, 2019) (Denying defendant's motion for judgment on the pleadings, the court observed a policy prohibiting leaving work premises is control over employees and the complaint alleged mandatory on-premises rest periods, so a determination could not be made on the pleadings alone; the court needed a more complete factual record to determine whether evidence supported plaintiffs' allegations that they were not relieved of all duties during rest periods).

[632] CAL. LAB. CODE § 226.7.

[633] *See* CAL. CODE REGS. tit. 8, § 11761.

[634] CAL. LAB. CODE § 226.7.

encompasses all nondiscretionary payments, not just hourly wages. [635] Therefore, this premium pay must be paid at the employee's regular rate, as opposed to the employee's base hourly rate. The duty to pay an employee an additional hour of pay for failure to provide required breaks arises immediately and, therefore, should be paid on the paycheck for the pay period when the failure to authorize and permit the break occurred. An employer's duty to pay does not depend on when an employee requests the pay.[636] However, liability for premium pay does not attach simply because there is proof an employer knew that employees worked though meal or rest periods. The California Supreme Court has explained that "employees cannot manipulate the flexibility granted them by employers to use their breaks as they see fit to generate such liability."[637] An employer is liable only for up to two premiums per day: one for a missed meal break and one for a missed rest break.[638]

Importantly, an employer is not permitted to choose between providing a meal period and paying the premium:

> The "additional hour of pay" . . . is the legal remedy for a violation of [section 226.7(a)], but whether or not it has been paid is irrelevant to whether section 226.7 was violated. In other words, section 226.7 does not give employers a lawful choice between providing either meal and rest breaks or an additional hour of pay. An employer's failure to provide an additional hour of pay does not form part of a section 226.7 violation, and an employer's provision of an additional hour of pay does not excuse a section 226.7 violation. The failure to provide required meal and rest breaks is what triggers a violation of section 226.7. Accordingly, a section 226.7 claim is not an action brought for nonpayment of wages; it is an action brought for nonprovision of meal or rest breaks.[639]

Any premiums paid are considered a part of an employee's wages, not a penalty.[640] However, this additional hour is not counted as hours worked for the purposes of overtime calculations.[641] The waiting time penalty for late or unpaid final wages under Labor Code section 203, as well as penalties for paystub violations under Labor Code section 226, do not apply if the sole reason for seeking the penalty is the failure to include 226.7 premium pay in the total amount of final wages or on a paystub.[642]

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[635] *Ferra v. Loews Hollywood Hotel, L.L.C.*, 280 Cal. Rptr. 3d 783 (Cal. 2021).

[636] *Safeway, Inc. v. Superior Ct.*, 190 Cal. Rptr. 3d 131 (Cal. Ct. App. 2015).

[637] *Brinker Rest. Corp. v. Superior Ct.*, 139 Cal. Rptr. 3d 315 (Cal. 2012).

[638] *United Parcel Service Wage & Hour Cases*, 125 Cal. Rptr. 3d 384 (Cal. Ct. App. 2011); California Div. of Labor Standards Enforcement, *Enforcement Policies and Interpretations Manual*, § 45.2.8.

[639] *Kirby v. Immoos Fire Protection, Inc.*, 140 Cal. Rptr. 3d 173 (Cal. 2012).

[640] *Murphy v. Kenneth Cole Prods., Inc.*, 56 Cal. Rptr. 3d 880 (Cal. 2007).

[641] California Div. of Labor Standards Enforcement, *Meal Periods*, *available at* https://www.dir.ca.gov/dlse/faq_mealperiods.htm.

[642] *Ling v. P.F. Chang's China Bistro, Inc.*, 200 Cal. Rptr. 3d 230 (Cal. Ct. App. 2016). *But see Naranjo v. Spectrum Sec. Servs., Inc.*, Case: S258966, Supreme Court of California (2022) (extra pay for missed breaks serves the dual purpose of compensation for the unlawful deprivation of a break and for the work performed during the break period and "thus constitutes "wages" that must be reported on statutorily required wage statements during employment (Lab. Code, § 226) and paid within statutory deadlines when an employee leaves the job (id., § 203)…The extra pay thus constitutes wages subject to the same timing and reporting rules as other forms of compensation for work.")

3.4(e) *State Recovery Periods*

As with the required meal and rest breaks, an employer cannot require an employee to work during a *recovery period* required by state law, which is a cool-down period afforded to an employee to prevent heat illness.[643] A recovery period may be required by a statute, regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health. A required recovery period counts as hours worked, so employees must be paid for recovery period time. If an employer fails to provide a recovery period, it must pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the recovery period is not provided.[644] The California Supreme Court has held that the term "regular rate of compensation" under Labor Code section 226.7(c), like "regular rate of pay" for overtime purposes, encompasses all nondiscretionary payments, not just hourly wages. [645] Therefore, this premium pay must be paid at the employee's regular rate, as opposed to the employee's base hourly rate.

3.4(f) *State Lactation Accommodation Guidelines*

3.4(f)(i) *California Lactation Accommodation Guidelines*

Employers must provide break time to accommodate employees each time they have a need to express breast milk for their infant child. The break time should, if possible, run concurrently with break time already provided to the employee.[646] Lactation break time is unpaid if it does not run concurrently with rest time authorized by applicable Wage Orders.[647] An employer is not required to provide break time if to do so would seriously disrupt its operations.[648] An employer's failure to comply with the lactation accommodation provisions carries a civil penalty of $100 for each violation.

The general rule in California is that an individual cannot be prohibited from breast feeding their child in any public or private location where the individual and the child are otherwise authorized to be.[649] In the employment context, the Labor Code requires that employers provide employees with a room or other location for the employee to express milk in private. The room or location cannot be a bathroom, and must be in close proximity to the employee's work area, shielded from view, and free from intrusion while the employee is expressing milk. Moreover, the room or location must meet the following requirements:

- it must be safe, clean and free of hazardous materials;
- it must contain a surface to place a breast pump or personal items;
- it must contain a place to sit; and
- it must have electricity or alternative devices, including but not limited to, extension cords or charging stations, that are needed to operate an electric or battery-powered breast pump.

In addition, employers must provide lactating employees who pump breastmilk with access to a sink with running water and a refrigerator suitable for storing milk in close proximity to the employee's workspace.

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643 CAL. LAB. CODE § 226.7.

644 CAL. LAB. CODE § 226.7.

645 *Ferra v. Loews Hollywood Hotel, L.L.C.*, 253 Cal. Rptr. 3d 798 (Cal. 2021).

646 CAL. LAB. CODE § 1030.

647 CAL. LAB. CODE § 1030.

648 CAL. LAB. CODE § 1032.

649 CAL. CIV. CODE § 43.3.

If a refrigerator cannot be provided, an employer may provide another cooling device suitable for storing milk, such as an employer-provided cooler.[650]

If an employer is not able to provide a permanent location that meets all of the above criteria due to operational, financial, or space limitations, the employer may designate a temporary space that is not a bathroom; is shielded from view; is free from intrusion while the employee is expressing milk, and otherwise complies with the lactation accommodation law.[651]

While an employer may use a multi-purpose room to meet the above requirements, the use of the room for lactation must take precedence over all other uses during the time it is used for lactation purposes.

An employer in a multitenant or multiemployer worksite may comply with these provisions by providing a shared space, if the employer cannot provide a lactation location within the employer's own workspace. If an employer coordinates a multiemployer worksite, it must provide lactation accommodations or a safe and secure location for a subcontractor employer to provide such on the worksite, within two business days of any written request received from a subcontractor employer with an employee who has requested an accommodation.[652]

Exemptions. Only an employer with fewer than 50 employees may be exempt from the requirements if they are able to demonstrate that compliance would impose an undue hardship, which is a change from the previous law that had allowed employers of any size to demonstrate undue hardship. To be exempt, a small employer must show that a requirement under the lactation accommodation provisions would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, or structure of the employer's business. If that employer can demonstrate that the requirement to provide an employee with the use of a room or location other than a bathroom would impose such undue hardship, the employer must make reasonable efforts to provide the employee with the use of a room or location, other than a toilet stall, in close proximity to the employee's work area, for the employee to express milk in private.[653]

Lactation Policy. Every California employer must develop and implement a policy regarding lactation accommodation that includes the following information:

- a statement about an employee's right to request lactation accommodation;
- the process by which the employee must make a request for lactation accommodation;
- an employer's obligation to respond to a lactation accommodation request. If the employer cannot provide break time or a location that complies with the law, the employer must so notify the employee in writing; and
- a statement about an employee's right to file a complaint with the Labor Commissioner for any violation of a right under the lactation accommodation provisions.

The employer must include the written lactation accommodation policy in an employee handbook or set of policies that the employer makes available to employees. Moreover, the employer must distribute the

[650] CAL. LAB. CODE § 1031.

[651] CAL. LAB. CODE § 1031.

[652] CAL. LAB. CODE § 1031.

[653] CAL. LAB. CODE § 1031.

policy (1) to new employees upon hire, and (2) when an employee makes an inquiry about or requests parental leave.[654]

Enforcement. An employer's failure to provide either a reasonable break time to express milk or adequate space to express milk will constitute a failure to provide a rest period under state law. This means that an employer must pay an aggrieved employee one additional hour of pay at the employee's regular rate of compensation for each lactation break not provided, and when an adequate space is not provided. The amended law also prohibits retaliation against any employee exercising rights under the lactation provisions. An aggrieved employee may file a complaint with the Labor Commissioner, which may impose a civil penalty of $100 for each day that an employee is denied reasonable break time or adequate space to express milk.

An agricultural employer is considered to be in compliance with the statute if the agricultural employer provides an employee wanting to express milk with a private, enclosed, and shaded space, including, but not limited to, an air-conditioned cab of a truck or tractor.[655]

California's fair employment practices statute also protects individuals who are breastfeeding from discrimination and harassment. The California Fair Employment and Housing Act (FEHA) provides that prohibited discrimination based on sex includes breast feeding and related medical conditions.[656] The prohibition against discrimination includes a prohibition against harassment.[657] Further, providing lactation breaks may be considered a reasonable accommodation under the FEHA, as discussed in **3.11(c)(ii)**.

3.4(f)(ii) *Local Lactation Accommodation Guidelines*

The City of San Francisco's Lactation in the Workplace Ordinance requires employers of at least one employee in the City to provide a reasonable amount of break time to accommodate an employee who needs to express breast milk for the employee's child. Compliance is required unless the employer can demonstrate that providing lactation accommodation would impose an undue hardship.[658] However, an employer does not have to provide a lactation location unless and until an employee requests one.[659]

Employee means any person who is employed within the geographic boundaries of San Francisco by an employer, including part-time employees. Employees who work in San Francisco on an occasional basis may be covered under the ordinance if they perform more than 56 hours of work within the city per year.[660] Other employees who work occasionally in San Francisco may also be eligible:

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[654] CAL. LAB. CODE § 1034.

[655] CAL. LAB. CODE § 1031.

[656] CAL. GOV'T CODE §§ 12926, 12940.

[657] CAL. CODE REGS. tit. 2, § 11036.

[658] S.F., CAL., LAB. & EMP. CODE §§ 31.1 *et seq*.

[659] OFFICE OF LABOR STANDARDS ENFORCEMENT RULES IMPLEMENTING THE LACTATION IN THE WORKPLACE ORDINANCE, *available at* https://sfgov.org/olse/sites/default/files/Final%20Lactation%20in%20the%20Workplace%20Rules%20-%20July%2025%202018.pdf.

[660] S.F., CAL., LAB. & EMP. CODE § 31.3; OFFICE OF LABOR STANDARDS ENFORCEMENT RULES IMPLEMENTING THE LACTATION IN THE WORKPLACE ORDINANCE.

- Employees who travel through San Francisco and stop in the city to work, such as to make deliveries, are covered by the ordinance for the hours in which they work in the city, including travel within the city to and from work sites. Employees who travel through San Francisco but do not do work there are not covered.
- Employees on a temporary assignment in San Francisco are covered while they are in San Francisco.
- Employees attending meetings or retreats in San Francisco at a location other than their ordinary place of work are covered by the ordinance during those functions.[661]

An employee returning from a leave of absence is covered if the employee performed 56or more hours of work in San Francisco in the year preceding the leave, or if there is a reasonable expectation that the employee will work at least 56 hours in the calendar year following the leave.[662] Employees who work from home in San Francisco are covered by the ordinance, but an employer is not required to provide a lactation location for them.[663]

An employee may make a request for a lactation accommodation verbally, by email, or in writing, and the employee is not required to submit the request on a specific form. The employer must respond to the employee's request in writing or by email. There is no certification requirement. An employer may not require any documentation, such as a doctor's note, regarding the employee's need for a lactation accommodation or the number or duration of lactation breaks that an employee needs.[664]

The break time must, if possible, run concurrently with any break time already provided to the employee. Break time that does not run concurrently with the rest time authorized for the employee by the applicable wage order of the Industrial Welfare Commission is unpaid.[665] An employer cannot limit the duration or number of an employee's lactation breaks unless the employer can demonstrate that the duration of the break requested by an employee is unreasonable. The time it takes for the employee to travel to and from the lactation location and to and from a refrigerator and a sink with running water is not included as part of the employee's break time. Further, an employer cannot limit the entire duration of the lactation accommodation in terms of months or years.[666]

The employer must provide a lactation location, other than a bathroom, in close proximity to the employee's work area that is shielded from view and free from intrusion from coworkers and the public. The lactation location must:

- be safe, clean, and free of toxic or hazardous materials;
- contain a surface (*e.g.*, a table or shelf) to place a breast pump and other personal items;
- contain a place to sit; and

[661] OFFICE OF LABOR STANDARDS ENFORCEMENT RULES IMPLEMENTING THE LACTATION IN THE WORKPLACE ORDINANCE.

[662] OFFICE OF LABOR STANDARDS ENFORCEMENT RULES IMPLEMENTING THE LACTATION IN THE WORKPLACE ORDINANCE.

[663] OFFICE OF LABOR STANDARDS ENFORCEMENT RULES IMPLEMENTING THE LACTATION IN THE WORKPLACE ORDINANCE.

[664] OFFICE OF LABOR STANDARDS ENFORCEMENT RULES IMPLEMENTING THE LACTATION IN THE WORKPLACE ORDINANCE.

[665] S.F., CAL., LAB. & EMP. CODE § 31.4.

[666] OFFICE OF LABOR STANDARDS ENFORCEMENT RULES IMPLEMENTING THE LACTATION IN THE WORKPLACE ORDINANCE.

- have access to electricity.[667]

The room or other location may include the place where the employee normally works if it otherwise meets the requirements of the ordinance for a lactation location. The employer must also provide, in close proximity to the employee's work area, access to a refrigerator where the employee can store breast milk and access to a sink with running water.[668] The lactation location, refrigerator, and sink cannot be located so far away from the employee's work space that it would be likely to deter a reasonable similarly situated person from exercising their rights under the ordinance. The refrigerator does not have to be provided solely for use by a lactating employee.[669]

The employer may elect to designate a room as a lactation location that is also used for other purposes. However, if the employer uses this method to provide the accommodation, the primary function of the room must be for lactation during the duration of an employee's need to express milk. During the period when the room is being used as a lactation location and also for other purposes, the employer must provide notice to other employees that the primary use of the room is for lactation, which takes precedence over other uses.[670]

Employers whose worksites are in multitenant buildings, and that cannot individually provide a lactation location that satisfies the requirements of the ordinance, can fulfill the accommodation obligation by establishing a compliant lactation location shared among multiple employers, provided that the location is sufficient to accommodate the number of employees who need to use it at any given time.[671]

Employers must develop a written lactation accommodation policy that:

- includes a statement that employees have a right to request lactation accommodation;
- identifies a process by which an employee may request lactation accommodation. The process must:
  - specify the means by which an employee may submit a request for lactation accommodation;
  - require the employer to respond to a request for accommodation within five business days; and
  - require the employer and employee to engage in an interactive process to determine the appropriate lactation break period(s) and the lactation location for the employee;
- includes a statement that if in response to a request for accommodation, the employer does not provide breaks or a lactation location, or provides a noncompliant location, the employer must provide the employee a written response that identifies the basis upon which the employer has denied the request.[672]

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667 S.F., CAL., LAB. & EMP. CODE § 31.4.

668 S.F., CAL., LAB. & EMP. CODE § 31.4.

669 OFFICE OF LABOR STANDARDS ENFORCEMENT RULES IMPLEMENTING THE LACTATION IN THE WORKPLACE ORDINANCE.

670 S.F., CAL., LAB. & EMP. CODE § 31.4.

671 S.F., CAL., LAB. & EMP. CODE § 31.4.

672 S.F., CAL., LAB. & EMP. CODE § 31.5.

The employer must provide a copy of the lactation accommodation policy to new employees upon hire and to any employee who inquires about or requests parental leave. If the employer maintains an employee handbook, the handbook must include the lactation accommodation policy.[673]

An employee alleging a violation of the ordinance may file an administrative complaint with the San Francisco Office of Labor Standards Enforcement. Employers found not to be in compliance may incur civil penalties of $500 per violation.[674]

3.5 Working Hours & Compensable Activities

3.5(a) *Federal Guidelines on Working Hours & Compensable Activities*

In contrast to some state laws that provide for mandatory days of rest, the FLSA does not limit the hours or days an employee can work and requires only that an employee be compensated for "all hours" worked in a workweek. Ironically, the FLSA does not define what constitutes hours of work.[675] Therefore, courts and agency regulations have developed a body of law looking at whether an activity—such as on-call, training, or travel time—is or is not "work." In addition, the Portal-to-Portal Act of 1947 excluded certain preliminary and postliminary activities from "work time."[676]

As a general rule, employee work time is compensable if expended for the employer's benefit, if controlled by the employer, or if allowed by the employer. All time spent in an employee's principal duties and all time spent in essential ancillary activities must be counted as work time. An employee's *principal duties* include an employee's productive tasks. However, the phrase is expansive enough to encompass not only those tasks an employee is employed to perform, but also tasks that are an "integral and indispensable" part of the principal activities. For more information on this topic, including information on whether time spent traveling, changing clothes, undergoing security screenings, training, waiting or on-call time, and sleep time will constitute hours worked under the FLSA, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

3.5(b) *State Guidelines on Working Hours & Compensable Activities*

California generally defines work time somewhat more broadly than does federal law. While the FLSA defines *work* as that which an employer "suffers or permits,"[677] the state defines *work time* to include all that which an employer suffers, permits, or "controls."[678] For example, California does not specifically exclude from work time certain activities that are excluded from work time under federal law. The activities that are excluded from work time under federal law, but not state law, include pre- and post-work activities, and clothes changing and washing time under collective bargaining agreements.[679]

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673 S.F., CAL., LAB. & EMP. CODE § 31.5.

674 S.F., CAL., LAB. & EMP. CODE § 31.7.

675 The FLSA states only that to employ someone is to "suffer or permit" the individual to work. 29U.S.C. § 203(g).

676 *See, e.g.*, *Integrity Staffing Solutions, Inc. v. Busk*, 135S. Ct. 513, 519(2014) (in determining whether certain preliminary and postliminary activities are compensable work hours, the question is not whether an employer requires an activity (or whether the activity benefits the employer), but rather whether the activity "is tied to the productive work that the employee is employed to perform").

677 29 U.S.C. § 203(g).

678 *See generally* California Wage Orders § 2(E).

679 29 U.S.C. §§ 203(o), 254.

California does not allow a de minimis exception to the state's working hours requirements. Employees must be paid for all work performed.[680]

The California legal principle that all work time that an employer suffers, permits, or controls shapes state law in determining what types of activities are considered "work" and therefore compensable. California law, in particular, addresses the compensability of reporting time, on-call time, split shifts, and travel time.

3.5(b)(i) *Reporting Time*

Employees who report to work on a scheduled work day but are not put to work or are given less than half their usual or scheduled day's work must be paid for half the usual or scheduled day's work, but in no event for less than two hours nor more than four hours, at their regular rate of pay.[681] If employees are required to report to work a second time in a scheduled workday and work for less than two hours, they must be paid for two hours at their regular rate of pay. Where a required meeting is scheduled for after a shift's end on a day when an employee is scheduled to work, the state enforcement agency states that if there is an unpaid hiatus between the end of the shift and the meeting, the employee must be paid at least two hours for reporting a second time in one day. If the meeting follows the shift immediately, however, there is no requirement for reporting time pay.[682]

However, the reporting time pay requirements do not apply:

- when an employer's operations cannot begin or continue due to threats to employees or property, or when civil authorities recommend that work not begin or continue;
- when public utilities fail to supply electricity, water, or gas, or there is a failure in the public utilities or sewer system;
- when the interruption of work is caused by an act of God or other cause not within the employer's control;
- to an employee who is called to report to work at a time other than the employee's scheduled time while on paid standby;
- when an employee has a regularly scheduled shift of less than two hours; or
- where a required meeting is scheduled for a day when a worker is not scheduled to work, but the meeting is scheduled several days in advance with the duration of the meeting specified.[683]

When employees are paid for a minimum number of hours under the reporting pay law, the hours for which they were compensated, but which were not actually work, are not counted as "hours worked"

[680] *Troester v. Starbucks Corp.*, 421 P.3d 1114 (Cal. 2018).

[681] California Wage Orders, § 5.

[682] California Wage Orders, § 5. California Div. of Labor Standards Enforcement, *Enforcement Policies and Interpretations Manual*, § 45.1.4.

[683] *See generally* California Wage Orders, § 5; California Div. of Labor Standards Enforcement, *Enforcement Policies and Interpretations Manual*, §§ 45.1.1, 45.1.3, 45.1.4.

when determining whether employees worked overtime hours.[684] Likewise, reporting time pay is similar to overtime premiums and is therefore not included in computing an employee's regular rate of pay.[685]

Reporting for work may mean telephoning the employer two hours prior to the start of a shift to determine if an employee should physically come in to work. Employees will be owed reporting time pay for this on-call time.[686] In 2017, a federal district court denied defendant's motion to dismiss plaintiff's claim that reporting to work via a cell phone (as opposed to physically reporting to work for a scheduled shift) should also be compensated under the wage order, stating that reporting via cell phone falls under the ambit of the wage order governing reporting time.[687]

3.5(b)(ii) *On-Call Time*

If California employees are on-call, and the restrictions on the employees prevent them from effectively engaging in private pursuits, the time spent on-call is considered hours worked and must be paid. However, a rate other than employee's regular rate of pay may be used for when paying on-call work if it is not less than the state minimum wage.[688]

Whether on-call waiting time is spent predominantly for the employer's benefit depends on two considerations: (1) the parties' agreement; and (2) the degree to which the employee is free to engage in personal activities.[689] Factors courts will examine when determining whether employees are free to engage in personal activities include, but are not limited to:

- whether there was an on-premises living requirement;
- excessive geographic restrictions on employee movement;
- whether frequency of calls was unduly restrictive;
- whether employee could easily trade on-call responsibilities;
- whether use of pagers could ease restrictions; or
- whether employee has actually engaged in personal activities during call-in time.[690]

All time spent at an assigned worksite while on-call is compensable. Sleep time cannot be excluded from 24-hour shifts and must also be compensated.[691]

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[684] California Div. of Labor Standards Enforcement, *Enforcement Policies and Interpretations Manual*, § 46.8.3.

[685] California Div. of Labor Standards Enforcement, *Enforcement Policies and Interpretations Manual*, § 49.1.2.4.

[686] *Ward v. Tilly's*, 243 Cal. Rptr. 3d 461 (Cal. Ct. App. 2019).

[687] *See Bernal v. Zumiez, Inc*., 2017 WL 3585230 (E.D. Cal. Aug. 16, 2017), *allowing an interlocutory appeal on issue*, 2017 WL 4542950 (Oct. 11, 2017).

[688] California Div. of Labor Standards Enforcement, *Enforcement Policies and Interpretation Manual*, §§ 46.1, 46.1.1, 46.6.3, and 47.5.1.1.

[689] *Gomez v. Lincare, Inc*., 93 Cal. Rptr. 3d 388, 401 (Cal. Ct. App. 2009).

[690] 93 Cal. Rptr. 3d at 401.

[691] *Mendiola v. CPS Sec. Solutions, Inc.*, 182 Cal. Rptr. 3d 124 (Cal. 2015).

3.5(b)(iii) *Split Shifts*

A *split shift* is defined as "a work schedule, which is interrupted by unpaid, non-working periods established by the employer, other than *bona fide* rest or meal periods."[692] The California Division of Labor Standards Enforcement takes the position that a *bona fide* meal period is one that does not exceed one hour in length.[693] An employee working a split shift must be paid an amount at least equal to the minimum wage times the hours worked in the day plus one hour.[694] Employees working regularly scheduled, consecutive overnight shifts that are not interrupted by unpaid, nonworking periods do not work split shifts.[695] Whether an employee is entitled to a split shift premium depends on the number of hours worked and the employee's regular rate of pay. The California Division of Labor Standards Enforcement takes the position that the split shift premium is one at the state minimum wage or the local minimum wage if there is one, whichever is greater.[696]

An employee is regularly scheduled, on the same day, to work from 9:00 A.M. to 1:00 P.M. and again from 5:00 P.M. to 9:00 P.M. The employee is only paid for the hours worked, and there is a four-hour unpaid, nonworking period between the employee's shifts. Under these conditions, depending on how much an employee earns, an employee could be entitled to a split-shift premium. The premium applies only when the total number of hours worked plus the additional hour at the minimum wage is less than the minimum wages for that day.

To determine whether a split-shift premium is owed:

1. multiply (the number of hours worked + 1 hour) by the minimum wage; then
2. multiply (the number of hours worked) by the employee's regular rate.

If the total amount in No. 1 exceeds the total amount in No. 2, an employer must pay a split-shift premium, which is the difference between the two rates. However, if the total amount in No. 2 exceeds the total amount in No. 1, a split shift premium is not due.

Example 1. An employee is paid $18 per hour and works a split shift. In total, the employee worked eight hours.

1. 9 hours (8 hours worked + 1 hour) x $16.00 (current state minimum wage for employers with 26 or more employees) = $144.00
2. 8 hours (8 hours worked) x $19.00 (regular rate) = $152.00

Because the total amount in No. 2 exceeds the total amount in No. 1, a split shift premium is not due.

Example 2. An employee is paid $16.00 per hour and works a split shift. In total, the employee worked eight hours.

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[692] California Wage Orders, §§ 2(Q), 4(C).

[693] California Div. of Labor Standards Enforcement, Op. Ltr. 2002.12.11.

[694] *Aleman v. Airtouch Cellular*, 134 Cal. Rptr. 3d 643 (Cal. Ct. App. 2011), *review granted by* 139 Cal. Rptr. 3d 643, *rev'd on other grounds by* 146 Cal. Rptr. 3d 849 (Cal. Ct. App. 2012); *Securitas Sec. Servs. USA, Inc., v. Superior Court*, 127 Cal. Rptr. 3d 883 (Cal. Ct. App. 2011).

[695] *Securitas*, 127 Cal. Rptr. 3d 883.

[696] https://www.dir.ca.gov/dlse/Split_Shift.htm#.

1. 9 hours (8 hours worked + 1 hour) x $14.00 (current state minimum wage for employers with 26 or more employees) = $144.00
2. 8 hours (8 hours worked) x $16.50 (regular rate) = $132.00

Because the total amount in No. 2 is less than the total amount in No. 1, a split shift premium of $12.00 (the difference between Nos. 1 and 2) is owed.

3.5(b)(iv) *Travel Time*

California law is more stringent than federal law with respect to travel time. In California, compulsory travel time constitutes time during which the employee is subject to the employer's control and thus constitutes compensable hours worked, even if the employee is free to pursue personal activities during the travel time.[697] The degree of control as well as whether the employee was suffered or permitted to work governs whether travel time is hours worked and therefore compensable. The two clauses of the hours worked definition – the "control" clause and the "suffered or permitted clause" are independent factors, each of which determines if the time spent is hours worked.[698] If employees are required to report to the employer's business premises prior to traveling to an off-site work location, time spent travelling from the premises to the site is compensable.

Case law and agency guidance shapes the parameters of compensable travel time. Time spent by employees on employer-provided shuttles from a parking lot to a worksite was found not to be compensable where the employees did not have to ride the shuttles from parking lots to work, but could be dropped off at the worksite.[699] Similarly, requiring employees to drive a company vehicle does not alone require compensation for the employee's commute time. An employee required to drive a company vehicle was not entitled to compensation for time spent commuting to and from jobsites because he was free to determine when he left, his route, and which assignment he drove to first.[700]

All time spent on out-of-town travel is compensable, regardless of whether it occurs during or outside normal working hours. Time spent driving, flying, or otherwise traveling to and from the out-of-town location is compensable, including time spent waiting to purchase a ticket, waiting for luggage, waiting for a plane to take off, and other like circumstances. However, when an employee takes a break from travel to eat, sleep, or participate in other personal activities, such time is not compensable.[701]

If an employee with a fixed and assigned workplace is required, on a short-term basis, to travel more than a *de minimis* distance to report to work at a place other than the usual worksite, the employee must be paid for the additional time (compared to normally required travel) between the employee's home and worksite. It is the time—not the distance—that matters.[702]

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697 *Morillion v. Royal Packing Co.*, 94 Cal. Rptr. 2d 3 (Cal. 2000).

698 Frlekin v. Apple, 8 Cal. 5th 1038 (Cal. 2020).

699 *Overton v. Walt Disney Co.*, 38 Cal. Rptr. 3d 693 (Cal. Ct. App. 2006).

700 *Rutti v. Lojack Corp.*, 596 F.3d 1046 (9th Cir. 2010).

701 California Div. of Labor Standards Enforcement, Op. Ltr. 2002.2.21.

702 California Div. of Labor Standards Enforcement, Op. Ltr. 2003.04.22.

The California Supreme Court also held that time spent on an employer's premises waiting in a personal vehicle waiting for and undergoing an exit process that includes a vehicle inspection is compensable under the control clause of the definition of hours worked under the wage orders.[703]

3.5(c) *Local Predictive Scheduling Ordinances*

Several California localities—Berkeley, (Table 12), Emeryville (Table 13), San Francisco (Table 14), San Jose (Table 15), Los Angeles (Table 16), and Los Angeles County, effective July 1, 2025 (Table 17)—have enacted predictive or secure scheduling ordinances, as briefly summarized below.

Table 12. Berkeley Fair Workweek Ordinance[704]	
Covered Employers	Covered employers are those with 10 or more employees in the city that are: • primarily engaged in the building services, healthcare, hotel, manufacturing, retail, or warehouse services industries with 56 or more employees globally; • primarily engaged in the restaurant industry with 100 or more employees globally; • franchisees in the retail or restaurant industries with 100 or more employees globally within the network of franchises; and • not-for-profit corporations with 100 or more employees globally. All employees, whether full-time, part-time, or temporary are counted, no matter what their location.
Eligible Employees	Employees of a covered employer that work at least two hours per work week within the city and are entitled to minimum wage under California law are covered under the ordinance. However, exempt employees and those who earn a monthly salary of twice the city's minimum wage are not covered.
Obligations	**Scheduling Requirements.** Employers must: • provide each employee with an initial good faith estimate of minimum hours; and • provide at least two weeks' notice of employee work schedules. **Compensation for Schedule Changes.** Employers must provide an employee with the variable compensation per shift for each previously-scheduled shift that the covered employer adds or subtracts hours, moves to another date or time, cancels, or for each previously-unscheduled shift that the covered employer adds to the employee's schedule. The amount of compensation varies based on the notice given. Exceptions apply. **Offer Work to Existing Employees.** Before hiring new employees or contract employees, including through a temporary services or staffing agency, employers must first offer additional hours to existing part-time employees. Exceptions apply.

[703] *Huerta v. CSI Electrical Contractors*, 15 Cal. 5th 908 (2024).

[704] BERKELEY, CAL., MUN. CODE §§ 13.102.010 *et seq.*

Table 12. Berkeley Fair Workweek Ordinance[704]	
	Right to Request a Flexible Working Arrangement. Employees have the right to request a modified work schedule. **Rest Between Shifts.** Employees may decline to work a shift that begins less than 11 hours after the end of a previous shift. Additional procedures apply if employees agree.
Notice/Poster Requirements	Employers must give written notification of employee rights under this ordinance to every new employee at the time of hire and to each current employee. The city will publish such a notice in English and in additional languages as required by regulation. The notice must be posted in the worksite where it will be seen by all employees. Employers must also give their name, address, and telephone number in writing to each employee at the time of hire.
Record-Keeping Requirements	Employers must retain records for each employee for three years. The required records include each employee's name, hours worked, pay rate, initial posted schedule and all subsequent changes to that schedule, consent to work hours where applicable, and documentation of the time and method of offering additional hours of work to existing staff. Employers must provide a copy of these records upon their reasonable request.

Table 13. Emeryville Fair Workweek Ordinance[705]	
Covered Employers	*Fast Food Firms*: With 56 or more employees globally, and 19 or more employees within the city limits of Emeryville. *Retail Firms*: With 56 or more employees globally.
Eligible Employees	A person who, in a calendar week, performs at least 2 hours of work within the geographic boundaries of the City of Emeryville for an employer, and who qualifies as an employee entitled to payment of a minimum wage under the California minimum wage law. The definition of employees includes "learners."
Obligations	**Scheduling Requirements.** Employers must: • provide each employee with a good faith estimate of the employee's work schedule in writing prior to or on commencement of employment; • consider any request by the employee to modify the estimated work schedule; • provide at least two weeks' notice of employee work schedules; and • provide each new employee, prior to their first day of employment, with an initial work schedule that runs through the date that the next biweekly schedule for existing employees is scheduled to be posted or distributed.

[705] EMERYVILLE, CAL., MUN. CODE §§ 15-5-39 *et seq.*

Table 13. Emeryville Fair Workweek Ordinance[705]	
	Any changes in an employee's work schedule after it has been posted or transmitted are subject to notice and compensation requirements. Employees may decline newly-scheduled hours and must be compensated at one and a half times the employee's regular rate of pay for any hours worked less than 11 hours following the end of a previous shift. **Compensation for Schedule Changes.** Employers must provide an employee with the variable compensation per shift for each previously-scheduled shift that the covered employer adds or subtracts hours, moves to another date or time, cancels, or for each previously-unscheduled shift that the covered employer adds to the employee's schedule. The amount of compensation varies based on the notice given. Exceptions apply. **Offer Work to Existing Employees.** Before hiring new employees or contract employees, including through a temporary services or staffing agency, employers must first offer additional hours to existing part-time employees. Exceptions apply. The part-time employee must have time to accept the additional hours, time requirements vary. **Right to Request a Flexible Working Arrangement.** Employees have the right to request a modified work schedule.
Notice/Poster Requirements	Employers must post notice informing employees of their rights under the ordinance as published by the city. When employers are required under the ordinance to offer additional hours to part-time employees, the employer must make the offer either in writing *or* by posting the offer in a conspicuous location in the workplace. Each covered employer must give written notification to each current employee and to each new employee at the time of hire, of their rights under the ordinance and provide each employee, at the time of hire, with the employer's name, address, and telephone number in writing. Notification must be in English and in other languages as provided in any implementing regulations.
Record-Keeping Requirements	Employers must retain each written offer of work for existing employees for no less than three years and a record for each employee containing: • their name; • hours worked; • pay rate; • initial posted schedule and all changes to that schedule; • consent to work hours where such consent is required by the ordinance; and

Table 13. Emeryville Fair Workweek Ordinance[705]	
	• documentation of time and method of offering additional hours of work to existing staff. Employers must provide each employee with a copy of their records upon the employee's reasonable request.

Table 14. San Francisco Predictive Scheduling Ordinances		
Ordinances	**San Francisco Family Friendly Workplace[706]**	**San Francisco Retail Workers' Bill of Rights[707]**
Covered Employers	People or entities that regularly employ 20 or more employees, regardless of location (including an employer's agents, corporate officers, or executives who directly or indirectly or through an agent or any other person, including through the services of a staffing agency) and that exercise control over the wages, hours, or working conditions of an employee. This includes any successor-in-interest.	Any person or legal or commercial entity, whether domestic or foreign, that owns or operates a "Formula Retail Establishment" with 20 or more employees in the city of San Francisco, including corporate officers or executives. "Employer" does not include a nonprofit corporation or government entity. *Formula Retail Establishment* is a business located in San Francisco that falls under the Planning Code's definition of "Formula Retail Use," and must have at least 40 retail sales establishments located worldwide.
Eligible Employees	Any person who is employed within San Francisco's geographic boundaries. Telework is considered work within the geographical boundaries of the city) by an employer (including part-time employees and Welfare-to-Work participants engaged in work activity that would be considered "employment" under the FLSA), so long as the person: • has been employed for six months or more; • works at least eight hours per week on a regular basis; and	Any person who: (1) performs at least two hours of work for an employer within San Francisco's geographic boundaries and is entitled to payment of a minimum wage, or is a participant in a Welfare-to-Work Program; and (2) is scheduled for an on-call shift for at least two hours, regardless of whether the person is required to report to work for such shift.

[706] S.F., CAL., LAB. & EMP. CODE §§ 32 *et seq.*

[707] S.F., CAL., LAB. & EMP. CODE §§ 42 *et seq.*

Table 14. San Francisco Predictive Scheduling Ordinances		
Ordinances	**San Francisco Family Friendly Workplace**[706]	**San Francisco Retail Workers' Bill of Rights**[707]
	• are a caregiver, *i.e.*, an employee who is a primary contributor to the ongoing care of a child, a person who is age 65or older and in a family relationship with a caregiver, or other person in a family relationship with the caregiver with a serious health condition. Exceptions apply.	
Obligations	**Employee Request.** An employee shall be permitted a flexible or predictable working arrangement to assist with caregiving responsibilities for: • child(ren) for whom the employee has assumed parental responsibility; • person(s) in a family relationship with the caregiver with a serious health condition; or • a person or persons age 65or older in a family relationship with the employee. The request may be made orally, but must be put into writing (at the employer's direction) and must: • specify the arrangement sought; • specify the date on which the employee requests that the arrangement becomes effective; • specify the duration of the arrangement; and • explain how the request is related to caregiving. An employer may require an employee to attest to or verify the employee's care-giving responsibilities prior to agreeing to a flexible or predictable working arrangement.	**Employer Obligations.** Employers subject to this ordinance must: • prior to the beginning of initial employment, provide a new employee with a written good faith estimate of the employee's expected minimum number of scheduled shifts per month and the days and hours of those shifts, including on-call shifts. The employee may request that the employer modify this proposed schedule; • provide employees with at least two weeks' notice of their work schedules by either posting the schedule in a conspicuous place at the workplace or by electronic means at least every 14 days, as long as all employees have access to the electronic schedule at the workplace. The schedule must include any on-call shifts; • provide notice of any change to the employee's schedule that has been posted or transmitted; and

Table 14. San Francisco Predictive Scheduling Ordinances		
Ordinances	**San Francisco Family Friendly Workplace[706]**	**San Francisco Retail Workers' Bill of Rights[707]**
	Employer Response. An employer may elect to meet with the employee regarding the flexible or predictable working arrangement within 14 days of the oral or written notice, and must consider and respond to a request in writing within 21 days of the oral or written notice). Whether the request is granted or denied, the employer must confirm in writing and provide additional information (about any denial) to the employee. Employees may request reconsideration of the matter. An employer who does not agree to the working arrangement must engage in the interactive process with the employee to attempt in good faith to determine an arrangement that is acceptable to both the employee and employer. An employer may deny an arrangement only if granting the arrangement would cause the employer undue hardship by causing the employer significant expense or operational difficulty when considered in relation to the size, financial resources, nature, or structure of the employer's business. The employer must explain the denial in a written response that sets out the basis for the denial and notifies the employee of the right to request reconsideration and the right to file a complaint, and includes a copy of the notice required. **Revocation.** Either an employer or an employee may revoke an arrangement with 14 calendar days written notice to the other party. A	• provide compensation to employees for each previously scheduled shift that the employer moves to another date or time or cancels, or each previously unscheduled shift that the employer requires the employee to come in to work. The rate of pay depends on the amount of notice provided. When an employer moves a scheduled shift with less than 24 hours' notice to another time on the same day or to another day, but does not change the shift's overall length, it must provide compensation based on the length of the shift and the length of the move. **Pay for On-Call Shifts.** Employers must provide employees with compensation for each on-call shift for which the employee is required to be available but is not called in to work. The rate of compensation varies based on the length of the shift and the length of the move. **Offering Additional Work to Part-Time Employees.** Before hiring new employees or using contractors or a temporary services or staffing agency to perform work in a Formula Retail Establishment, an employer must first offer additional work to existing part-time employees. Exceptions apply. The part-time employee must have time to accept the additional hours (time requirements vary).

Table 14. San Francisco Predictive Scheduling Ordinances		
Ordinances	**San Francisco Family Friendly Workplace**[706]	**San Francisco Retail Workers' Bill of Rights**[707]
	working arrangement can be altered by mutual agreement of the employer and employee. An employer that concludes the arrangement is causing it undue hardship must engage in the interactive process with the employee to attempt in good faith to determine a different arrangement that would be acceptable to both the employee and employer. If the interactive process is unsuccessful in determining a different arrangement, an employer may revoke the existing arrangement after the interactive process within 14 days written notice to the employee.	
Notice/Poster Requirements	Employers must post the city/county-created notice, in a conspicuous place at any workplace or jobsite where any employee works. The notice must be posted in English, Spanish, Chinese, and any language spoken by at least 5% of the employees at the jobsite.[708]	Employers must post in a conspicuous place at any workplace or jobsite where any employee frequently visits, the city/county-created notice. The notice must be posted in English, Spanish, Chinese, Tagalog, and any language spoken by at least 5% of the employees at the workplace or jobsite.[709]
Record-Keeping Requirements	Employers must keep documentation for a period of three years from the date of the request for a flexible or predictable working arrangement, including, but not limited to: • all such requests; • documentation of meetings about requests, such as emails, meeting minutes, notes; • employer's responses granting or denying arrangements;	Employers must retain employment and payrolls records, including work schedules, pertaining to all current and former employees for three years. Employers must also retain any written offers of additional work to part-time employees for three years.

[708] The notice is available at http://sfgov.org/olse/sites/default/files/FileCenter/Documents/11256-FFWO%20Official%20Notice.pdf.

[709] The notice is available at http://sfgov.org/olse/sites/default/files/FileCenter/Documents/13056-FRERO_Notice_2015_09_09_final.pdf.

Table 14. San Francisco Predictive Scheduling Ordinances		
Ordinances	**San Francisco Family Friendly Workplace[706]**	**San Francisco Retail Workers' Bill of Rights[707]**
	• employees' requests for reconsideration; • requests for verification of caregiving responsibilities; and • verification of caregiving responsibilities.	

Table 15. San Jose Opportunity to Work, Measure E[710]	
Covered Employers	Any person, including corporate officers or executives, who: • directly or indirectly through any other person, including through the services of a staffing agency, or similar entity, employs or exercises control over the wages, hours, or working conditions of any employee; and • is either subject to the business license tax or has a place of business in the city which is exempt under state law from that business license tax. **Hardship Exemption.** The Office of Equality Assurance may grant a hardship exemption for up to 12 months to an employer demonstrating that: • it has undertaken in good faith all reasonable steps to comply; and • full or immediate compliance would be impracticable, impossible, or futile. This exemption may be extended beyond 12 months if the employer demonstrates that, despite its best efforts to comply, the hardship continues. **Small Business Exemption.** A small business enterprise that qualifies under San Jose Municipal Code § 4.12.060 (*i.e.*, businesses with 35 or fewer employees) will be exempt, except that: • for a chain business that is not owned by a franchisee, the number of employees, for purposes of qualifying, is determined by the combined number of employees at every location of that chain business, whether or not located in the City of San Jose; and • for a franchisee, the number of employees, for the purpose of qualifying, is determined by the combined total number of employees at every location owned by the franchisee and operated under the same franchise, whether or not located in the City of San Jose. Executive, administrative, and professional employees not covered by the Opportunity to Work ordinance are not included in the threshold count.

[710] SAN JOSE, CAL., MUN. CODE §§ 4.101.010 *et seq.*

Table 15. San Jose Opportunity to Work, Measure E[710]	
Eligible Employees	A person who: (1) in a calendar week, performs at least two hours of work for an employer; and (2) qualifies as an employee entitled to the state minimum wage or is a Welfare-to-Work Program participant. This definition includes temporary and seasonal employees, so long as the employee satisfies the preceding definition. Executive, administrative, and professional employees who are exempted from overtime requirements and minimum wage coverage are not covered by the ordinance.
Obligations	**Offer to Work to Existing Employees.** Before hiring additional employees or subcontractors, including hiring through the use of temporary services or staffing agencies, an employer must offer additional hours of work to existing employees who, in the employer's good faith and reasonable judgment, have the skills and experience to perform the work. The City may issue guidelines in the future to encourage employees to create training opportunities to permit employees to perform work which the employer can be expected to have a need for additional hours. An employer must use a transparent and nondiscriminatory process to distribute the hours of work among those existing employees. No fines, fees, or civil penalties will be assessed for an employer's first violation.
Notice/Poster Requirements	Employers must post a notice of employee rights. The notice will be published in four languages: English, Spanish, Vietnamese, and Cantonese. The Office of Equality Assurance will post the notice.
Record-Keeping Requirements	Employers must retain the following for no less than four years: • for any new employee or subcontractors, documentation of the offer of additional work to exist employees prior to hire; • work schedules, employment and payroll records for current and former employees; • copies of written offers to current and former part-time employees for additional work hours; and • any other records the Office of Equality Assurance requires.

Table 16. Los Angeles Fair Work Week Ordinance[711]	
Covered Employers	Employers with 300 or more employees globally that are in the retail business, as identified in the North American Industry Classification System as subcategories 44 through 45.
Eligible Employees	Employees of a covered employer that work at least two hours per work week within the city and are entitled to minimum wage under California law are covered under the ordinance. This includes part-time, temporary, or

[711] LOS ANGELES, CAL., MUN. CODE §§ 185.00 *et seq.*, 188.00 *et seq.*; LOS ANGELES, CAL., R. & REG. IMPLEMENTING THE FAIR WORK WEEK ORD., 1-11.

Table 16. Los Angeles Fair Work Week Ordinance[711]	
	seasonal work. The individual's primary work location must support retail operations, such as a store or warehouse. The ordinance does not cover individuals whose primary work is to support administrative functions related to the corporate office. Employees that perform all work outside the city are not covered, even if the employer is based in the city.
Obligations	**Good Faith Estimate of Work Schedule** Before they are hired, employers must provide employees with a written good faith estimate of their work schedule, which includes the hours, days, and times of work as well as on-call shifts. Employers must also provide the estimate to an employee within ten days of their request. If the actual schedule substantially deviates from the good faith estimate, the employer must document a legitimate business reason that was unknown to the employer when the estimate was provided. Additional requirements for the good faith estimate are found in the ordinance and rules. The estimate must also notify new employees of their rights under the ordinance, or the employer may provide the employee a copy of the city's required notice for that purpose. **Right to Request Changes to Schedule** Employees may request certain hours, times, or locations of work. An employer need not accept a request, but if they deny it, the employer must notify the employee of the reason for the denial in writing. **Written Notice of Schedule** At least 14 calendar days before a work period starts, an employer must provide written notice to an employee of their work schedule. The employer may post the schedule in a conspicuous and accessible location or transmit it electronically, or in another manner that is reasonably calculated to provide notice. If an employer changes the work schedule, it must notify employees in writing. Employees may accept (in writing) or decline any hours, shifts, or location changes that were not included in the written notice of schedule. Additional requirements regarding the written notice of schedule are available in the ordinance and rules. **Offer of Work to Existing Employees** Before an employer can hire a new employee, contractor, or temporary employee, it must offer work to current employees if they are qualified and the additional hours do not require a premium rate of pay. The offer must be made to each current employee in writing or by posting. Additionally, the offer must be made at least 72 hours before hiring any new employee. Employees have 48 hours after receiving the offer to accept it,

Table 16. Los Angeles Fair Work Week Ordinance[711]	
	and must accept in writing. Employers must assign the hours fairly and equitably if more employees than are required for full staffing accept. Employees that accept the additional offer of work are not entitled to predictability pay for those hours. Additional information regarding the process for offering and accepting hours is available in the ordinance and rules. **Predictability Pay** Employers must compensate employees with one hour of additional pay when the employee agrees to a change in their work schedule for each change that does not result in an employee's loss of work time or does not result in additional work time that exceeds 15 minutes. Likewise, employers must compensate employees at a rate of one-half of their regular rate for the time the employee does not work if the employer reduces the scheduled work time by at least 15 minutes. Put another way, employers must provide predictability pay for each change they initiate to a work schedule that occurs less than 14 calendar days before the start of a work period as follows: • one hour at the regular rate of pay for an increase in hours that exceeds 15 minutes; • one hour at the regular rate of pay for a change to the date, time, or location of a shift; • all hours not worked at a half rate of pay for a reduction of hours by at least 15 minutes; and • all hours not worked at a half rate of pay for an on-call shift where the employer does not call the employee to perform work. However, predictability pay is not required if: • the employee initiates the work schedule change; • the employee accepts a work schedule change made because another scheduled employee is absent. The employer must communicate that acceptance is voluntary and the employee may decline; • the employee accepts additional hours when hours are offered to existing employees before the employer hires new employees as described above; • the employee's hours are reduced because the employee violated a law or the employer's lawful procedures; • the employer's operations are "compromised" due to law or force majeure; or • extra hours provided would require payment of overtime. **Rest Between Shifts** Employers may not schedule employees to work a shift that starts fewer than ten hours from the employee's last shift. However, an employee may agree

Table 16. Los Angeles Fair Work Week Ordinance[711]	
	(in writing) to work those hours. The employer must pay the employee a premium of time and a half for each such shift.
Notice/Poster Requirements	Employers must post the city-created notice of rights every year in a conspicuous and accessible place at any workplace or job site where an employee works. It must be posted in English, Spanish, Chinese (Cantonese and Mandarin), Hindi, Vietnamese, Tagalog, Korean, Japanese, Thai, Armenian, Russian, and Farsi, and any other language spoken by at least five percent of the employees at the workplace.
Record-Keeping Requirements	Employers must retain records for current and former employees for three years. The required records include work schedules, written offers, and good faith estimates of work schedules, among other things.

Table 17. Los Angeles County Fair Workweek Ordinance, effective July 1, 2025[712]	
Covered Employers	Employers with 300 or more employees globally that are in the retail business, as identified in the North American Industry Classification System as subcategories 44 through 45.
Eligible Employees	Employees of a covered employer that work at least two hours per work week within the unincorporated areas of the county and are entitled to minimum wage under California law are covered under the ordinance. The individual's primary work location must support retail operations, such as a store or warehouse.
Obligations	**Good Faith Estimate of Work Schedule** Before they are hired, employers must provide employees with a written good faith estimate of their work schedule, subject to several requirements, which includes the Notice of Retail Employee's Workweek Rights in several languages (these languages are English, Spanish, and any language spoken by at least 10% of the retail employees at a workplace or job site). Employers must also provide the estimate to an employee within ten days of their request. If the actual schedule substantially deviates from the good faith estimate, the employer must document a legitimate business reason that was unknown to the employer when the estimate was provided. Additional requirements for the good faith estimate are found in the ordinance. **Right to Request Changes to Schedule** Employees may request certain hours, times, or locations of work. An employer need not accept a request, but if they deny it, the employer must notify the employee of the reason for the denial in writing. **Written Notice of Schedule**

[712] LOS ANGELES CNTY., CAL., CODE §§ 8.102.010 *et seq*.

Table 17. Los Angeles County Fair Workweek Ordinance, effective July 1, 2025[712]	
	At least 14 calendar days before a work period starts, an employer must provide written notice to an employee of their work schedule in several languages. The employer may post the schedule in a conspicuous and accessible location or transmit it electronically, or in another manner that is reasonably calculated to provide notice. If an employer changes the work schedule, it must notify employees by electronic means or another method reasonably calculated to provide actual notice. Employees may accept (in writing) or decline any hours, shifts, or location changes that were not included in the written notice of schedule. Additional requirements regarding the written notice of schedule are available in the ordinance. **Offer of Work to Existing Employees** Before an employer can hire a new employee, contractor, staffing agency, or temporary employee, it must offer work to current employees if they are qualified and the additional hours do not require a premium rate of pay. The offer must be made in several languages to each current employee in writing or by posting the offer in a conspicuous location in the workplace where notices to employees are customarily posted. **Predictability Pay** Employers must compensate employees with one hour of additional pay when the employee agrees to a change in their work schedule (date, time, or location) for each change that does not result in an employee's loss of work time or results in additional work time that exceeds 15 minutes. Employers must compensate employees at a rate of one-half of their regular rate for the time the employee does not work for the following reasons, if they occurred after the advanced notice required above: • Subtracting hours from a shift before or after the employee reports for duty; • Changing the start or end time of a shift resulting in a loss of more than 15 minutes; • Changing the date of a shift; • Cancelling a shift; or • Scheduling an employee for an on-call shift for which they are not called in. However, predictability pay is not required if: • the employee initiates the work schedule change;

Table 17. Los Angeles County Fair Workweek Ordinance, effective July 1, 2025[712]	
	• the employee accepts a work schedule change made because another scheduled employee is absent. The employer must communicate that acceptance is voluntary and the employee may decline and must document the specific nature of the request and the employee's consent; • the employee accepts additional hours when hours are offered to existing employees before the employer hires new employees as described above; • the employee's hours are reduced because the employee violated a law or the employer's lawful procedures; • the employer's operations are "compromised" pursuant to law; or extra hours provided would require payment of overtime. **Rest Between Shifts** Employers may not schedule employees to work a shift that starts fewer than ten hours from the employee's last shift. However, an employee may agree (in writing) to work those hours. The employer must pay the employee a premium of time and a half for each such shift.
Notice/Poster Requirements	Every employer must post the notice published each year by the county that informs employees of their rights under the ordinance. The notices must be posted in a conspicuous and accessible place at any workplace or job site where an employee works and in several languages. For employees who do not have regular access to the workplace or job site, the employer must provide a copy by electronic communication or US mail annually.
Record-Keeping Requirements	Employers must retain records for current and former employees for three years. The required records include work schedules, written offers, and good faith estimates of work schedules, among other things.

3.6 Child Labor

3.6(a) *Federal Guidelines on Child Labor*

The FLSA limits the tasks minors, defined as persons under 18 years of age, can perform and the hours they can work. Occupational limits placed on minors vary depending on the age of the minor and whether the work is in an agricultural or nonagricultural occupation. There are exceptions to the list of prohibited activities for apprentices and student-learners, or if an individual is enrolled in and employed pursuant to approved school-supervised and school-administered work experience and career exploration programs.[713] Additional latitude is also granted where minors are employed by their parents.

Considerable penalties can be imposed for violation of the child labor requirements, and goods made in violation of the child labor provisions may be seized without compensation to the employer. Employers may protect themselves from unintentional violations of child labor provisions by maintaining an

[713] 29 C.F.R. §§ 570.36, 570.50.

employment or age certificate indicating an acceptable age for the occupation and hours worked.[714] For more information on the FLSA's child labor restrictions, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

3.6(b) *State Guidelines on Child Labor*

The employment of minors is heavily regulated in California. California employers that intend to hire minors must apply for and obtain a child labor permit, and there are strict limitations on the types of work and number of hours a minor may work. For purposes of employment, a minor is anyone under the age of 18 Except under rare circumstances, a minor must be at least 14 years of age to work in California. In general, the same wage payment laws that protect adults apply to minors in California. Minors must be paid the same minimum wage as adults, and laws regulating overtime, final pay, and deductions from wages are all identical to the laws for adults.

3.6(b)(i) *State Restrictions on Type of Employment for Minors*

General Restrictions. In California, minors cannot work in any occupation declared particularly hazardous or detrimental to their health or well-being.[715] California law distinguishes between minors aged 16 and 17 and minors under 16 with respect to the types of work restrictions in place.[716] The state's child labor law restrictions do not prohibit the full-time employment of minors who meet all other legal employment requirements, and who are exempt from compulsory school attendance under the state education code.[717] Table 18 summarizes the state restrictions on type of employment by age.

Table 18. Restrictions on Type of Employment by Age

Age Range	Restrictions
Ages 16-17	Minors may not work in any occupation declared particularly hazardous for the employment of minors between 16and 18 years of age, or declared detrimental to their health or well-being as designated under federal law.[718]
Under Age 16	*In addition to the restrictions for minors aged 16 and 17 no minor under age 16 years may work in any capacity:* • in or in connection with any manufacturing establishment; • adjusting any belt to any machinery; • sewing or lacing machine belts in any workshop or factory; • oiling, wiping, or cleaning machinery, or assisting therein; • operating or assisting in operating various machines (*e.g.*, dough brakes or cracker machinery); • upon any railroad; • upon any vessel or boat engaged in navigation or commerce within the jurisdiction of California;

[714] 29 C.F.R. § 570.6.

[715] CAL. LAB. CODE § 1294.1.

[716] CAL. LAB. CODE §§ 1294.3, 1294.5.

[717] CAL. LAB. CODE § 1394.

[718] 29 C.F.R. § 570(e); CAL. LAB. CODE §§ 1290, 1292, 1293, 1294, 1294.1, 1294.3, and 1297; CAL. CODE REGS. tit. 8, §§ 11701, 11707.

Table 18. Restrictions on Type of Employment by Age	
Age Range	**Restrictions**
	• in, about, or in connection with any processes in which dangerous or poisonous acids are used, in the manufacture or packing of paints, colors, white or red lead, or in soldering; • in occupations causing dust injurious quantities, in the manufacture or use of poisonous dyes, in the manufacture or preparation of compositions with dangerous or poisonous gases or in the manufacture or use of compositions of lye in which the quantity is injurious to health; • on scaffolding, in heavy work in the building trades, in any tunnel or excavation, or in, about, or in connection with any mine, coal breaker, coke oven, or quarry; • in assorting, manufacturing, or packing tobacco; • operating any automobile, motorcar, or truck; • in any occupation dangerous to the life or limb, or injurious to the health or morals of the minor; • in occupations involving coming in close proximity to moving machinery; • delivering goods, merchandise, commodities, papers, or packages from motor vehicles; or • in close proximity to the functioning parts of unguarded and dangerous moving equipment, functioning blades, or propellers; and • as a messenger for any telegraph, telephone, or messenger company, or for the U.S. government or any of its departments while operating the same, in the distribution, transmission, or delivery of goods or messages in cities of more than 15,000 inhabitants.[719] *Minors 14 and 15 years of age may work in the following occupations:* • office and clerical work, including the operation of office machines; • cashiering, selling, working in advertising departments, and comparative shopping; • price marking and tagging by hand or by machine, assembling orders, packing, and shelving; • bagging and carrying out customers' orders; • errand and delivery work by foot, bicycle, and public transportation; • cleanup work, including the use of vacuum cleaners and floor waxers, and maintenance of grounds, but not including the use of power-driven mowers or cutters; • kitchen work and other work involved in preparing and serving food and beverages, including the operation of machines and devices used in the performance of this work, including, but not limited to, dishwashers, toasters, dumb-waiters, popcorn poppers, milkshake blenders, and coffee grinders; and

[719] CAL. LAB. CODE §§ 1290, 1292, 1293, 1294, 1294.1, and 1297; CAL. CODE REGS. tit. 8, §§ 11701, 11707.

Table 18. Restrictions on Type of Employment by Age	
Age Range	**Restrictions**
	• cleaning vegetables and fruits, and wrapping, sealing, labeling, weighing, pricing, and stocking goods when performed in areas physically separate from areas where meat is prepared for sale and outside freezers or meat coolers.[720]

Restrictions on Selling or Serving Alcohol. Special rules apply to the sale of alcohol. Individuals under age 21 cannot sell and serve alcoholic beverages in the portion of a business used primarily for on-premises consumption. However, individuals who are 18 or over may serve alcoholic beverages in *a bona fide* public eating place that is licensed for the on-premise sale of alcoholic beverages, where such person is not acting in the capacity of a bartender and the service occurs in an area primarily designed and used for the sale and service of food for consumption on the premises. Individuals under age 17 cannot sell alcoholic beverages at the premises of an off-sale licensee unless they are under the continuous supervision of an individual age 21 or older.[721]

3.6(b)(ii) *State Limits on Hours of Work for Minors*

In California, minors age 15 and 16 cannot work:

- more than eight hours in one day of 24 hours on a nonschool day;
- more than four hours on a school day (unless the minor is employed in a personal attendant occupation, school-approved work experience, or cooperative vocational program);
- more than 48 hours in one week; or
- between 10:00 P.M. and 5:00 A.M. on a day preceding a school day.[722]
    - Exceptions include: minors may work until 12:30 A.M. on any evening preceding a nonschool day; and minors enrolled in certain work experience educational programs conducted by private schools may work until 12:30 A.M. if certain conditions are met (minors working between 10:00 P.M. and 12:30 A.M. must be paid the adult minimum wage).

The state labor department may grant an exemption, subject to limitations, to minors age 16 and 17working in agricultural packing plants to work up to 10 hours per day during peak harvest season if the hours of employment are during a nonschool day.[723]

The time and hour restrictions do not apply to minors with a high school diploma or its equivalent.[724]

Additionally, the time and hour restrictions do not apply to minors employed in agricultural, horticultural, viticultural, or domestic labor when public schools are not in session, or during hours other than school hours, when the work performed is for or under the control of their parent or guardian and performed

[720] CAL. LAB. CODE § 1294.3.

[721] CAL. BUS. & PROF. CODE §§ 25663, 25667.

[722] CAL. LAB. CODE §§ 1391, 1391.1.

[723] CAL. LAB. CODE § 1393.

[724] CAL. LAB. CODE § 1391.2.

upon or in connection with premises owned, operated, or controlled by the parent or guardian. This exemption, however, does not apply to minors who are younger than school age while public schools are in session.[725]

While school is in session, minors aged 15and younger cannot work:

- more than three hours in any school day;
- more than 18 hours in any week; and
- during school hours.[726]

However, minors enrolled in and employed pursuant to a school-supervised and school-administered work experience and career exploration program may be employed for no more than 23 hours, any portion of which may be during school hours.[727]

When school is not in session, minors aged 15and younger cannot work:

- more than eight hours in one day of 24 hours;
- more than 40 hours in one week; and
- between 7:00 P.M. and 7:00 A.M., except that minors may work until 9:00 P.M. from June 1 through Labor Day.[728]

Minors over age 12 and under age 18 may be employed on a regular school holiday, during the regular vacation of the public school, during such time as the minor is exempt from compulsory school attendance pursuant to the state education code, and during the period of a specified occasional public school vacation, in any establishment or occupation not otherwise prohibited by law.[729]

3.6(b)(iii) *State Child Labor Exceptions*

California's child labor prohibitions do not apply to the following types of employment:

- the employment or use of any minor as a singer or musician in any church, school, or academy, or the teaching or learning of the science or practice of music;
- the employment of any minor as a musician at any concert or other musical entertainment, or as a performer in any form of entertainment, upon the written consent of the Labor Commissioner;
- the participation by any minor of any age, whether or not the minor receives payment for their services or receives money prizes, in any horseback riding exhibition, contest, or event other than a rough stock rodeo event, circus, or race; or

[725] CAL. LAB. CODE § 1394.

[726] CAL. LAB. CODE § 1391.

[727] CAL. EDUC. CODE § 49116.

[728] CAL. LAB. CODE § 1391; CAL. EDUC. CODE § 49116.

[729] CAL. EDUC. CODE § 49111.

- the leading of livestock by a minor in nonprofit fairs, stock parades, livestock shows, and exhibitions.[730]

The prohibition against minors working in certain types of manufacturing establishments, on common carriers, in the building trades, and other industrial occupations generally deemed hazardous to minors does not apply to:

- courses of training in vocational or manual training schools or in state institutions;
- apprenticeship training provided in an apprenticeship training program;
- work experience education programs, provided that the work experience coordinator determines that the students have been sufficiently trained in the employment or work otherwise prohibited under the program regulations, if parental approval is obtained, and the principal or the counselor of the student has determined that the progress of the student toward graduation will not be impaired; or
- student-learners in a *bona fide* vocational agriculture program under a written agreement that provides that the student-learner's work is incidental to training, intermittent, for short periods of time, and under close supervision of a qualified person, and includes all of the following:
  - safety instructions given by the school and correlated with the student-learner's on-the-job training;
  - a schedule of organized and progressive work processes for the student-learner;
  - the name of the student-learner; and
  - the signature of the employer and a school authority, each of whom must keep copies of the agreement.[731]

3.6(b)(iv) *State Work Permit or Waiver Requirements*

Employers must keep all permits to work (for the employee) and to employ (for the employer) and age certificates on file.[732] The files must be open to the inspection of the school attendance and probation officers, the State Board of Education, and the officers of the Division of Labor Standards Enforcement.[733] Permits must be kept on file during the term of the minor's employment.[734]

Permits may be issued by the principal of a public or private school, or administrator in the school designated by the principal, the school superintendent, the chief executive officer (CEO) of a charter school, or certain persons authorized by the superintendent or CEO.[735] Before a permit will be issued, an application must be filed by the parent, guardian, foster parent, caregiver with whom the minor resides,

[730] CAL. LAB. CODE §§ 1308, 1308.5.

[731] CAL. LAB. CODE § 1295.

[732] CAL. LAB. CODE § 1299, CAL. EDUC. CODE § 49160.

[733] CAL. LAB. CODE § 1299, CAL. EDUC. CODE § 49164.

[734] CAL. EDUC. CODE § 49161.

[735] CAL. EDUC. CODE §§ 49110, 49110.1.

or the applicable residential shelter services provider. The hour limitations that apply to a work permit must be based on the school calendar of the school the pupil attends.[736]

Age certificates serve as a permit to employ a minor who is not by law required to attend school, but who is otherwise required to hold a permit to work.[737]

Full-time work permits are available to minors between ages 14 and 16 who hold a diploma of graduation from elementary school when one of the following applies:

- the minor's parent/guardian presents a sworn statement indicating incapacitation for labor through illness or injury, or that through a parent's death or desertion of a parent, the family needs the minor to work;
- the minor does not live with their family and needs the earnings for self-support; or
- the minor lives in foster care and there is written authorization from the minor's social worker, probation officer, or child protective services worker, and working would help enable the minor to become emancipated or gain knowledge of necessary work skills and habits.[738]

Full-time work permits may also be issued to minors between ages 16and 18.[739]

3.6(b)(v) *State Enforcement, Remedies & Penalties*

The Department of Industrial Relations enforces California's child labor statutes and has the power to investigate violations and impose civil penalties.[740] Class "A" violations are those that present an imminent danger to minor employees or a substantial probability that death or serious physical harm would result therefrom. A Class "A" violation is subject to a civil penalty in an amount between $5,000 and $10,000 for each violation. Willful or repeated violations carry higher civil penalties than those imposed for comparable nonwillful or first violations, not to exceed $10,000.[741] Class "B" violations are those that have a direct or immediate relationship to the health, safety, or security of minor employees other than Class "A" violations. A Class "B" violation is subject to a civil penalty in an amount between $500 and $1,000 for each violation. Willful or repeated violations shall receive higher civil penalties than those imposed for comparable nonwillful or first violations.[742]

Criminal charges may also apply. An employer that violates California's child labor laws is guilty of a misdemeanor and may be fined between $1,000 and $5,000. Willful violations carry a fine of $10,000.[743] Failure to produce any permit or certificate either to work or to employ is *prima facie* evidence that an employer is engaging in illegal employment of any minor whose permit or certificate is not so produced. Proof that any person was the manager or superintendent of any place of employment at the time any

[736] CAL. EDUC. CODE § 49110.

[737] CAL. EDUC. CODE § 49114.

[738] CAL. EDUC. CODE §§ 49130, 49132.

[739] CAL. EDUC. CODE § 49131.

[740] CAL. LAB. CODE § 1287.

[741] CAL. LAB. CODE § 1288.

[742] CAL. LAB. CODE § 1288.

[743] CAL. LAB. CODE § 1303.

minor is alleged to have been employed in violation of the child labor laws is *prima facie* evidence that the person employed or permitted the minor to work.[744]

3.7 Wage Payment Issues

3.7(a) *Federal Guidelines on Wage Payment*

There is no federal wage payment law. The FLSA covers minimum wage and overtime requirements, but would not generally be considered a "wage payment" law as the term is used in state law to define when and how wages must be paid.

3.7(a)(i) *Form of Payment Under Federal Law*

Authorized Instruments. Wages may be paid by cash, check, or facilities (*e.g.*, board or lodging).[745]

Direct Deposit. Neither the FLSA, nor its implementing regulations, address direct deposit of employee wages. The U.S. Department of Labor (DOL) has briefly considered the permissibility of direct deposit by stating:

> The payment of wages through direct deposit into an employee's bank account is an acceptable method of payment, provided employees have the option of receiving payment by cash or check directly from the employer. As an alternative, the employer may make arrangements for employees to cash a check drawn against the employer's payroll deposit account, if it is at a place convenient to their employment and without charge to them.[746]

According to the Consumer Financial Protection Bureau (CFPB), an employer may require direct deposit of wages by electronic means if the employee is allowed to choose the institution that will receive the direct deposit. Alternatively, an employer may give employees the choice of having their wages deposited at a particular institution (designated by the employer) or receiving their wages by another means, such as by check or cash.[747]

Payroll Debit Card. Employers may pay employees using payroll card accounts, so long as employees have the choice of receiving their wages by at least one other means.[748] The "prepaid rule" regulation defines a *payroll card account* as an account that is directly or indirectly established through an employer and to which electronic fund transfers of the consumer's wages, salary, or other employee compensation such

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[744] CAL. LAB. CODE § 1304.

[745] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c, *available at* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf; *see also* 29 C.F.R. § 531.32 (description of "other facilities").

[746] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c00.

[747] Consumer Fin. Prot. Bureau, *CFPB Bulletin 2013-10: Payroll Card Accounts (Regulation E)* (Sept.12, 2013), *available at* http://files.consumerfinance.gov/f/201309_cfpb_payroll-card-bulletin.pdf.

[748] 12 C.F.R. § 1005.18; *see also* Consumer Fin. Prot. Bureau, *CFPB Bulletin 2013-10: Payroll Card Accounts (Regulation E)* (Sept.12, 2013) and Consumer Fin. Prot. Bureau, *Ask CFPB: Prepaid Cards, If my employer offers me a payroll card, do I have to accept it?* (Sept. 4, 2020), *available at* https://www.consumerfinance.gov/ask-cfpb/if-my-employer-offers-me-a-payroll-card-do-i-have-to-accept-it-en-407/.

as commissions are made on a recurring basis, whether the account is operated or managed by the employer, a third-party payroll processor, a depository institution, or any other person.[749]

Employers that use payroll card accounts must comply with several requirements set forth in the prepaid rule. Employers must give employees certain disclosures before the employees choose to be paid via a payroll card account, including a short-form disclosure, a long-form disclosure, and other information that must be disclosed in close proximity to the short-form disclosure. Employees must receive the short-form disclosure and either receive or have access to the long-form disclosure before the account is activated. All disclosures must be provided in writing. Importantly, within the short-form disclosure, employers must inform employees in writing and before the card is activated that they need not receive wages by payroll card. This disclosure must be very specific. It must provide a clear fee disclosure and include the following statement or an equivalent: "You do not have to accept this payroll card. Ask your employer about other ways to receive your wages." Alternatively, a financial institution or employer may provide a statement that the consumer has several options to receive wages or salary, followed by a list of the options available to the consumer, and directing the consumer to tell the employer which option the customer chooses using the following language or similar: "You have several options to receive your wages: [list of options]; or this payroll card. Tell your employer which option you choose." This statement must be located above the information about fees. A short-form disclosure covering a payroll card account also must contain a statement regarding state-required information or other fee discounts or waivers.[750] As part of the disclosures, employees must: (1) receive a statement of pay card fees; (2) have ready access to a statement of all fees and related information; and (3) receive periodic statements of recent account activity or free and easy access to this information online. Under the prepaid rule, employees have limited responsibility for unauthorized charges or other unauthorized access, provided they have registered their payroll card accounts.[751]

The CFPB provides numerous online resources regarding prepaid cards, including Frequently Asked Questions. Employers that use or plan to use payroll card accounts should consult these resources, in addition to the prepaid card regulation, and seek knowledgeable counsel.[752]

3.7(a)(ii) *Frequency of Payment Under Federal Law*

Federal law does not specify the timing of wage payment and does not prohibit payment on a semi-monthly or monthly basis. However, all wages that are required by the FLSA are generally considered to be due on the payday for the pay period in which the wages were earned. FLSA regulations state that if an employer cannot calculate how much it owes an employee in overtime by payday, it must pay that employee overtime as soon as possible and no later than the next payday.[753]

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[749] 12 C.F.R. § 1005.2(b)(3)(i)(A).

[750] 12 C.F.R. § 1005.18; *see also* Consumer Fin. Prot. Bureau, *Guide to the Short Form Disclosure* (Mar. 2018), *available at* https://files.consumerfinance.gov/f/documents/cfpb_prepaid_guide-to-short-form-disclosure.pdf; *Prepaid Disclosures* (Apr. 1, 2019), *available at* https://files.consumerfinance.gov/f/documents/102016_cfpb_PrepaidDisclosures.pdf.

[751] 12 C.F.R. § 1005.18.

[752] *See* Consumer Fin. Prot. Bureau, *Prepaid Cards*, *available at* https://www.consumerfinance.gov/ask-cfpb/category-prepaid-cards/ and *Prepaid Rule Small Entity Compliance Guide* (Apr. 2019), *available at* https://files.consumerfinance.gov/f/documents/cfpb_prepaid_small-entity-compliance-guide.pdf.

[753] 29 C.F.R. § 778.106; *see also* U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30b04, *available at* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf.

3.7(a)(iii) *Final Payment Under Federal Law*

Federal law does not address when final wages must be paid to discharged employees or to employees who voluntarily quit. However, as noted in **3.7(a)(ii)**, wages that are required by the FLSA are generally considered to be due on the payday for the pay period in which the wages were earned.

3.7(a)(iv) *Notification of Wage Payments & Wage Records Under Federal Law*

Federal law does not generally require employers to provide employees wage statements when wages are paid. However, federal law does require employers to furnish pay stubs to certain unique classifications of employees, including migrant farm workers.

Federal law does not address whether electronic delivery of earnings statements is permissible.

3.7(a)(v) *Changing Regular Paydays or Pay Rate Under Federal Law*

There are no general notice requirements under federal law should an employer wish to change an employee's payday or wage rate. However, it is recommended that employees receive advance written notice before a change in regular paydays or pay rate occurs.

3.7(a)(vi) *Paying for Expenses Under Federal Law*

The FLSA does not have a general expense reimbursement obligation. Nonetheless, it prohibits employers from circumventing minimum wage and overtime laws by passing onto employees the cost of items that are primarily for the benefit or convenience of the employer, if doing so reduces an employee's wages below the highest applicable minimum wage rate or cuts into overtime premium pay.[754] Because the FLSA requires an employer to pay minimum wage and overtime premiums "free and clear," the employer must reimburse employees for expenses that are primarily for the benefit of the employer if those expenses would reduce the applicable required minimum wage or overtime compensation.[755] Accordingly, among other items, an employer may be required to reimburse an employee for expenses related to work uniforms,[756] tools and equipment,[757] and business transportation and travel.[758] Additionally, if an employee is reimbursed for expenses normally incurred by an employee that primarily benefit the employer, the reimbursement cannot be included in the employee's regular rate.[759]

3.7(a)(vii) *Wage Deductions Under Federal Law*

Permissible Deductions. Under the FLSA, an employer can deduct:

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[754] *See* 29 U.S.C. §§ 203(m),206; 29 C.F.R. §§ 531.2, 531.32(a), and 531.36(a); U.S. Dep't of Labor, Wage & Hour Div., *Fact Sheet #16: Deductions From Wages for Uniforms and Other Facilities Under the Fair Labor Standards Act (FLSA)* (rev. July 2009).

[755] 29 C.F.R. §§ 531.35, 531.36, and 531.37.

[756] 29 U.S.C. § 203(m); 29 C.F.R. §§ 531.3, 531.32; U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c12.

[757] 29 U.S.C. § 203(m); 29 C.F.R. §§ 531.3, 531.35; U.S. Dep't of Labor, Wage & Hour Div., Op. Ltr. FLSA 2001-7 (Feb. 16, 2001).

[758] 29 C.F.R. § 531.32; U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c04.

[759] 29 C.F.R. § 778.217.

- state and federal taxes, levies, and assessments (*e.g.*, income, Social Security, unemployment) from wages;[760]
- amounts ordered by a court to pay an employee's creditor, trustee, or other third party, under garnishment, wage attachment, trustee process, or bankruptcy proceedings (the employer or anyone acting on its behalf cannot profit from the transaction);[761]
- amounts as directed by an employee's voluntary assignment or order to pay an employee's creditor, donee, or other third party (the employer or agent cannot directly or indirectly profit or benefit from the transaction);[762]
- with an employee's authorization for:
  - the purchase of U.S. savings stamps or U.S. savings bonds;
  - union dues paid pursuant to a valid and lawful collective bargaining agreement;
  - payments to the employee's store accounts with merchants wholly independent of the employer;
  - insurance premiums, if paid to independent insurance companies where the employer is under no obligation to supply the insurance and derives, directly or indirectly, no benefit or profit from it; or
  - voluntary contributions to churches and charitable, fraternal, athletic, and social organizations, or societies from which the employer receives no profit or benefit, directly or indirectly;[763]
- the reasonable cost of providing employees board, lodging, or other facilities by including this cost as wages, if the employer customarily furnishes these facilities to employees;[764] or
- amounts for premiums the employer paid while maintaining benefits coverage for an employee during a leave of absence under the Family and Medical Leave Act if the employee fails to return from leave after leave is exhausted or expires, if the deductions do not otherwise violate applicable federal or state wage payment or other laws.[765]

Additionally, while the FLSA contains no express provisions concerning deductions relating to overpayments made to an employee, loans and advances, or negative vacation balance, informal guidance from the DOL suggests such deductions may nonetheless be permissible. While this informal guidance may be interpreted to permit a deduction for loans to employees, employers should consult with counsel before deducting from an employee's wages. An employer can deduct the principal of a loan or wage advance, even if the deduction cuts into the minimum wage or overtime owed. However, deductions for

[760] 29 C.F.R. § 531.38.

[761] 29 C.F.R. § 531.39. The amount subject to withholding is governed by the federal Consumer Credit Protection Act. 15 U.S.C. §§ 1671 *et seq*.

[762] 29 C.F.R. § 531.40.

[763] 29 C.F.R. § 531.40.

[764] 29 U.S.C. §203. However, the cost cannot be treated as wages if prohibited under a collective bargaining agreement.

[765] 29 C.F.R. § 825.213.

interest or administrative costs on the loan or advance are illegal to the extent that they cut into the minimum wage or overtime pay. Loans or advances must be verified.[766]

An employer may also be able to deduct for wage overpayments even if the deduction cuts into the employee's FLSA minimum wage or overtime pay. The deduction can be made in the next pay period or several pay periods later. An employer cannot, however, charge an administrative fee or charge interest that brings the payment below the minimum wage.[767] Finally, if an employee is granted vacation pay before it accrues, with the understanding it constitutes an advance of pay, and the employee quits or is fired before the vacation is accrued, an employer can recoup the advanced vacation pay, even if this cuts into the minimum wage or overtime owed an employee.[768]

Deductions During Non-Overtime v. Overtime Workweeks. Whether an employee receives overtime during a given workweek affects an employer's ability to take deductions from the employee's wages. During non-overtime workweeks, an employer may make qualifying deductions (*i.e.*, the cost is reasonable and there is no employer profit) for "board, lodging, or other facilities" even if the deductions would reduce an employee's pay below the federal minimum wage. Deductions for articles that do not qualify as "board, lodging, or other facilities" (*e.g.*, tools, equipment, cash register shortages) can be made in non-overtime workweeks if, after the deduction, the employee is paid at least the federal minimum wage.[769]

During overtime workweeks, deductions can be made on the same basis in overtime weeks as in non-overtime weeks if the amount deducted does not exceed the amount which could be deducted if the employee had not worked overtime during the workweek. Deductions that exceed this amount for articles that are not "facilities" are prohibited. There is no limit on the amount that can be deducted for qualifying deductions for "board, lodging, or other facilities." However, deductions made only in overtime weeks, or increases in prices charged for articles or services during overtime workweeks will be scrutinized to determine whether they are manipulations to evade FLSA overtime requirements.[770]

Prohibited Deductions. The FLSA prohibits an employer from making deductions for administrative or bookkeeping expenses incurred by an employer to the extent they cut into the minimum wage and overtime owed an employee.[771]

3.7(b) *State Guidelines on Wage Payment*

3.7(b)(i) *Form of Payment Under State Law*

Authorized Instruments. Wages may be paid in cash, an instrument negotiable in cash (*e.g.*, check, order, draft, note, memorandum), or by voluntary direct deposit in a financial institution of the employee's

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[766] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10, *available at* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf.

[767] U.S. Dep't of Labor, Wage & Hour Div., Op. Ltr. FLSA2004-19NA (Oct. 8, 2004); *see also* U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10.

[768] U.S. Dep't of Labor, Wage & Hour Div., Op. Ltr. FLSA2004-17NA (Oct. 6, 2004); *see also* U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10.

[769] 29 C.F.R. § 531.36.

[770] 29 C.F.R. § 531.37.

[771] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10.

choice with a place of business in California.[772] Checks and other acknowledgements of indebtedness must be payable in cash on demand, without discount, at an established place of business in California, the name and address of which must be written on the check.[773] At the time of issuance, and for at least 30 days after, the funds must be fully available and accessible to the employee.[774]

Direct Deposit. Mandatory direct deposit is not permitted in California. However, if an employee agrees, direct deposit of wages is allowed into a bank, savings and loan association, or credit union of the employee's choice with a place of business in California.[775] Direct deposits of wages to an employee's bank, saving and loan, or credit union account that were previously authorized by the employee are immediately terminated when an employee quits or is discharged, and the payment of wages upon termination of employment apply UNLESS the employee has voluntarily authorized a direct deposit for the final wage payment.[776]

Payroll Debit Card. Payment of wages via payroll debit card is permitted in California. The Division of Labor Standards Enforcement (DLSE) has instructed that payroll card programs that utilize both the direct deposit of wages and a means of accessing those wages using an electronic card are allowed.[777]

To pay wages via a payroll debit card, an employee must voluntarily authorize the deposit, and must also have the option of having their pay directly deposited into an account of the employee's choosing.[778] The deposit must be made in a financial institution with a place of business in California. However, a branch office in California is not required—an electronic payment network for the receipt of wages in California is sufficient.[779] There must be sufficient funds available for employee access for at least 30 days.[780]

Employees must have immediate access to their wages in full.[781] The fact that an employee has other options (*e.g.*, withdrawing a lesser amount) does not run afoul of the requirement that employees receive their full wages on payday. Moreover, the fact that an employee has other options (*e.g.*, having certain amounts transferred to other accounts) does not render the payroll debit card redeemable for something other than money.[782] Employees must be provided at least one transaction per pay period without fees.[783]

3.7(b)(ii) *Frequency of Payment Under State Law*

The general rule in California is that wages are due and payable twice per calendar month, on regular paydays. Labor performed between the 1st and 15th must be paid between the 16th and the 26th day,

[772] CAL. LAB. CODE §§212,213.

[773] CAL. LAB. CODE § 214.

[774] CAL. LAB. CODE §214.

[775] CAL. LAB. CODE §§ 212,213.

[776] CAL. LAB. CODE § 213(d); California Div. of Labor Standards Enforcement, *Paydays, Pay Periods, and the Final Wages*, *available at* https://www.dir.ca.gov/dlse/FAQ_Paydays.htm.

[777] California Div. of Labor Standards Enforcement, Op. Ltr. 2008.07.07.

[778] CAL. LAB. CODE § 213.

[779] CAL. LAB. CODE § 212.

[780] CAL. LAB. CODE § 212.

[781] CAL. LAB. CODE §§ 212, 213.

[782] California Div. of Labor Standards Enforcement, Op. Ltr. 2008.07.07.

[783] CAL. LAB. CODE § 212.

and labor performed between the 16th and the last day must be paid between the first and tenth day of the following month. Additionally, wages earned for labor in excess of the normal work period (*e.g.*, overtime) must be paid no later than the payday for the next regular payroll period.[784]

Alternatively, when the earning period is something other than between the first and 15th, and 16th and last day of the month, weekly or biweekly payroll is permitted if wages are paid not more than seven calendar days following the close of the payroll period.[785] Employers may also use a weekly pay period. Labor Code section 204 does not apply to employees paid on a weekly basis on a regular payday. Labor performed during a calendar week before or on the regular payday must be paid by the regular payday during the following calendar week, and labor performed after the regular payday must be paid no later than seven days after the regular payday during the following calendar week.[786]

Some employers may elect to pay their employees on a monthly basis. If covered by a collective bargaining agreement, employees can be paid monthly according to the terms of the agreement.[787] Exempt white collar employees, if covered by the FLSA, may be paid their entire calendar month's salary once a month on or before the 26th day of the month labor was performed.[788] If salaries include weekly overtime, overtime must be paid on or before the 26th day of the following month.[789] However, these employees may be paid within seven days of the close of their monthly payroll period if:

1. they are not covered by the FLSA;
2. they are not covered by a collective bargaining agreement; and
3. their monthly pay does not include overtime.[790]

An employer may pay wages at more frequent intervals, or in greater amounts, or in full when or before due.[791] Special requirements may apply in specific industries.

3.7(b)(iii) *Final Payment Under State Law*

In California, the timing of final wage payment depends on the method of employment termination.

- If an employee is fired, final wages must be paid immediately.[792]
- If an employee quits or retires, final wages must be paid within 72 hours. If the employee provided at least 72 hours' notice of quitting, however, final wages must be paid at the time of quitting.[793]

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[784] CAL. LAB. CODE § 204.

[785] CAL. LAB. CODE § 204; California Div. of Labor Standards Enforcement, *Paydays, Pay Periods, and the Final Wages*, *available at* http://www.dir.ca.gov/dlse/faq_paydays.htm.

[786] CAL. LAB. CODE § 204B.

[787] CAL. LAB. CODE § 204.

[788] CAL. LAB. CODE § 204.

[789] CAL. LAB. CODE § 204.2.

[790] CAL. LAB. CODE § 204C.

[791] CAL. LAB. CODE § 219.

[792] CAL. LAB. CODE § 201.

[793] CAL. LAB. CODE § 202; *McLean v. State*, 204 Cal. Rptr. 3d 544, 545 (Cal. 2016) ("We conclude . . . that Labor Code sections 202 and 203 . . . apply when employees retire from their employment.").

- In the event of a strike, striking employees must be paid by the next regular payday.[794]

If voluntarily authorized by the employee, direct deposit of wages is allowed into a bank, savings and loan association, or credit union of the employee's choice with a place of business California. Direct deposits of wages to an employee's bank, saving and loan, or credit union account that were previously authorized by the employee are immediately terminated when an employee quits or is discharged, and the payment of wages upon termination of employment apply UNLESS the employee has voluntarily authorized a direct deposit for the final wage payment.[795]

Temporary services employers must pay employees on a daily basis if the employee is assigned to work for a client who is engaged in a trade dispute, such as a strike, or if the employee is assigned to work for the client on a "day-to-day basis." Additionally, temporary services employers must pay employees providing temporary services not later than the regular payday following the week in which the employee actually performed the work.[796] Special rules apply to certain seasonal, motion picture, and oil drilling employees.[797]

An employer that fails to timely pay final wages to an employee who quits or is discharged will be subject to waiting time penalties for each day that the final wages go unpaid, up to a maximum of 30 days.[798] The penalty is equal to the employee's daily rate of pay.[799] The 30-day period is measured in calendar days, and includes weekends, holidays, and any other days that the employee would not normally work.[800]

3.7(b)(iv) *Notification of Wage Payments & Wage Records Under State Law*

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

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

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[794] CAL. LAB. CODE § 209.

[795] CAL. LAB. CODE § 213(d); California Div. of Labor Standards Enforcement, *Paydays, Pay Periods, and the Final Wages*, *available at* https://www.dir.ca.gov/dlse/FAQ_Paydays.htm.

[796] CAL. LAB. CODE § 201.3.

[797] *See* CAL. LAB. CODE §§ 201, 201.5, and 201.7.

[798] CAL. LAB. CODE § 203. *See also Diaz v. Grill Concepts Servs., Inc.*, 233 Cal. Rptr. 3d 524 (Cal. Ct. App. 2018) (Trial courts do not have discretion to waive or reduce waiting time penalties) & *Nishiki v. Danko Meredith, APC*, 236 Cal. Rptr. 3d 626 (Cal. Ct. App. 2018) (Willful violation did not occur when numerical amount of check differed from written amount, but waiting penalties were proper from the date the employee notified the employer the bank would not cash the check due to the discrepancy and the date a corrected check was issued).

[799] CAL. LAB. CODE § 203.

[800] California Div. of Labor Standards Enforcement, *Waiting Time Penalty FAQ*, *available at* http://www.dir.ca.gov/dlse/faq_waitingtimepenalty.htm.

- physical address of the employer's main office or principal place of business, and a mailing address, if different;
- employer's telephone number;
- name, address, and telephone number of employer's workers' compensation insurance carrier;
- any other information the Labor Commissioner deems material and necessary; and
- the employee's rights and obligations under the California paid sick leave law.[801]

Additional requirements may apply in special occupations and/or industries.[802]

Certain employees are not required to receive the wage notice. These include overtime-exempt employees and employees covered by a valid collective bargaining agreement, if the agreement expressly provides for the employees' wages, hours of work, and working conditions, and if the agreement provides premium wage rates for all overtime hours worked and a regular hourly rate of pay for those employees of not less than 30% more than the state minimum wage.[803]

Notice of Paydays. Employers must conspicuously post—at the place of work, if practicable, or otherwise where it can be seen as employees come or go to their places of work, or at the office or nearest agency for payment kept by the employer—a notice specifying the regular paydays, and the time and place of payment.[804] Employers are not required to provide a specific date for each payday, but the information provided should be sufficient for employees to understand when they will be paid. The regular day(s) of the month when wages will be paid should be specified, in addition to the measure of time between pay days (*e.g.*, semi-monthly, monthly, biweekly, weekly, etc.).[805]

Wage Statement Requirements. Employers must—semi-monthly or when wages are paid—provide each employee with an accurate itemized statement in writing showing:

- gross wages earned;
- total hours worked by the employee. This requirement does not apply to any employee whose compensation is solely based on a salary and who is exempt from the payment of overtime under the Labor Code or any applicable order of the Industrial Welfare Commission, and to employees exempt from minimum wage or overtime under any of the following exemptions:

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[801] CAL. LAB. CODE § 2810.5.

[802] *See, e.g.*, CAL. LAB. CODE § 2810.5 (temporary service employers).

[803] CAL. LAB. CODE § 2810.5.

[804] CAL. LAB. CODE § 207. Labor Code 207, enacted before the Wage Theft Prevention Act, appears to require at least contemporaneous or, more prudently, some measure of advance notice about when paydays occur or when payday changes will occur. A court may ultimately look for reasonable advance notice of payday changes. *See, e.g., Asmus v. Pacific Bell*, 96 Cal. Rptr. 2d 179, 190 (Cal. 2000) ("An employer may terminate a written employment security policy that contains a specified condition, if the condition is one of indefinite duration and the employer makes the change after a reasonable time, on reasonable notice, and without interfering with the employees' vested benefits").

[805] California Div. of Labor Standards Enforcement, *Wage Theft Protection Act of 2011 – Notice to Employees*, *available at* http://www.dir.ca.gov/dlse/FAQs-NoticeToEmployee.html.

  - persons employed in an executive, administrative, or professional capacity provided in any applicable order of the Industrial Welfare Commission;
  - outside salespersons provided in any applicable order of the Industrial Welfare Commission;
  - overtime exemption for computer software professionals paid on a salaried basis;
  - individuals who are the parent, spouse, child, or legally-adopted child of the employer provided in any applicable order of the Industrial Welfare Commission;
  - participants, director, and staff of a live-in alternative to incarceration rehabilitation program with special focus on substance abusers provided in section 8002 of the Penal Code;
  - any crew member employed on a commercial passenger fishing boat licensed under the Fish and Game Code provided in any applicable order of the Industrial Welfare Commission; and
  - any individual participating in a national service program provided in any applicable order of the Industrial Welfare Commission.
- the number of piece-rate units earned and any applicable piece rate (if the employee is paid on a piece-rate basis);
- all deductions, provided that 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 and the last four digits of the employee's Social Security number or an existing employee identification number other than the full Social Security number;[806]
- the name and address of the legal entity that is the employer and if the employer is a farm labor contractor (as defined in subdivision (b) of § 1682), the name and address of the legal entity that secured the services of 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; and if the employer is a temporary services employer, the of pay and the total hours worked for each temporary services assignment;[807]
- if an employee worked in excess of their normal work period (*i.e.*, overtime), an employer may list the actual hours worked on the next pay stub as itemized corrections. Any corrections set out in a subsequently issued pay stub must state the inclusive dates of the pay period for which the employer is correcting its initial report of hours worked; and

[806] The use of payroll service provider generated unique employee file numbers on employee wage statements is also permitted. *Blair v. Dole Food Co.*, 2017 WL 604718 (Cal. Ct. App. Feb. 15, 2017).

[807] Because employers are not otherwise required to track certain exempt employees' hours, and paid time off and vacation are not "hours worked," employers are not required to state applicable hourly rates for payment of accrued paid time off or vacation on *exempt* employee wage statements. *Blair*, 2017 WL 604718.

- amount of paid sick leave available to the employee, or paid time off an employer provides in lieu of sick leave. If an employer provides unlimited paid sick leave or unlimited paid time off to an employee, the employer may indicate "unlimited" on the employee's itemized wage statement.[808]

COVID 19 Supplemental Paid Sick Leave Requirement for Other Workers

- Covered employers under this law must provide written notice concerning the amount of leave available to covered employees on either an itemized wage statement or in a separate writing provided on designated pay days.[809]

The record of the itemized statement of deductions must be recorded in ink or other indelible form, properly dated, showing the month, day, and year.[810]

In addition to the requirements for wage statements listed above for all employees, wage statements of employees paid on a piece-rate basis must also contain the following information:

- the total hours of compensable rest and recovery periods, the rate of compensation for those periods, and the gross wages paid for those periods during the pay period; and
- the total hours of other nonproductive time, the rate of compensation for that time, and the gross wages paid for that time during the pay period.[811]

According to the DLSE, electronically-stored statements that employees can read on screen or print and read as a hard copy satisfy the "in writing" requirement. Moreover, electronic delivery is permissible if:

- each employee retains the right to elect to receive a written paper stub or record;
- employees who are provided with electronic wages statements are able to easily access the information and convert the electronic statements into hard copies at no expense;
- the employer complies with state wage and hour record-keeping requirements;
- the employer retains pay records for at least three years, and the records are accessible by employees and former employees; and
- the electronic wages statement system incorporates proper safeguards to ensure the confidentiality of the employee's personal information.[812]

Merely making an electronic wage statement available on a computer for viewing or printing at the workplace may be insufficient under California law as it may not meet the requirement for statements that are easily accessible. However, in *Guillen v. Dollar Tree Stores, Inc.*, a jury found that the employer's practice of providing wage statements to employees by printing them at the cash register was compliant with California law in this area.[813]

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[808] CAL. LAB. CODE § 226.

[809] CAL. LAB. CODE § 248.1.

[810] CAL. LAB. CODE § 226.

[811] CAL. LAB. CODE §§ 226(a), 226.2.

[812] California Div. of Labor Standards Enforcement, Op. Ltr. 2006.07.06.

[813] No. CV-15-3813 (C.D. Cal. Nov. 15, 2017).

3.7(b)(v) *Wage Transparency*

The Labor Code prohibits California employers from taking any of the following actions:

- requiring, as a condition of employment, that an employee refrain from disclosing the amount of their wages;
- requiring an employee to sign a waiver or other document that purports to deny the employee the right to disclose the amount of their wages; or
- discharging, formally disciplining, or otherwise discriminating against an employee who discloses the amount of their wages.[814]

An employee alleging a violation under the Labor Code is not required to exhaust administrative remedies and may file a civil action within three years of the alleged violation.[815]

Under California's equal pay statute, discussed more fully in **3.11(b)(ii)**, an employer is also prohibited from preventing its employees from disclosing their own wages, discussing others' wages, inquiring about other employees' wages, or assisting another employee with the assertion of the individual's rights under the law.[816] However, the law provides that no one, including the employer, is obligated to make any disclosures concerning employees' wages. The law also prohibits employers from discriminating or retaliating against any employee for invoking the employee's own rights, or assisting others to invoke their rights under the statute.[817]

An employee alleging a violation of the wage disclosure provisions under the equal pay statute may file a civil action within one year of the alleged violation.[818]

3.7(b)(vi) *Changing Regular Paydays or Pay Rate Under State Law*

Change in Payday. In the event the employer intends to change the payday schedule, the WTPA requires employers to give employees written notice about payday changes within seven calendar days of changes occurring unless notice is given in another writing required by law within seven days of the changes.[819]

Change in Rate of Pay. Likewise, the WTPA requires employers to give employees written notice about pay rate changes within seven calendar days of changes occurring. Notice must include rate(s) of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or otherwise, including any rates for overtime, as applicable.[820] However, notice is not required if all changes are reflected on a timely and compliant wage statement and/or notice is given in another writing required by law within seven days of the changes.[821] Additionally, the requirement does not apply to an employee who is overtime-exempt under state law or is covered by a valid collective bargaining agreement, if the agreement expressly provides for the employee's wages, hours of work, and working conditions, and the

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814 CAL. LAB. CODE § 232.

815 CAL. CIV. PROC. CODE § 228; CAL. LAB. CODE § 244.

816 CAL. LAB. CODE § 1197.5(j)(1).

817 CAL. LAB. CODE § 1197.5(j)(1).

818 CAL. LAB. CODE § 1197.5.

819 CAL. LAB. CODE § 2810.5.

820 CAL. LAB. CODE § 2810.5.

821 CAL. LAB. CODE § 2810.5.

agreement provides premium wage rates for all overtime hours worked and a regular hourly rate of not less than 30% more than the state minimum wage.[822]

3.7(b)(vii) *Paying for Expenses Under State Law*

An employer must reimburse an employee for all necessary expenditures and losses incurred in the performance of the employee's duties. An employer may meet its obligation in this regard by designating a portion of an employee's regular compensation payments as an expense reimbursement, if the designation is appropriately documented, the amount is sufficient to reimburse the employee's expenses, and the employee can challenge the amount of the reimbursement.[823] An employee may recover prejudgment interest, costs, and attorneys' fees with any award of expenses.[824] The obligation to reimburse expenses cannot be waived.[825] Even where the employee's business entity, rather than a single employee, claims expenses, the employer will be liable.[826]

Uniform Expenses. An employer is not prohibited from "prescribing the weight, color, quality, texture, style and make of uniforms" it requires employees to wear.[827] When uniforms are required by the employer to be worn as a condition of employment, they must be provided and maintained by the employer. *Uniform* includes wearing apparel and accessories of distinctive design or color.[828] Note that this does not apply to protective apparel regulated by the Occupational Safety and Health Standards Board.[829]

A reasonable deposit may be required as security for the return of uniforms furnished by the employer. The employee must be provided a deposit receipt. Moreover, the deposit must comply with section 400 *et seq*. of the Labor Code, or an employer must receive the employee's prior written authorization to deduct from the employee's final paycheck the cost of the uniform if not returned.[830]

Tools & Equipment. When tools or equipment are required by the employer, or necessary to perform the job, they must be provided and maintained by the employer.[831] However, an employee who earns at least twice the state minimum wage may be required to provide and maintain hand tools and equipment customarily required by the trade or craft.[832] According to the DLSE, if an employee does not earn twice the minimum wage, and is required to purchase tools and equipment, the employer violates the general expense reimbursement requirement set forth in Labor Code section 2802.

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[822] CAL. LAB. CODE § 2810.5.

[823] *Gattuso v. Harte-Hanks Shoppers, Inc*., 67 Cal. Rptr. 3d 468 (Cal. 2007).

[824] CAL. LAB. CODE § 2802.

[825] CAL. LAB. CODE § 2804; *Edwards v. Arthur Andersen L.L.P.*, 81 Cal. Rptr. 3d 282 (Cal. 2008).

[826] *Bowerman v. Field Asset Servs., Inc.*, 2017 WL 4469112 (N.D. Cal. Oct. 6, 2017).

[827] CAL. LAB. CODE § 452.

[828] California Wage Order Nos. 1-15, § 9, and No. 16, § 8.

[829] California Wage Order Nos. 1-15, § 9, and No. 16, § 8.

[830] California Wage Order Nos. 1-15, § 9, and No. 16, § 8 (this wage order governing "on-site occupations" contains no provisions concerning deposits).

[831] California Wage Order Nos. 1-15, § 9, and No. 16, § 8.

[832] California Wage Order Nos. 1-15, § 9, and No. 16, § 8.

"Hand tools and equipment" must be given "literal meaning." Such tools include, for example, hammers and screw drivers, and do not include power-driven tools or equipment. The term *equipmen*t encompasses hand-held measuring instruments or like apparatus.[833]

A reasonable deposit may be required as security for the return of tools or equipment furnished by the employer. As with uniforms, the employee must be provided a deposit receipt and the deposit must comply with the applicable Labor Code sections or the employer must receive the employee's prior written authorization to deduct from the employee's final paycheck the cost of the tools or equipment if not returned.[834]

Training & Education. Whether training and education costs are reimbursable depends on whether the training or education in question is required by the employer. In *Uss-Posco Industries v. Case*, to secure a sought-after position, an employee had three options: (1) pass a test required for the position without additional education or training; (2) pass the test after self-study or self-arranged study; or (3) pass the test after enrolling in and completing the employer's test preparation program.[835] The employee chose the third option, which required him to reimburse the employer for program costs if he voluntarily left employment within 30 months of completing the program, which ultimately occurred. The court held "the educational expenses [] ultimately incurred were a matter of personal choice—they were not an employer-imposed requirement of either continued employment . . . or of the [] position [] sought."[836] Accordingly, they were not an expenditure or loss the employee had to "necessarily incur" which requires reimbursement under section 2802.

State-required training for licensing of police officers was held to not be employer-mandated and reimbursable under section 2802, but the court also stated that "Labor Code Section 2802 precludes the city from requiring recruits to reimburse it for the cost of the portion of the [city's] training which is in excess of that required for basic POST certification."[837]

The law's general indemnification provisions apply to any expense or cost of any employer-provided or employer-required educational program or training for an applicant or employee providing direct patient care for a general acute care hospital.[838]

Cellular Telephone Service. In *Cochran v. Schwan's Home Service*, the California Court of Appeal held that, if employees must make work-related calls on a personal cellphone, section 2802 requires an employer to reimburse them a reasonable percentage of their phone bill. Because of the differences in phone plans and work-related scenarios, calculating reimbursement is left to the trial court and parties in each particular case.[839]

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[833] California Div. of Labor Standards Enforcement, *Enforcement Policies and Interpretations Manual* (rev. June 2002), §§ 45.5.8, 45.5.8.1, 45.5.9, and 45.5.11.

[834] California Wage Order Nos. 1-15, § 9, and No. 16, § 8.

[835] *Uss-Posco Indus. v. Case*, 197 Cal. Rptr. 3d 791 (Cal. Ct. App. 2016).

[836] *Uss-Posco Indus.*, 197 Cal. Rptr. 3d at 799.

[837] *In re Acknowledgment Cases*, 192 Cal. Rptr. 3d 337, 343 (Cal. Ct. App. 2015). *See also* California Div. of Labor Standards Enforcement, Op. Ltr. 11.17.1994.

[838] CAL. LAB. CODE § 2802.1.

[839] *Cochran v. Schwan's Home Serv.*, 176 Cal. Rptr. 3d 407 (Cal. Ct. App. 2014), *rev. denied*, 176 Cal. Rptr. 3d 407 (Cal. Nov. 25, 2014).

3.7(b)(viii) *Wage Deductions Under State Law*

Requirements for Deductions. In California, an employer may deduct from an employee's wages if:

- the deduction is required or empowered under state or federal law;
- the employee provides express written authorization for deductions to cover insurance premiums, hospital or medical dues, or other deductions not amounting to a rebate or deduction from the standard wage set by a collective bargaining agreement or per a wage agreement or statute; or
- a deduction to cover health and welfare contributions is expressly authorized by a collective bargaining or wage agreement.[840]

The general deductions provisions apply to deductions from final wages.[841]

Permissible Deductions. In addition to deductions that specifically meet the requirements set forth above, the deductions summarized below are expressly authorized by law. Because of the heightened risks in California associated with deductions not expressly permitted under state or federal law, it is recommended that employers consult with counsel before deducting from employee wages.

- **Deductions for Benefits Paid During Family Leave.** An employer may recover the premiums it paid while maintaining group health plan benefits coverage for an employee during the employee's leave of absence under the California Family Rights Act (CFRA) if:[842]
  - the employee fails to return to work after leave is exhausted or expired; and
  - the employee's failure to return from leave is for a reason other than the continuation, recurrence, or onset of a serious health condition that entitled the employee to CFRA leave, or other circumstances beyond the control of the employee.
- **Unreturned Company Property.** An employer may deduct the cost of unreturned company property (uniforms, tools, etc.) from an employee's final wages if the employer obtained the employee's prior written authorization for the deduction.[843]
- **Company Credit Cards.** In an unpublished decision, a federal court in California held that an employer could lawfully deduct amounts owed by employees on their employer-guaranteed credit cards from the employees' final pay if doing so does not violate minimum wage or overtime laws.[844] In the case, an employer provided a guaranteed credit card program to some employees, guaranteeing the credit card to the issuer in the event of an employee's default. Each employee signed an authorization permitting the employer to deduct an amount equal to the employee's credit card then-outstanding balance from the employee's

[840] CAL. LAB. CODE § 224; *see also Davis v. Farmers Ins. Exch.*, 200 Cal. Rptr. 3d 315 (Cal. Ct. App. 2016) (reversing directed verdict for employer concerning deductions from final pay for impermissible reasons, including operational expenses, such as computer equipment, promotional mailers, and stationery, contributions toward the company's lobbying efforts, and advertisements).

[841] CAL. LAB. CODE § 224; California Wage Orders, § 9.

[842] CAL. GOV'T CODE § 12945.2.

[843] California Wage Orders, § 9.

[844] *Ward v. Costco Wholesale Corp.*, 2011 WL 3296173 (C.D. Cal. Aug. 1, 2011), *aff'd*, 552 F. App'x 631 (9th Cir. 2014).

final paycheck. Each employee received a final paycheck that included pay for all hours worked during the final pay period, as well as accrued vacation and sick leave pay. The employer then deducted an amount equal to the outstanding balance of the employer-sponsored credit card from the employees' final pay. Per the court, "there [was] no showing that [the employer] did not pay the required minimum and overtime wages, because none [of the plaintiffs] had an amount withheld high enough to invade minimum or overtime wages."[845]

Prohibited Deductions. Unless it can be shown that the employee's dishonest or willful act, or gross negligence, caused the loss, an employer cannot deduct for:

- cash shortages;
- breakage or other damage; or
- loss of equipment.[846]

Further, the DLSE cautions that use of this deduction may, in fact, not comply with the provisions of the California Labor Code and various California Court decisions.[847]

Indirect deductions from employees' wages are also prohibited. An employer cannot require an employee to patronize the employer or any other person with respect to the purchase of anything of value. This prohibition has been extended to preclude an employer from requiring an applicant for employment to pay any fee in connection with the application for, receipt of, or processing of an application for employment.[848]

3.7(b)(ix) *Wage Assignments & Wage Garnishments*

California employers must comply with a wage garnishment order issued against an employee.[849] California limits the amount of an employee's disposable earnings that are subject to garnishment: the lesser of 25% of the employee's disposable income or 50% of the amount by which the individual's disposable earnings for that week exceed 40times the state minimum wage in effect at the time the earnings are payable; provided that if the debtor employee works in a location where the local minimum hourly wage is greater than the state minimum hourly wage, the local minimum hourly wage in effect at the time the earnings are payable must be used for this calculation.[850] *Disposable income* is that part of earnings that remains after mandatory deductions for amounts required by law to be withheld. Employers are allowed to deduct an administrative fee of $1.50 for each payment associated with administering the

[845] 2011 WL 3296173.

[846] California Wage Order No. 4, § 8.

[847] California Div. of Labor Standards Enforcement, *Deductions*, *available at* http://www.dir.ca.gov/dlse/FAQ_Deductions.htm (citing CAL. LAB. CODE § 224 and *Kerr's Catering v. Department of Industrial Relations*, 19 Cal. Rptr. 492 (Cal. 1962)).

[848] CAL. LAB. CODE § 450.

[849] CAL. CIV. PROC. CODE §§ 706.020 *et seq*.; *see also* California Courts, *Wage Garnishment/Earnings Withholding for Employers*, *available at* https://www.courts.ca.gov/34892.htm?rdeLocaleAttr=en.

[850] CAL. CIV. PROC. CODE § 706.050.

debt collection garnishment.[851] Employers may not terminate employees because of a garnishment or support order.[852]

3.7(b)(x) *State Enforcement, Remedies & Penalties*

California gives employees the choice of using a specialized administrative procedure to resolve wage claims or filing their claims directly in court. An employee can pursue wage claims that are based on a law, such as a minimum wage or overtime claim, and wage claims that are based on a contract, such as bonuses and commissions, through either process.

Administrative Proceedings. An employee alleging wage and hour violations under the Labor Code or the Wage Orders may file a claim with the state Labor Commissioner.[853] An outline of California's special wage claim hearing procedure is set out below:[854]

1. A wage claim is filed by the completion of a relatively simple form.
2. A notice that the claim is filed and a summary description of the claim are mailed to the employer with an invitation to reply.
3. Most often a voluntary conference is scheduled, at which time the facts underlying the claim will be reviewed and the possibility of settling the matter will be investigated.
4. If the claim is not settled, then the Labor Commissioner may dismiss the claim so that the employee can pursue it in court or the Labor Commissioner may set the matter for a hearing.
5. A notice of a formal hearing and complaint will be mailed to the employer. The employer must file an answer to the complaint within 10 days.
6. The hearing itself is conducted informally. However, a record of the hearing is maintained, and an employer must have all relevant documents and witnesses available at the hearing.
7. Within 15 days after the hearing is concluded, the Labor Commissioner must issue an order, decision, or award resolving the complaint. The order, decision, or award includes a summary of the hearing and the reasons for the decision.

A party that loses before the Labor Commissioner can appeal the Labor Commissioner's decision and seek *de novo* review in superior court.[855]

The Labor Commissioner also has the authority to file suit against an employer to recover wages on behalf of a group of employees, without any formal assignment of the claims by the employees to the state.[856] The DLSE can be awarded attorneys' fees when pursuing employees' wage claims. In addition, the Labor Commissioner has the right to intervene in any court proceedings conducted pursuant to Labor Code

[851] CAL. CIV. PROC. CODE § 706.034.

[852] CAL. LAB. CODE § 2929.

[853] CAL. LAB. CODE § 98.

[854] CAL. LAB. CODE §§ 98, 98.1.

[855] CAL. LAB. CODE § 98.2.

[856] CAL. LAB. CODE § 98.3.

section 98.2 (*de novo* review of the Labor Commissioner's decision) that involve questions of the interpretation of statutes or administrative regulations.[857]

Wage & Hour Lawsuits. Alternatively, a California employee may file suit in court without first pursuing proceedings before the Labor Commissioner. The statute of limitations based on a violation of the minimum wage, overtime, and wage payment laws is three years.[858] A claim for unfair competition based on violation of the state's wage and hour laws must be filed within four years.[859] Employees alleging a breach of contract claim in connection with commissions, vacation pay, etc. must file suit within four years, in the case of a written contract.[860]

An employee may also file a class action lawsuit on their own behalf and on behalf of other similarly-situated employees.[861] California also recognizes "representative actions," which are not required to follow California class action procedure and which can be authorized either by case law or statute.[862] A claim for a violation of the state's Unfair Competition Law may be brought as a representative action, but for the action to be maintainable, the named plaintiff must be a person "who has suffered injury in fact and has lost money or property as a result of the unfair competition," and who has "complied with Code of Civil Procedure section 382," *i.e.*, obtained class certification.[863]

Private Attorneys General Act of 2004. Under the California Labor Code Private Attorneys General Act of 2004 (PAGA), the civil penalties established for violations of the Labor Code can be pursued by private litigants as well as by the Labor Commissioner.[864] In other words, the PAGA plaintiff steps into the shoes of the Labor Commissioner and acts in the public interest to enforce California's wage and hour laws. The PAGA thus allows individuals to collect penalties that previously could be recovered only by the Labor Commissioner.[865] In addition, the PAGA adds a separate civil penalty (known as the PAGA "default penalty") for the violation of any provision of the Labor Code for which there was not previously a stated penalty.[866] The PAGA specifically authorizes the pursuit of these penalties through class actions and the award of attorneys' fees to successful plaintiffs.

The PAGA plaintiff sues as a private attorney general who "represents" other aggrieved employees only insofar as the plaintiff seeks civil penalties based on violations of the other aggrieved employees' Labor Code rights. Under PAGA, 75% of any penalty award is payable to the Labor & Workforce Development Agency (LWDA), and the remaining 25% is distributed to aggrieved employees.[867] In 2009, the California

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[857] CAL. LAB. CODE § 98.5.

[858] CAL. CIV. PROC. CODE § 338.

[859] CAL. BUS. & PROF. CODE § 17208.

[860] CAL. CIV. PROC. § 337.

[861] CAL. CIV. PROC. CODE § 382.

[862] *Tenants Ass'n of Park Santa Anita v. Southers*, 272 Cal. Rptr. 361, 364-65 (Cal. Ct. App. 1990).

[863] *See Amalgamated Transit Union v. Superior Ct. (First Transit, Inc.)*, 95 Cal. Rptr. 3d 605, 610 (Cal. 2009).

[864] CAL. LAB. CODE §§ 2698 *et seq*. For more information on the PAGA, see LITTLER MENDELSON ON EMPLOYMENT LAW CLASS ACTIONS (3d ed. 2014).

[865] CAL. LAB. CODE § 2699(e)(1).

[866] CAL. LAB. CODE § 2699(f).

[867] The LWDA is the umbrella agency for the California Industrial Welfare Commission and the state Labor Commissioner.

Supreme Court held in *Arias v. Superior Court (Angelo Dairy)* that a PAGA representative action may be brought as a representative action without class certification.[868]

An employee may file suit under the PAGA for Labor Code violations only if the employee first gives written notice to both the LWDA and the employer.[869] The required notice must identify the specific Labor Code provisions alleged to have been violated and include the facts and theories supporting the alleged violations.[870] If the Labor Code section that is alleged to have been violated is listed in Labor Code section 2699.5, the employee may pursue a civil action only after the LWDA's preliminary consideration of the claim. The employee may not sue until: (1) the LWDA notifies the individual, within 60 calendar days, that it will not investigate; or (2) the LWDA provides no response within 65 calendar days.[871] If the LWDA chooses to investigate, it has 120 days to do so. If the LWDA issues a citation to the employer, the employee is precluded from filing a civil suit under PAGA.[872]

If the Labor Code section is not listed in Labor Code section 2699.5, the employer has 33 days to "cure" the violation; otherwise, the employee may file a civil action or amend an existing complaint to add PAGA claims.[873] The PAGA includes a separate procedure with respect to alleged violations of the Labor Code sections under the California Occupational Safety and Health Act (Cal-OSHA).[874] However, the vast majority of PAGA litigation to date has involved alleged violations of California's wage and hour laws.

The PAGA does not affect an employee's right either to file a claim or to sue an employer directly for statutory penalties (*i.e.*, those penalties that an employee has always been entitled to collect without going through the LWDA).[875] As a result, depending on the circumstances, aggrieved employees might attempt to pursue both statutory penalties and PAGA penalties for the same underlying infraction.[876]

The statute of limitations for filing with the LWDA is one year from the date of the alleged violation.[877] Filing with the LWDA tolls the statute of limitations while the LWDA determines whether to investigate; usually 60 days or the time it takes the LWDA to indicate it does not intend to investigate, whichever is soonest.[878] A plaintiff has the right to amend an existing complaint to add a PAGA cause of action within the 60 days following the end of the tolling period.[879]

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[868] 95 Cal. Rptr. 3d 588, 592-95 (Cal. 2009).

[869] CAL. LAB. CODE § 2699.3(a)(1).

[870] CAL. LAB. CODE § 2699.3(a)(1), (b)(1), (c)(1).

[871] CAL. LAB. CODE § 2699.3(a)(2).

[872] CAL. LAB. CODE § 2699(h).

[873] CAL. LAB. CODE § 2699.3(c)(2).

[874] CAL. LAB. CODE § 2699.3(b).

[875] An example of a statutory penalty is that found under Labor Code section 203, which allows an employee to collect one day's wages (up to 30 days) for each day past the date that an employee is required to be paid after termination, is a "statutory penalty."

[876] *See, e.g.*, *York v. Starbucks Corp.*, 2012 WL 10890355 (C.D. Cal. Nov. 1, 2012).

[877] *See Amaral v. Cintas Corp. No. 2*, 78 Cal. Rptr. 3d 572, 605-06 (Cal. Ct. App. 2008).

[878] CAL. LAB. CODE § 2699.3(d); *see also Martinez v. Antique & Salvage Liquidators, Inc.*, 2011 WL 500029, at *8 (N.D. Cal. Feb. 8, 2011).

[879] CAL. LAB. CODE § 2699.3(a)(2)(C).

Antiretaliation Provisions. The California Labor Code protects employees who initiate PAGA claims or testify in PAGA proceedings.[880] Employers are prohibited from firing, retaliating, or otherwise taking adverse action against any such employee. Employees who suffer retaliation are entitled to "reinstatement and reimbursement for lost wages and work benefits."[881] Additionally, employers may be subject to a civil penalty of up to $10,000 per employee for each violation, to be awarded to the injured employee(s).[882]

3.8 Other Benefits

3.8(a) *Vacation Pay & Similar Paid Time Off*

3.8(a)(i) *Federal Guidelines on Vacation Pay & Similar Paid Time Off*

To the extent an "employee welfare benefit plan" is established or maintained for the purpose of providing vacation benefits for participants or their beneficiaries, it may be governed under the federal Employee Retirement Income Security Act (ERISA).[883] However, an employer program of compensating employees for vacation benefits out of the employer's general assets is not considered a covered welfare benefit plan.[884] Further, the U.S. Supreme Court, in *Massachusetts v. Morash*, noted that extensive state regulation of vesting, funding, and participation rights of vacation benefits may provide greater protections for employees than ERISA and, as a result, the court was reluctant to have ERISA preempt state law in situations where it was not clearly indicated.[885]

3.8(a)(ii) *State Guidelines on Vacation Pay & Similar Paid Time Off*

California law does not provide a statutory definition of vacation—it is generally considered the right to take time off from work without the condition of being ill or a certain holiday occurring.[886] The law surrounding paid vacation time in California centers primarily on how vacation accrues, when it is considered vested, and when an employer must pay out accrued vacation compensation. California employers are not required to provide paid vacation policies. However, employers that do have paid vacation policies are required to pay out accrued and unused vacation compensation to an employee upon termination, unless otherwise provided in a collective bargaining agreement.[887] An employer's

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[880] CAL. LAB. CODE § 98.6.

[881] CAL. LAB. CODE § 98.6(b).

[882] CAL. LAB. CODE § 98.6(b)(3).

[883] 29 U.S.C. § 1002.

[884] 29 C.F.R. § 2510.3-1; *see also* U.S. Dep't of Labor, *Advisory Opinion 2004-10A* (Dec. 30, 2004), *available at* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2004-10a; U.S. Dep't of Labor, *Advisory Opinion 2004-08A* (July 2, 2004), *available at* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2004-08a; U.S. Dep't of Labor, *Advisory Opinion 2004-03A* (Apr. 30, 2004), *available at* https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/2004-03a.

[885] 490 U.S. 107, 119(1989).

[886] *Paton v. Advanced Micro Devices*, 129 Cal. Rptr. 3d 784 (Cal. Ct. App. 2011).

[887] CAL. LAB. CODE § 227.3.

vacation policy cannot require forfeiture of vested vacation time upon termination.[888] The waiver of vacation benefits through collective bargaining agreements has been narrowly construed.[889]

In September 2023, the U.S. Court of Appeals for the Ninth Circuit, deferring to the state labor department's position in an opinion letter and its enforcement manual, held that a furlough or temporary layoff with no specified return date within the normal pay period is a discharge for purposes of California Labor Code section 201, thereby activating vacation payout requirements under California Labor Code section 227.3. The appellate court rejected the defendant's argument that discharge did not occur until the employees were formally terminated three months after the furlough / temporary layoff announcement.[890]

In April 2020, the California Court of Appeals reviewed a case involving the payout of unlimited vacation.[891] After a bench trial, a state court trial judge held unlimited vacation constituted a vested right, so payout was required under Labor Code section 227.3. The company provided "unlimited" vacation to some employees, while others accrued vacation. Per the court, "offering vacation time in an undefined amount simply presents *a problem of proof* as to what the employer's policy was."[892] The court held that "[s]ince twenty days' annual vacation was approved at least once, . . . at least that much vacation was actually available to plaintiffs under the [sic] policy applied to them."[893] After it reached this conclusion, it held the question was then whether more than twenty days' annual vacation vested. The lower court observed that testimony made clear that plaintiffs never considered that they could be approved for some large amount of vacation and concluded that the evidence establishes that twenty days, and no more, vested. While the court noted that an employee handbook might provide the best guidance as to the available vacation time under the employer's policy in cases where an amount of vacation is undefined as to a particular employee, the court held it was not the best course of action in the case at hand. Instead, it determined that the best approach would be a more "straightforward" one: 20 days of vacation vested annually for each plaintiff, and any unused portion is payable at termination. The decision was appealed.

The appellate court largely adopted the trial court's logic for why – in this case with these facts – Labor Code section 227.3 requires a vacation payout. The appellate court limited its decision to the specific policies and employees in the case. However, in noting that it appreciated the benefit and understood the appeal of unlimited time off policies, the appellate court provided the following guiding principles of a written policy that might, depending on the facts of the particular case, constitute an unlimited time off policy: (1) clearly provides that employees' ability to take paid time off is not a form of additional wages for services performed, but perhaps part of the employer's promise to provide a flexible work schedule—including employees' ability to decide when and how much time to take off; (2) spells out the rights and obligations of both employee and employer and the consequences of failing to schedule time off; (3) in

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888 CAL. LAB. CODE § 227.3; *see also, e.g.*, *Sansone v. Charter Communs., Inc.*, 831 F. App'x 801 (9th Cir. 2020) (Reversing in part summary judgment for defendant, the appeals court held the employer made it wholly impossible for plaintiffs to continue their employment with it by merging. Because vacation pay was a form of deferred compensation, once it was earned it was payable. Notwithstanding the fact that plaintiffs' vacation time was transferred, they were entitled to payment of their unused vested vacation time when their employment ended with the employer, absent an agreement to the contrary.).

889 *Choate v. Celite Corp.*, 155 Cal. Rptr. 3d 915 (Cal. Ct. App. 2013).

890 *Hartstein v. Hyatt Corp.*, 2023 U.S. App. LEXIS 25154 (9th Cir. Sept. 22, 2023).

891 *McPherson v. EF Intercultural Foundation, Inc.*, 260 Cal. Rptr. 3d 640 (Cal. Ct. App. 2020).

892 260 Cal. Rptr. 3d 640 at 647.

893 260 Cal. Rptr. 3d 640 at 647.

practice allows sufficient opportunity for employees to take time off, or work fewer hours in lieu of taking time off; and (4) is administered fairly so that it neither becomes a de facto "use it or lose it policy" nor results in inequities, such as where one employee works many hours, taking minimal time off, and another works fewer hours and takes more time off. These guiding principles do not provide a bright-line rule employers can apply to determine whether or not they must pay out vacation when employment ends, but appear to constitute factors courts should consider (among others) when concluding whether the vacation policy under review requires payout.

In general, vacation compensation is considered to accrue in increments on a daily basis, and an employer cannot defer the accrual of vacation compensation to the end of a month or the end of a year to avoid the pro rata accrual of vacation benefits.[894] Subject to these limitations, an employer can generally determine the rate at which employees accrue vacation compensation and whether employees are to accrue any vacation compensation at all.[895] The amount of vacation that an employee can use at any one time and the dates on which vacation can be used are also subject to the approval of the employer. An employer can require a salaried, overtime-exempt, white collar employee to use a partial day of accrued vacation for a partial-day absence without compromising the employee's salaried, exempt status.[896]

Because all unused vacation compensation must be paid out on termination, an employer cannot enforce a "use it or lose it" provision in a vacation plan.[897] However, an employer can enforce a reasonable cap on the accrual of vacation compensation that would allow an employee to retain all previously earned vacation compensation, but that would not allow the employee to earn any additional vacation compensation until some of the previously earned amount had been used.[898] An employer can also cash out an employee at the end of each year by paying the employee the cash value of all earned and unused vacation compensation. The cash value is measured by the employee's current rate of pay.[899]

In unpublished opinions, state and federal appellate courts have reached different conclusions about what an employee's "final rate" is under California Labor Code section 227.3.[900] A state appellate court concluded that, in the case before it, the final rate included the employee's base rate only – as expressly set forth in the employer's policy – and excluded commissions.[901] Conversely, a federal appellate court that, in the case before it, the final rate included the employee's base rate plus shift differentials; however, because the court held that "multiple courts have reached opposing conclusions," the employer had acted in good faith in paying out unused vacation at the base rate, and did not act willfully, so the former

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894 *Suastez v. Plastic Dress-Up Co.*, 183 Cal. Rptr. 846 (Cal. 1982).

895 *See, e.g.*, *Owen v. Macy's, Inc.*, 96 Cal. Rptr. 3d 70 (Cal. Ct. App. 2009) (six-month continuous employment requirement prior to accruing vacation was valid); *see also Minnick v. Auto. Creations, Inc.*, 220 Cal. Rptr. 3d 752 (Cal. Ct. App. 2017) (one-year waiting period was valid).

896 *Conley v. Pacific Gas & Elec. Co*., 31 Cal. Rptr. 3d 719 (Cal. Ct. App. 2005).

897 *Boothby v. Atlas Mechanical, Inc.*, 8 Cal. Rptr. 2d 600 (1992) (Unwritten Policy); *Iljas v. Ripley Entm't Inc.*, 402 F. Supp. 3d 793 (N.D. Cal. 2019) (Written Policy).

898 *Boothby v. Atlas Mech., Inc.*, 8 Cal. Rptr. 2d 600 (Cal. Ct. App. 1992).

899 CAL. LAB. CODE § 227.3.

900 *See also, e.g.*, *Steele v. Genuine DBT Licensed Clinical Soc. Worker Inc.*, 2019 Cal. Super. LEXIS 3640 (Butte County Apr. 5, 2019) (affirming award issued by California Division of Labor Standards Enforcement, which determined the amount due by calculating the employee's "average" hourly rate during the 30 days before employment ended because the employee received "various hourly rates depended on the type of work [] performed.").

901 *Molina v. Lexmark Int'l*, 2013 WL 5278451 (Sep. 19, 2013).

employee was not entitled to waiting time penalties for late wages under California Labor Code section 203.[902]

The time limit for which a previously terminated employee may claim vacation compensation is a point of controversy. There is no dispute that an employee must file a claim for vacation compensation within the applicable statute of limitations following termination of employment. A California Court of Appeal has held that a claim for unpaid vacation does not accrue until the employee's employment has ended without the employee using all of the their vested vacation time, and that the employee may recover any vacation pay lost throughout their entire period of employment.[903] By contrast, a different Court of Appeal had previously held that an employee's recovery for unpaid vacation pay is limited to the four years prior to termination.[904]

3.8(b) *Holidays & Days of Rest*

3.8(b)(i) *Federal Guidelines on Holidays & Days of Rest*

There is no federal law requiring that employees be provided a day of rest each week, or be compensated at a premium rate for work performed on the seventh consecutive day of work or on holidays.

3.8(b)(ii) *State Guidelines on Holidays & Days of Rest*

Day of Rest. Employers must provide employees with a day off each week for rest or worship.[905] Employees are entitled to one day of rest in seven, unless their total hours of employment do not exceed 30 hours in a week or six hours in any one day.[906] This requirement may be met by accumulating days of rest equivalent to one day in seven on a monthly basis when the nature of the employment reasonably requires that employees work seven or more consecutive days.[907]

However, the day of rest requirement does not apply:

- in emergency situations;
- when the work performed is protecting life or property from loss or destruction;
- to common carriers engaged in or connected with the movement of trains; or
- to any person employed in an agricultural occupation.[908]

Additionally, the Division of Labor Standards Enforcement may exempt an employer or employees from the day of rest requirement if hardship would otherwise result.[909]

Working on a Day of Religious Observance. The California Fair Employment and Housing Act (FEHA) requires an employer to reasonably accommodate an employee's observance of a Sabbath or other

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[902] *Mills v. Target Corp.*, 2023 WL 2363959 (9th Cir. Mar. 6, 2023).

[903] *Church v. Jamison*, 50 Cal. Rptr. 3d 166 (Cal. Ct. App. 2006).

[904] *Sequeira v. Rincon-Vitova Insectaries, Inc.*, 38 Cal. Rptr. 2d 264 (Cal. Ct. App. 1995).

[905] CAL. LAB. CODE § 552.

[906] CAL. LAB. CODE §§ 551,556.

[907] CAL. LAB. CODE § 554(a).

[908] CAL. LAB. CODE § 554(a).

[909] CAL. LAB. CODE § 554(b).

religious holy days, unless doing so would result in undue hardship to the conduct of the employer's business.[910]

Seven Consecutive Days of Work. An employer that requires employees to work seven consecutive days in a workweek must pay such employees at 1½ times their regular rate for the first eight hours of work on the seventh day, and double time for all hours worked in excess of eight.[911]

3.8(c) *Recognition of Domestic Partnerships & Civil Unions*

3.8(c)(i) *Federal Guidelines on Domestic Partnerships & Civil Unions*

Federal law does not regulate or define domestic partnerships and civil unions. States and municipalities are free to provide for domestic partnership and civil unions within their jurisdictions. Thus, whether a couple may register as domestic partners or enter into a civil union depends on their place of residence. States may also pass laws to regulate whether employee benefit plans must provide coverage for an employee's domestic partner or civil union partner.

Whether such state laws apply to an employer's benefit plans depends on whether the benefits are subject to ERISA. Most state and local laws that relate to an employer's provision of health benefit plans for employees are preempted by ERISA. Self-insured plans, for example, are preempted by ERISA. If the plan is preempted by ERISA, employers may not be required to comply with the states' directives on requiring coverage for domestic partners or parties to a civil union.[912] ERISA does not preempt state laws that regulate insurance, so employer health benefit plans that provide benefits pursuant to an insurance contract are subject to state laws requiring coverage for domestic partners or civil union partners.

The federal Comprehensive Omnibus Budget Reconciliation Act (COBRA) requires group health plans to provide continuation coverage under the plan for a specified period of time to each qualified beneficiary who would lose coverage under the plan as a result of a qualifying event (*e.g.*, the employee's death or termination from employment).[913] However, under COBRA, only an employee and the employee's spouse and dependent children are considered "qualified beneficiaries."[914] Here again, states may choose to extend continuation coverage requirements to domestic partners and civil union partners under state mini-COBRA statutes.

3.8(c)(ii) *State Guidelines on Domestic Partnerships & Civil Unions*

In California, registered domestic partners have the same rights as spouses.[915] For group health insurance purposes, a *dependent* includes the spouse, and thus, the domestic partner, of an eligible employee.[916] Moreover, health insurance coverage must be provided to domestic partners on the same terms as

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[910] CAL. GOV'T CODE § 12940.

[911] CAL. LAB. CODE § 510.

[912] 29 U.S.C. § 1144.

[913] 29 U.S.C. § 1161.

[914] 29 U.S.C. § 1167(3).

[915] CAL. FAM. CODE § 297.5; *see also* CAL. INS. CODE § 10112.5.

[916] CAL. INS. CODE § 10700.

spouses.[917] Domestic partners are also considered eligible dependents for purposes of coverage under California's mini-COBRA statute.[918]

3.9 Leaves of Absence

Leave law in California includes overlapping, but not quite duplicative, requirements under the federal FMLA, the California Family Rights Act (CFRA), and several other state and federal leave of absence statutes. Thus, California employers must identify and apply a web of federal and state leave regulations.

3.9(a) *Family & Medical Leave*

3.9(a)(i) *Federal Guidelines on Family & Medical Leave*

The federal Family and Medical Leave Act (FMLA) requires covered employers to provide eligible employees up to 12 weeks of unpaid leave in any 12-month period:

- for the birth or placement of a child for adoption or foster care;[919]
- to care for an immediate family member (spouse, child, or parent) with a serious health condition;[920]
- to take medical leave when the employee is unable to work because of a serious health condition;[921]
- for a qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is on covered active duty or called to covered active duty status as a member of the National Guard, armed forces, or armed forces reserves (see **3.9(l)(i)** for information on "qualifying exigency leave" under the FMLA); and
- to care for a next of kin service member with a serious injury or illness (see **3.9(l)(i)** for information on the 26 weeks available for "military caregiver leave" under the FMLA).

A *covered employer* is engaged in commerce or in any industry or activity affecting commerce and has at least 50 employees in 20 or more workweeks in the current or preceding calendar year.[922] A *covered employee* has completed at least 12 months of employment and has worked at least 1,250 hours in the last 12 months at a location where 50or more employees work within 75 miles of each other.[923] For information on the FMLA, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

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[917] CAL. INS. CODE § 10112.5.

[918] CAL. INS. CODE § 10128.51.

[919] 29 C.F.R. §§ 825.102, 825.112, 825.113, 825.120, and 826.121.

[920] 29 C.F.R. §§ 825.102, 825.112, and 825.113; *see also* U.S. Dep't of Labor, Wage & Hour Div., *Administrator's Interpretation No. 2010-3* (June 22, 2010), *available at* https://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.pdf (guidance on who may take time off to care for a sick, newly-born, or adopted child when the employee has no legal or biological attachment to the child).

[921] 29 C.F.R. §§ 825.112, 825.113.

[922] 29 U.S.C. § 2611(4); 29 C.F.R. §§ 825.104 to 825.109.

[923] 29 U.S.C. § 2611(2); 29 C.F.R. §§ 825.110 to 825.111.

3.9(a)(ii) *State Guidelines on Family & Medical Leave*

California employers covered by the California Family Rights Act (CFRA) must remain cognizant of the state requirements because employees may be protected under both the CFRA and the FMLA. The CFRA differs in some important respects from the FMLA; for example, the CFRA covers employers with five or more employees. This publication highlights some, but not all, of the differences. For the most part, however, the CFRA conforms to the FMLA. In addition, California has also adopted the FMLA regulations to the extent they are consistent with the CFRA.[924]

Coverage & Eligibility

Covered Employers. The CFRA covers employers with five or more employees.[925] The employees need not all work in California, and the employer may be a joint employer or a successor-in-interest.[926] Full-time and part-time employees, and those on paid or unpaid leave, including CFRA leave, leave of absence, disciplinary suspension, or other leave, are counted.[927]

Covered Employees. Eligible employees are those with 12 months of service who worked 1,250 hours during the 12-month period prior to the commencement of the leave.[928] For purposes of calculating the 12-month length of service requirement, employment periods prior to a break in service of seven years or more do not have to be counted when determining whether the employee has been employed by the employer for at least 12 months, except for a break in service caused by a military service obligation or written agreement to the contrary.[929] In addition, for an employee who takes CFRA for baby bonding following a pregnancy disability leave, the 1,250 hour eligibility is measured from the first day of pregnancy disability leave. An employee may become CFRA-eligible while out on a leave of absence.[930] If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave during which other benefits or compensation are provided by the employer, the week counts as a week of employment.[931]

Permissible Reasons for Leave. An employee may take CFRA leave for one or more of the following reasons:

- the birth or placement of a child for adoption or foster care;
- the employee's own serious health condition; or
- the serious health condition of the employee's child, parent, spouse, registered domestic partner,[932] registered domestic partner's child, grandparent, grandchild, and sibling.[933]

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924 CAL. CODE REGS. tit. 2, § 11096.

925 CAL. GOV'T CODE § 12945.2; CAL. CODE REGS. tit. 2, § 11087(d).

926 CAL. CODE REGS. tit. 2, § 11087(d).

927 CAL. CODE REGS. tit. 2, § 11087(d).

928 CAL. GOV'T CODE § 12945.2(a), (b); CAL. CODE REGS. tit. 2, § 11087(e).

929 CAL. CODE REGS. tit. 2, § 11087(e)(2).

930 CAL. CODE REGS. tit. 2, § 11087(e)(3).

931 CAL. CODE REGS. tit. 2, § 11087(e)(5).

932 By contrast, FMLA leave is not available to care for the serious health condition of an employee's registered domestic partner.

933 CAL. GOV'T CODE § 12945.2.

A *child* means a biological, adopted, or foster child, a stepchild, a legal ward, a child of a domestic partner, or a person to whom the employee stands *in loco parentis*.[934] An *adult dependent child* is an individual who is 18 years of age or older and who is incapable of self-care because of a mental or physical disability.[935] *Parent* means a biological, foster, or adoptive parent, a stepparent, a legal guardian, or other person who stood *in loco parentis* to the employee when the employee was a child, parent-in-law, and a designated person related by blood or whose association with the employee is like that of a family relationship.[936]

A *serious health condition* within the meaning of the CFRA means an illness, injury (including, but not limited to, on-the-job injuries), impairment, or physical or mental condition that involves either inpatient care or continuing treatment, including, but not limited to, treatment for substance abuse.[937] For additional clarification on what constitutes a serious health condition:

- *Inpatient care* means a stay in a hospital, hospice, or residential health care facility, any subsequent treatment in connection with such inpatient care, or any period of incapacity. A person is considered an inpatient when a heath care facility formally admits the individual to the facility with the expectation that the individual will remain at least overnight and occupy a bed, even if it later develops that such person can be discharged or transferred to another facility and does not actually remain overnight.[938]
- *Incapacity* means the inability to work, attend school, or perform other regular daily activities due to a serious health condition, its treatment, or the recovery that it requires.[939]
- *Continuing treatment* means ongoing medical treatment or supervision by a health care provider.[940]

In a major departure from the FMLA, the CFRA excludes pregnancy, childbirth, and related medical conditions from its definition of *serious health condition*.[941] Thus, pregnancy disability leave is not available under the CFRA, though it is available under the California Fair Employment and Housing Act (FEHA) and the FMLA.

CFRA leave may be taken for a qualifying exigency related to the covered active duty or call to covered active duty of an employee's spouse, domestic partner, child, or parent in the U.S. armed forces.[942] California's family military leave law is codified under a different statute.[943]

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[934] CAL. GOV'T CODE § 12945.2; CAL. CODE REGS. tit. 2, § 11087(c).

[935] CAL. GOV'T CODE § 12926(j).

[936] CAL. CODE REGS. tit. 2, § 11087(m); CAL. GOV'T CODE § 12945.2.

[937] CAL. CODE REGS. tit. 2, § 11087(q).

[938] CAL. CODE REGS. tit. 2, § 11087(q)(1).

[939] CAL. CODE REGS. tit. 2, § 11087(q)(2).

[940] CAL. CODE REGS. tit. 2, § 11087(q).

[941] CAL. CODE REGS. tit. 2, § 11093.

[942] CAL. GOV'T CODE § 12945.2(b)(4).

[943] CAL. MIL. & VET. CODE § 395.10.

Where an employee requesting leave is eligible for both FMLA and CFRA leave, the two leaves must be taken concurrently when both are available.[944]

Length of Leave. The CFRA entitles employees to a maximum of 12 workweeks of leave in a 12-month period.[945] California employers should select one of the following four methods for measuring the 12-month period in which 12 workweeks of leave may be taken:

- a calendar year;
- any fixed 12-month "leave year," such as a fiscal year, a year required by state law, or a year starting on an employee's "anniversary" date;
- the 12-month period measured forward from the date an employee's first FMLA leave begins (the forward method); or
- a rolling 12-month period measured backward from the date an employee first takes a family and medical leave (the rolling method).[946]

An employer may not limit two parents' entitlement to CFRA leave for any other qualifying purpose. For example, parents employed by the same employer each may take 12 weeks of CFRA leave if needed to care for a child with a serious health condition.[947]

Employers must be mindful of disability accommodation obligations when working with an employee to determine a date for returning to work. If an employee has a CFRA-qualifying serious health condition that also constitutes a disability under the FEHA, and cannot return to work at the conclusion of their CFRA leave, the employer has an obligation to initiate the interactive process with the employee to determine whether an extension of the leave period would constitute a reasonable accommodation under the FEHA.[948]

Intermittent Leave & Reduced Schedule. Like the FMLA, the CFRA permits an eligible employee to take leave intermittently or using a reduced work schedule. The rules for using intermittent or reduced schedule leave depend on the purpose for which an employee is taking leave.

Leave taken due to the employee's or a family member's serious health condition may be taken intermittently or on a reduced schedule basis only when medically necessary, as indicated by the individual's health care provider.[949] However, intermittent or reduced work schedule leave may also be taken for absences where the employee or family member is incapacitated or unable to perform the essential functions of the position because of a chronic serious health condition, even if the individual does not receive treatment by a health care provider during those occasions. When administering intermittent or reduced schedule leave, the employer should limit leave increments to the shortest period

[944] CAL. GOV'T CODE § 12945.2(s).

[945] CAL. GOV'T CODE § 12945.2(a); CAL. CODE REGS. tit. 2, § 11087(h).

[946] CAL. CODE REGS. tit. 2, § 11090(b).

[947] CAL. GOV'T CODE § 12945.2(q); CAL. CODE REGS. tit. 2, § 11088(c).

[948] CAL. CODE REGS. tit. 2, §§ 11089(b)(2), 11093.

[949] CAL. CODE REGS. tit. 2, § 11090(e).

of time that its payroll system uses to account for absences or use of leave, provided it is not greater than one hour.[950]

Another area where California and federal law diverge relates to the minimum duration of leave taken for the birth, adoption, or foster care placement of a child. The FMLA requires that such leave must be taken in one block of time, unless the employer agrees otherwise.[951] The CFRA, on the other hand, states that the basic minimum duration of such leave is two weeks; however, an employer is required to grant a request for such leave in increments of at least one day, but less than two weeks, on any two occasions. California employers should follow the CFRA as it is more generous in this regard. The FMLA and the CFRA do agree, however, that all such leave must be concluded within the 12-month period following the birth or placement of the child with the employee.[952]

When an employee requests intermittent or reduced schedule leave, an employer may require that the employee be transferred temporarily to an available alternative position with equivalent pay and benefits that better accommodate the recurring periods of leave. The alternative position need not be one of equivalent duties, but it must have the same benefits and rate of pay.[953]

Compensation & Additional Employer Obligations

Compensation During Leave. Like the FMLA, the CFRA does not require an employer to provide time off with pay during a period of family or medical leave.[954] Nonetheless, an employee taking CFRA leave may elect, or an employer may require, that the employee substitute any of the employee's accrued vacation leave or other accrued paid or unpaid time off during the leave period. If an employee takes a leave because of the employee's own serious health condition, the employee may also elect, or the employer require, that the employee substitute accrued sick leave during the period of the leave. Under the CFRA, however, an employee cannot use sick leave during a period of leave in connection with the birth, adoption, or foster care of a child, or to care for a child, parent, or spouse with a serious health condition, unless mutually so agreed by the employer and the employee.[955] (That being said, employees may be entitled to use accrued sick leave to care for family members under the state's paid sick leave law discussed in **3.9(b)(ii)**,[956] under California's kin care provision, discussed in **3.9(b)(iii)**,[957] or under local paid sick ordinances discussed in **3.9(b)(iv)**.)

State Wage Replacement Benefits. An employee taking CFRA and/or FMLA leave to bond with a new child or to care for a family member with a serious health condition may be eligible to receive state wage replacement benefits to supplement unpaid leave.[958] California's Family Temporary Disability Insurance (FTDI) program provides up to six weeks of paid family leave benefits (60% of an employee's usual wages and 70% of usual wages for employees with income under a certain level, up to a statutory maximum)

[950] CAL. CODE REGS. tit. 2, § 11090(e).

[951] 29 C.F.R. § 825.202(c).

[952] CAL. CODE REGS. tit. 2, § 11090(d).

[953] CAL. CODE REGS. tit. 2, § 11090(e).

[954] CAL. CODE REGS. tit. 2, 11092(b).

[955] CAL. GOV'T CODE § 12945.2(e).

[956] CAL. LAB. CODE § 245 *et seq*.

[957] CAL. LAB. CODE § 233(a).

[958] CAL. UNEMP. INS. CODE § 3300(d).

every 12 months.[959] Up to eight weeks of paid family leave benefits is available through the FTDI program.[960] Paid family leave benefits are administered through the Employment Development Department (EDD), and employees apply directly to the EDD for benefits.[961] Employees may qualify for paid family leave benefits regardless of their length of service with the employer or the number of hours the employee worked in the year preceding the first day of leave. An employee may use paid family leave benefits for the following purposes:

- to care for a seriously-ill parent, child, spouse, registered domestic partner, grandparent, grandchild, sibling, or parent-in-law (including the parent of a registered domestic partner);
- to bond with a minor child within the first year of the child's birth or placement for adoption or foster care; or
- for a qualifying exigency related to the covered active duty or call to covered active duty of an individual's spouse, domestic partner, child, or parent in the U.S. armed forces.[962]

Effective January 1, 2025, the following sentence is repealed: An employer may require an employee to use up to two weeks of accrued vacation leave or paid time off (PTO) prior to receiving paid family leave benefits.[963] Thereafter, an employee receiving paid family leave benefits is not considered to be on unpaid leave, and an employer may not require the employee to use PTO, sick leave, or accrued vacation during any time period in which the employee is also receiving FTDI benefits.[964]

Continuation of Benefits During Leave. The CFRA protects an employee's health insurance coverage during leave by requiring an employer to maintain coverage under any group health plan for up to12 workweeks per 12-month period. Employers must continue to pay health insurance premiums as though the employee had continued working, that is, at the level and under the conditions of coverage as if the employee had not taken leave. In the event the employee fails to return to work at the end of the leave for reasons other than the onset, continuation, or recurrence of a serious health condition, or because of "other circumstances beyond the control of the employee," the employer may recover the cost of the premiums paid during the leave from the employee.[965]

Special employer obligations come into play with respect to an employee who takes back-to-back pregnancy disability leave under the FEHA and baby bonding leave under the CFRA and/or FMLA. The CFRA regulations and the FEHA regulations together create an obligation to continue group health coverage for up to a maximum of seven months for an individual who takes both a pregnancy disability

[959] CAL. UNEMP. INS. CODE §§ 2655, 3301(b).

[960] CAL. UNEMP. INS. CODE § 3301.

[961] Relatedly, employees in San Francisco may be entitled to additional wage replacement benefits under that city's Paid Parental Leave ordinance. The ordinance provides supplemental compensation to employees receiving California state FTDI benefits for the purpose of leave to bond with a new child, such that the employee will receive full wage replacement during bonding leave. The employee must also be eligible for California state FTDI benefits in order to receive benefits under San Francisco's program. S.F., CAL., LAB. & EMP. CODE §§ 14.1 *et seq*.

[962] CAL. UNEMP. INS. CODE § 3301(a).

[963] CAL. UNEMP. INS. CODE § 3303.1 (as amended by A.B. 2123 (Cal. 2024).

[964] CAL. CODE REGS. tit. 2, 11092(b).

[965] CAL. GOV'T CODE § 12945.2(f); CAL. CODE REGS. tit. 2, § 11092(c)(5).

leave and a leave protected by the CFRA and/or FMLA. This computation results in a maximum of four months plus 12 weeks of benefits coverage, for a total of roughly 29.33 weeks of coverage.[966]

With respect to other types of employment benefits, the CFRA entitles an employee to continue life, disability, and/or accident insurance or other benefits during leave to the same extent and under the same conditions as apply to an unpaid leave taken for other reasons. If the employer has no policy regarding continuation of benefits, the employer may require an employee on CFRA leave to pay premiums as a condition of continued coverage. However, an employer is not required to make payments to pension or other retirement plans during a leave, or count the leave for purposes of time accrued under the plan.[967]

General Reinstatement Requirements. When a California employer grants an employee's request for CFRA leave, the employer must notify the employee that the CFRA guarantees that the employee be reinstated to the same or a comparable position upon returning from leave.[968] *Comparable* has the same meaning as *equivalent position* under the FMLA, and means the position must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority. The job must be performed at the same or geographically proximate worksite, and ordinarily means the same shift or same or equivalent work schedule. Note that nothing in the CFRA prohibits an employer from accommodating an employee's request to be restored to a different shift, schedule, position, or geographic location that better suits the employee's personal needs upon return from leave, or from offering a promotion to a better position.[969]

An employee must be reinstated with the same seniority as when the leave commenced for purposes of layoff, recall, promotion, job assignment, and other seniority-related benefits.[970] Equivalent benefits include benefits resumed in the same manner and at the same levels as provided when the leave began, subject, however, to any changes in benefit levels that may have taken place during the leave that affected the entire workforce, unless otherwise elected by the employee.[971]

The CFRA guarantees reinstatement even if the employee has been replaced during leave, or if the employee's position has been restructured to accommodate the employee's absence. Further, if an employee somehow became unqualified for their former position while on leave, the employee must be afforded an opportunity to requalify for the position. For example, if an employee's job duties require a license that lapsed as a result of having to take leave, the employee must be allowed the opportunity to renew the license.[972]

Reinstatement Rules for Key Employees. Prior to January 1, 2021, the CFRA contained a key employee exception for the reinstatement rules.

Notice & Posting. The CFRA requires covered employers to post a notice in a conspicuous location in the workplace describing the right to CFRA leave and providing information concerning the procedures for

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966 CAL. GOV'T CODE § 12945.2(f)(1); CAL. CODE REGS. tit. 2, §§ 11044(c)(1), 11092(c)(2), (4).

967 CAL. GOV'T CODE § 12945.2(f); CAL. CODE REGS. tit. 2, § 11092(d),(e).

968 CAL. GOV'T CODE § 12945.2(a); CAL. CODE REGS. tit. 2, § 11089(a)(1).

969 CAL. CODE REGS. tit. 2, § 11089(b).

970 CAL. GOV'T CODE § 12945.2(g).

971 CAL. CODE REGS. tit. 2, § 11089(b).

972 CAL. CODE REGS. tit. 2, § 11089(a).

filing complaints of violations with the Department of Fair Employment and Housing. The notice must be posted prominently where it can be readily seen by employees and applicants for employment, and the poster and text must be large enough to be easily read and contain fully legible text.[973] Electronic posting is sufficient to meet this requirement.[974]

In addition to posting the notice in the workplace, employers are also encouraged to give a copy of the notice to each current and new employee. If an employer maintains and distributes an employee handbook, the employer is required to include a description of an employee's CFRA rights and obligations in the handbook.[975]

An employer that adopts requirements governing how an employee should request leave must give its employees reasonable advance notice of any notice requirements that it adopts, for example, by incorporating the information into the workplace poster and/or the employee handbook. An employer that has not made its employees aware of its CFRA notice policy is precluded from taking any adverse action against the employee, including denying CFRA leave, for failing to furnish the employer with advance notice of a need to take CFRA leave.[976]

Antiretaliation Provisions. The CFRA prohibits an employer from discriminating and retaliating against an employee who takes a leave of absence or otherwise exercises their rights under the statute.[977] In addition, interference with the exercise of an employee's rights under the CFRA is unlawful. Examples of CFRA interference include:

- refusing to authorize CFRA leave and discouraging an employee from taking leave;
- transferring employees among worksites for the purpose of reducing worksites or to remain below the 50-employee threshold for employee eligibility;
- changing the essential functions of a job to preclude an employee from taking leave;
- reducing an employee's work schedule to avoid employee eligibility; and
- terminating an employee, if the employer suspects the employee will be requesting CFRA leave in the future.

Employee Rights & Obligations

Required Notice & Designation of CFRA Leave. An employee wishing to take leave under the CFRA must provide at least verbal notice sufficient to make the employer aware that the individual needs a CFRA-qualifying leave. California employers must carefully review employees' requests for time off. Failure to specifically reference the CFRA, or a mere mention of "vacation," other PTO, or resignation does not render an employee's notice insufficient, provided the underlying reason for the request is CFRA-qualifying, and the employee communicates that reason to the employer. The employer should make further inquiries to determine whether the employee is requesting leave for a CFRA-qualifying reason. The employee has an affirmative obligation to respond to an employer's questions designed to determine whether the reason for the employee's requested absence would be covered under the CFRA. An

[973] The CFRA regulations contain a model notice at CAL. CODE REGS. tit. 2, § 11095(d).

[974] CAL. CODE REGS. tit. 2, § 11095.

[975] CAL. CODE REGS. tit. 2, § 11095.

[976] CAL. CODE REGS. tit. 2, § 11091(a)(5).

[977] CAL. GOV'T CODE § 12945.2(l).

employee who fails to respond to permissible employer inquiries regarding the leave request risks denial of CFRA-protected leave if the employer is unable to determine whether the leave is CFRA-qualifying.[978]

If the employee's need for time off is foreseeable based on an expected birth or placement of a child for adoption or foster care, or for planned medical treatment, the CFRA requires the employee to provide at least 30 days' notice.[979] In the case of foreseeable leave due to planned medical treatment, the employee must make a reasonable effort to schedule the leave to avoid disruption to the employer's operations.[980]

If the employee's need for time off is not foreseeable, or there is a change in circumstances or a medical emergency, the employee must provide notice as soon as practicable.[981] An employer cannot deny CFRA leave that is unforeseeable or due to an emergency on the basis that the employee did not provide advance notice of the need for the leave, so long as the employee provided notice to the employer as soon as practicable.[982]

Once an employee has requested leave, the employer must respond to the request within five business days, measured from the time the employer has enough information to determine whether the leave is being requested for a qualifying reason.[983] It is the employer's responsibility to designate leave, whether paid or unpaid, as CFRA-qualifying, based on the information provided by the employee. Retroactive designation of leave as CFRA leave after the employee has returned to work is not permitted, except with appropriate notice to the employee and where the employer's failure to timely designate does not cause harm or injury to the employee.[984]

Medical Certification. When an employee's request for leave is due to the individual's own or a family member's serious health condition, an employer may require the employee to provide medical certification of the condition.[985] The CFRA provides guidelines for providing adequate certification. Certification for the employee's own serious health condition is sufficient if it includes:

- the date on which the employee's serious health condition began;
- the probable duration of the absence; and
- a statement that due to the serious health condition the employee is unable to perform the functions of the employee's position.[986]

An employer may not ask the employee for more specific medical information, such as the individual's symptoms or a diagnosis, and may not request information that identifies the nature of the serious health condition.

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978 CAL. CODE REGS. tit. 2, § 11091(a)(1).

979 CAL. GOV'T CODE § 12945.2(h); CAL. CODE REGS. tit. 2, § 11091(a)(2).

980 CAL. GOV'T CODE § 12945.2(i).

981 CAL. CODE REGS. tit. 2, § 11091(a)(3).

982 CAL. CODE REGS. tit. 2, § 11091(a)(4).

983 CAL. CODE REGS. tit. 2, § 11091(a)(6).

984 CAL. CODE REGS. tit. 2, § 11091(a)(1).

985 CAL. GOV'T CODE § 12945.2(j), (k).

986 CAL. GOV'T CODE § 12945.2(k); CAL. CODE REGS. tit. 2, § 11091(b)(2).

Certification for a family member's serious health condition is sufficient if it includes:

- the date on which the serious health condition commenced and its probable duration;
- an estimate of the amount of time the employee needs to care for the family member; and
- a statement that the serious health condition warrants the employee's participation to provide supervision or care during treatment.[987]

An employer may require that the employee submit the health care provider's certification within 15 calendar days, unless it is not practicable to do so. As a result, in some cases, the leave may begin prior to the date the employer receives the employee's certification. At the time the employer requests certification, the employer also must advise the employee of the anticipated consequences of the employee's failure to provide adequate certification. If the employee fails to timely return the certification, the employer may deny CFRA protections for the leave following the expiration of the 15-day time period until a sufficient certification is provided.[988]

The employer may not contact an employee's health care provider for any reason other than to authenticate a medical certification.[989] However, if an employer has a good faith, objective reason to doubt the validity of a medical certification, it may require a second and (in some instances) a third opinion at its own cost.[990] Note that an employer may not request a second or third opinion to verify the serious health condition of a family member.

An employer may require recertification of the serious health condition of the employee or family member, but only upon the expiration of the leave and only if additional leave is requested.[991]

Release & Fitness for Duty. An employer may require that the employee obtain a release to return to work from the employee's health care provider stating that the employee is able to resume work, but only if the employer has a uniformly-applied practice or policy of requiring such releases from other employees returning to work after illness, injury, or disability and if there is no collective bargaining agreement in place that states otherwise.[992] However, an employer is not entitled to a return-to-work release for each absence taken on an intermittent or reduced leave schedule unless reasonable safety concerns exist regarding the employee's ability to perform the assigned duties. In such a case, the employer may request a release once every 30 days.[993]

An employer may not require an employee to undergo a fitness-for-duty examination as a condition of an employee's return from CFRA leave. After an employee returns from leave, the employer may request fitness-for-duty examination, but the examination must be job-related and consistent with business necessity.[994]

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987 CAL. GOV'T CODE § 12945.2(j).

988 CAL. CODE REGS. tit. 2, § 11091(b)(3).

989 CAL. CODE REGS. tit. 2, § 11091(b)(1).

990 CAL. GOV'T CODE § 12945.2(k)(3).

991 CAL. GOV'T CODE § 12945.2(j), (k); CAL. CODE REGS. tit. 2, § 11091(b).

992 CAL. GOV'T CODE § 12945.2(k)(4).

993 CAL. CODE REGS. tit. 2, § 11091(b)(2)(E).

994 CAL. CODE REGS. tit. 2, § 11091(b)(2)(F).

Bereavement Leave. Employers with five or more employees are required to provide up to five days of bereavement leave to employees that have been employed by the employer for at least 30 days before the leave begins. Employers must grant employees up to five days of bereavement leave upon the death of a family member. Family member has the same definition as used in the CFRA. The leave days need not be consecutive. It must be completed within three months of the family member's death. Leave need not be paid unless the employer has a paid bereavement policy. Employees may use existing vacation, personal, sick, or other PTO available during that time. The employee must provide documentation of the family member's death within 30 days of the first day of leave, if requested. Employers must maintain the confidentiality of the employees that request leave. Employers may not interfere, discriminate, or retaliate against a person for their use of leave or for giving testimony about leave.[995]

Reproductive Loss Leave. California allows a leave of absence for reproductive-related losses, expanding on the bereavement leave available. Employers with five or more employees are required to provide up to a maximum of 20 days of leave within a 12-month period, regardless of the number of reproductive loss events that occur in that 12-month period. This leave is available to employees who have been employed by the employer for at least 30 days before the leave begins. A "reproductive loss event" means the day or, for a multiple-day event, the final day of a failed adoption, failed surrogacy, miscarriage, stillbirth, or an unsuccessful reproduction. Eligible employees are required to take this leave within three months of the reproductive loss event that triggers the leave, but the leave is not required to be taken on consecutive days. This leave is not required to be paid, unless the employer has an existing policy required paid leave under the circumstances. Further, eligible employees are entitled to use any accrued and available sick leave, or other paid time off, for reproductive loss leave. The law is silent regarding an employer's right to request documentation from an employee in connection with that employee's use of reproductive loss leave. It is unlawful for an employer to refuse to grant an eligible employee's request for up to five days of leave following a reproductive loss event, and prohibits employers from retaliating against an employee for requesting or taking this leave.[996]

3.9(b) *Paid Sick Leave*

3.9(b)(i) *Federal Guidelines on Paid Sick Leave*

Federal law does not require private employers (that are not government contractors) to provide employees paid sick leave. Executive Order No. 13706 requires certain federal contractors and subcontractors to provide employees with a minimum of 56 hours of paid sick leave annually, to be accrued at a rate of at least one hour of paid sick leave for every 30 hours worked.[997] The paid sick leave requirement applies to certain contracts solicited—or renewed, extended, or amended—on or after January 1, 2017, including all contracts and subcontracts of any tier thereunder. For more information on this topic, see LITTLER ON GOVERNMENT CONTRACTORS & EQUAL EMPLOYMENT OPPORTUNITY OBLIGATIONS.

3.9(b)(ii) *State Guidelines on Paid Sick Leave*

In 2014, California enacted the Healthy Workplaces, Healthy Families Act (HWHFA),[998] requiring private employers to provide paid sick and safe time to eligible employees.

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995 CAL. GOV'T CODE § 12945.7.

996 CAL. GOV'T CODE § 12945.6.

997 80 Fed. Reg. 54,697-54,700 (Sept. 10, 2015).

998 CAL. LAB. CODE §§ 245 *et seq*.

Coverage & Eligibility

Covered Employers. The HWHFA's broad definition of *employer* includes any person employing another under any appointment or contract of hire and includes the state, political subdivisions of the state, and municipalities.[999] The U.S. Court of Appeals for the Ninth Circuit, however, held the federal Railroad Unemployment Insurance Act (RUIA) preempts California law.[1000] Moreover, the law expressly excludes RUIA-covered employers.

Covered Employees. A *covered employee* is one who works in California for the same employer for 30or more days within a year from the start of employment, and includes part-time, per diem, and temporary employees.[1001] In-home supportive services workers are also eligible to accrue and use paid sick time,[1002] as well as individual providers of waiver personal care services.[1003] Individuals employed by an air carrier as flight deck or cabin crew members that are subject to the provisions of Title II of the federal Railway Labor Act[1004] are not covered if they are provided with compensated time off equal to or exceeding the amount of paid sick and safe time required to accrue under the HWHFA.[1005] Additionally, the U.S. Court of Appeals for the Ninth Circuit held the federal Railroad Unemployment Insurance Act (RUIA) preempts California law.[1006] Moreover, the law expressly excludes RUIA-covered employees.

For purposes of coverage under the HWHFA, the term *employee* does not include, subject to certain exceptions:

- an employee covered by a valid collective bargaining agreement (CBA), if the agreement expressly provides for the wages, hours of work, and working conditions of employees, and expressly provides for paid sick days or a paid leave or PTO policy that permits the use of sick days for those employees. The CBA must also call for final and binding arbitration of disputes concerning the application of its paid sick days provisions, for premium wage rates for all overtime hours worked, and for regular hourly rate(s) of pay of not less than 30% more than

[999] CAL. LAB. CODE § 245.5(b).

[1000] *Nat'l R.R. Passenger Corp. v. Su,* 41 F.4th 1147 (9th Cir. 2022). Although the district court held California's law impermissibly burdened interstate commerce so it violated the dormant Commerce Clause, because the Ninth Circuit held the RUIA preempted California law, it did not address the railroads arguments about the dormant Commerce Clause and ERISA preemption.

[1001] California Dep't of Industrial Relations, *California Paid Sick Leave: Frequently Asked Questions*, *available at:* http://www.dir.ca.gov/DLSE/Sick_Leave_Law_FAQs.pdf.

[1002] *See* CAL. LAB. CODE §§ 245.5, 246, 1182.12. Providers of in-home supportive services who work in California for 30 or more days within a year from the beginning of employment are entitled to paid sick and safe time. These workers will accrue paid sick days at a rate of not less than one hour for every 30 hours worked. The paid sick days will not carry over to the next year of employment, however, if the worker receives the full amount of leave at the beginning of each year of employment, calendar year or 12-month period. After the full implementation period for the law, when the state minimum wage has reached $15 per hour, such workers will be able to take up to 24 hours or three days in each year of employment, calendar year or 12-month period.

[1003] CAL. LAB. CODE § 246(a)(1)-(2).

[1004] 45 U.S.C. §§ 181 *et seq*.

[1005] CAL. LAB. CODE § 245.5(a)(4).

[1006] *Nat'l R.R. Passenger Corp. v. Su,* 41 F.4th 1147 (9th Cir. 2022). Although the district court held California's law impermissibly burdened interstate commerce so it violated the dormant Commerce Clause, because the Ninth Circuit held the RUIA preempted California law, it did not address the railroads arguments about the dormant Commerce Clause and ERISA preemption.

the state minimum wage rate. However, these otherwise not covered individuals are considered "employees" for purposes of covered uses of paid leave, the replacement worker prohibition, and the law's anti-retaliation protections;[1007] or

- an employee in the construction industry covered by a valid CBA, if the agreement expressly provides for the wages, hours of work, and working conditions of employees, for premium wage rates for all overtime hours worked, and for regular hourly pay of not less than 30% more than the state minimum wage rate, and the agreement either:
  - was entered into before January 1, 2015; or
  - expressly waives the requirements of the paid sick leave law in clear and unambiguous terms.[1008]

The HWHFA does not impact an employer's obligation to comply with a collective bargaining agreement providing more generous sick days to an employee than required under the HWHFA.[1009]

Existing Policies. A private employer is not required to provide additional paid sick days if the employer has a paid leave policy or PTO policy and certain conditions are met. The employer's policy must provide an amount of leave for employees that may be used for the same purposes and under the same conditions as specified in the paid sick leave law, and the policy must satisfy one of the following:

- the policy meets the accrual, carry over, and use requirements of the law; or
- the policy afforded paid sick leave or PTO to a class of employees before January 1, 2015, per a sick leave or PTO policy that used an accrual method different than providing one hour per 30 hours worked, if accrual is on a regular basis so that an employee, including an employee hired into that class after January 1, 2015, has no less than one day or eight hours of accrued sick leave/PTO within three months of employment of each calendar year or each 12-month period, and the employee was eligible to earn at least three 40 hours or five days of sick time/PTO within six months of employment. If an employer modifies the accrual method used in the policy it had in place before January 1, 2015, it must comply with the law's accrual method or front load the full amount of leave at the beginning of each year of employment, calendar year, or 12-month period. However, the law does not prohibit an employer increasing the accrual amount or rate for a class of employees covered by this provision; moreover, per the state labor department, a plan does not lose its grandfathered status by doing so.[1010]

Permitted Uses, Notice & Documentation

Permitted Uses For Leave. Upon an employee's oral or written request, an employer must permit the employee to use accrued paid sick and safe time for the following purposes:

[1007] Interpreting the new requirement, the state labor department has stated that a CBA-covered employee could file a complaint with the agency and seek remedies should, *e.g.*, they be denied leave because they could not find a replacement worker. California Labor Commissioner, California Paid Sick Leave: Frequently Asked Questions, *available at* https://www.dir.ca.gov/DLSE/Paid_Sick_Leave.htm.

[1008] CAL. LAB. CODE § 245.5(a).

[1009] CAL. LAB. CODE § 249.

[1010] CAL. LAB. CODE § 246(e); California Div. of Labor Standards Enforcement, *Enforcement Policies and Interpretations Manual*, § 30.4.

- diagnosis, care, or treatment of an existing health condition of, or preventive care for, an employee or an employee's family member; and
- for an employee who is a victim of domestic violence, sexual assault, or stalking:
  - to obtain or attempt to obtain any relief (*e.g.*, a temporary restraining order, restraining order, or other injunctive relief) to help ensure the health, safety, or welfare of the victim or their child;
  - to seek medical attention for injuries caused by domestic violence, sexual assault, or stalking;
  - to obtain services from a domestic violence shelter, program, or rape crisis center as a result of domestic violence, sexual assault, or stalking;
  - to obtain psychological counseling related to an experience of domestic violence, sexual assault, or stalking; or
  - to participate in safety planning and take other actions to increase safety from future domestic violence, sexual assault, or stalking, including temporary or permanent relocation.[1011]

Effective January 1, 2025, "safe" and "other" leave reasons change, so, upon an employee's oral or written request, an employer must permit the employee to use accrued paid sick and safe time for the following purposes:

- diagnosis, care, or treatment of an existing health condition of, or preventive care for, an employee or an employee's family member;
- for an employee or family member who is a victim of domestic violence, sexual assault, stalking, or an act, conduct, or pattern of conduct in which a third party causes bodily injury or death to another individual, exhibits, draws, brandishes, or uses a firearm, or other dangerous weapon, with respect to another individual, or uses, or makes a reasonably perceived or actual threat to use, force against another individual to cause physical injury or death:[1012]
  - obtain or attempt to obtain any relief (includes, but is not limited to, a temporary restraining order, restraining order, or other injunctive relief, to help ensure the health, safety, or welfare of the victim, their child, or a family member);
  - seek, obtain, or assist a family member to seek or obtain, medical attention for or to recover from injuries caused by a qualifying act of violence;
  - seek, obtain, or assist a family member to seek or obtain services from a domestic violence shelter, program, rape crisis center, or victim services organization or agency as a result of a qualifying act of violence;
  - seek, obtain, or assist a family member to seek or obtain psychological counseling or mental health services related to an experience of a qualifying act of violence;

[1011] CAL. LAB. CODE §§ 230(c), 230.1(a), and 246.5(a).

[1012] Victim is defined per CAL. GOV'T CODE § 12945.8(j), and the uses comes from CAL. GOV'T CODE § 12945.8(a)(3) and (b).

- participate in safety planning or take other actions to increase safety from future qualifying acts of violence;
- relocate or engage in the process of securing a new residence due to the qualifying act of violence, including, but not limited to, securing temporary or permanent housing or enrolling children in a new school or childcare;
- provide care to a family member who is recovering from injuries caused by a qualifying act of violence;
- seek, obtain, or assist a family member to seek or obtain civil or criminal legal services in relation to the qualifying act of violence;
- prepare for, participate in, or attend any civil, administrative, or criminal legal proceeding related to the qualifying act of violence; or
- seek, obtain, or provide childcare or care to a care-dependent adult if the childcare or care is necessary to ensure the safety of the child or dependent adult as a result of the qualifying act of violence.

- for an agricultural employee[1013] who works outside, to avoid smoke, heat, or flooding conditions created by a local or state emergency, including, but not limited to, when the employee's worksite is closed due to the smoke, heat, or flooding conditions.[1014]

The HWHFA defines a *family member* as: a biological, adopted, or foster child, stepchild, legal ward, or a child to whom the employee stands *in loco parentis*; a biological, adoptive, or foster parent, stepparent, or legal guardian of an employee or the employee's spouse or registered domestic partner, or a person who stood *in loco parentis* when the employee was a minor child; a spouse; a registered domestic partner; a grandparent; a grandchild; a sibling, and a designated person, *i.e.*, a person identified by an employee at the time the employee requests leave.[1015] The definition of a child is applicable regardless of age or dependency status. Thus, an employee may use earned sick time to care for an adult child. An employer may limit an employee to one designated person per 12-month period.

When Leave Can Be Used. An employee can use accrued paid sick and safe time beginning on the 90th day of employment, after which the employee may use paid sick and safe time as it accrues.[1016]

How Much Leave Can Be Used. An employer can limit an employee's use of paid sick days to 40 hours or five days in each year of employment, calendar year, or 12-month period.[1017] The state labor department interprets the hour/ day rule as follows. It contends an employee working an alternative work schedule of four ten-hour days who has 30 hours of accrued leave can use 30 sick leave hours under the pre-2024

[1013] An "agricultural employee" is generally defined per CAL. LAB. CODE § 9110 as a person employed in an agricultural occupation under Wage Order 14, an industry preparing agricultural products for the market, on the farm under Wage Order 13, or an industry handling products after harvest under Wage Order 8.

[1014] Section 2 of SB 1105 (2024), states that this covered use "does not constitute a change in, but is declaratory of, existing law to the extent that the sick days are necessary for preventive care."

[1015] CAL. LAB. CODE § 245.5(c).

[1016] CAL. LAB. CODE § 246(c).

[1017] CAL. LAB. CODE § 246(b).

standard. It also contends an employee working part-time, six hours per day, who has accrued 24 hours of leave can take four days of paid sick leave under the pre-2024 standard.[1018]

An employee determines how much earned sick and safe time the employee needs to use. However, an employer can set a reasonable minimum increment, not to exceed two hours, for the use of paid sick leave.[1019]

Shift Trading / Makeup Hours. The HWHFA prohibits an employer from requiring, as a condition of using earned sick and safe time, that an employee search for or find a replacement worker to cover the days during which the employee takes time off.[1020]

Required Notice. Upon an employee's oral or written request, an employer must permit the employee to use accrued paid sick and safe time for a qualifying purpose.[1021] If the need to take leave is foreseeable, the employee must provide reasonable advance notification. If the need for leave is unforeseeable, the employee must provide notice as soon as practicable.[1022]

Documentation. Unlike the CFRA and FMLA, the HWHFA does not require an employer to obtain certification from the employee verifying the need to use paid sick and safe time, nor is an employer obligated to record the purposes for which an employee uses paid time off.[1023] However, per the state labor department, employers cannot deny leave solely due to a lack of certification from a health care provider. But, it also says that, in certain circumstances, it may be reasonable to request documentation, *e.g.*, if an employer has information indicating an employee requested leave for an invalid purposes. Per the department, "[i]n any such instance, the reasonableness of the parties' actions will inform the outcome of the claim."[1024]

Accrual, Caps, Carry-Over & Cash Value

Accrual. Covered employees accrue sick and safe time at a rate of one hour of paid leave per every 30 hours worked. An employer may use a different accrual method so long as accrual occurs on a regular basis so that an employee has accumulated no less than 24 hours of accrued paid time off by the 120th calendar day of employment of each calendar year, or in each 12-month period.[1025] Additionally, an employee must accumulate no less than 40 hours of accrued paid time off by the 200th calendar day of employment of each calendar year, or in each 12-month period.

California employees who are exempt from overtime requirements as an administrative, executive, or professional employee under a Wage Order are deemed to work 40 hours per workweek, unless the

[1018] California Div. of Labor Standards Enforcement, Op. Ltr. 08.07.2015.

[1019] CAL. LAB. CODE § 246(j).

[1020] CAL. LAB. CODE § 246.5(b).

[1021] CAL. LAB. CODE § 246.5(a).

[1022] CAL. LAB. CODE § 246(l).

[1023] CAL. LAB. CODE § 247.5(b).

[1024] California Labor Commissioner, California Paid Sick Leave: Frequently Asked Questions, *available at* https://www.dir.ca.gov/DLSE/Paid_Sick_Leave.htm.

[1025] CAL. LAB. CODE § 246(b).

employee's normal workweek is less than 40 hours, in which case the employee accrues paid sick days based upon that normal workweek.[1026]

Employers may elect to frontload their employees' paid sick and safe time as an alternative to the accrual method set forth above. Under the frontloading method, an employee must receive the full amount of leave (three days or 24 hours) at the beginning of each year of employment, calendar year, or 12-month period. Moreover, an employer can satisfy the accrual requirements by providing not less than 24 hours or three days of paid sick leave that is available for employees to use by the time they complete their 120th calendar day of employment.[1027] Additionally, the employer must provide not less than 40 hours or 5 days of paid sick leave by the completion of the employee's 200th calendar day of employment.

Caps on Accrual & Carry-Over. An employer is not obligated to allow an employee's total accrual of paid sick and safe time to exceed 80 hours or 10 days' worth.[1028] Accrued, unused paid sick and safe time carries over to the following year of employment, subject to the foregoing accrual cap.[1029]

Cash Value. Paid sick and safe time is paid at the same wage an employee normally earns during regular work hours.[1030] For nonexempt employees, employers must calculate paid sick and safe time using either of the following calculations:

- Paid sick time is calculated in the same manner as the regular rate for the workweek when the employees use sick leave, regardless of whether overtime is worked.
- Paid sick time is calculated by dividing an employee's total wages—excluding overtime premium pay—from the employee's total hours worked in the full pay periods of the prior 90 days of employment.

Paid sick and safe time for exempt employees must be calculated in the same manner as the employer calculates wages for other forms of paid leave time.[1031] Exempt pay standards apply to exempt executive, administrative, or professional employees only. These exempt employees must be paid sick leave at an amount of pay equal to their regular salary, so nondiscretionary bonus would not be included in pay rate. An employee who does not fall into one of those exemptions is considered nonexempt for paid sick leave pay purposes.[1032]

An employer must pay an employee for sick leave used no later than the payday for the next regular payroll period after the sick leave was used.[1033]

Cash-Out. The HWHFA does not require an employer to provide compensation to an employee for accrued, unused paid sick days upon termination, resignation, retirement, or other separation from employment. However, an employee who separates from employment and is rehired by the same

[1026] CAL. LAB. CODE § 246(b)(2).

[1027] CAL. LAB. CODE § 246(b), (d).

[1028] CAL. LAB. CODE § 246(i).

[1029] CAL. LAB. CODE § 246(d).

[1030] CAL. LAB. CODE § 245.5(e).

[1031] CAL. LAB. CODE § 245.5(k).

[1032] California Div. of Labor Standards Enforcement, Op. Ltr. 2016.10.11.

[1033] CAL. LAB. CODE § 246(m).

employer within one year from the date of separation is entitled to have their previously accrued and unused paid sick time reinstated. The employee may then use previously accrued and unused paid sick time upon rehiring.[1034]

Posting & Record Keeping

In conjunction with the California Wage Theft Prevention Act, an employer must comply with stringent notification requirements that obligate an employer to provide notice concerning the HWHFA to employees at the time of hire and any time there is a change in information.

At the time of hiring, employers must provide each employee a written wage theft notice, in the language the employer normally uses to communicate employment-related information to the employee, containing various information, including that an employee:

- may accrue and use sick leave;
- has a right to request and use accrued paid sick leave;
- cannot be terminated or retaliated against for using or requesting the use of accrued paid sick leave; and
- has the right to file a complaint against an employer for violation of the HWHFA.

An employer must notify employees in writing of any changes to the information within seven calendar days after the time of the changes, unless all changes are reflected on a timely wage statement or notice of all changes is provided in another writing required by law within seven days of the changes.[1035]

Some employees are not required to receive the wage theft notice. For purposes of the wage theft notice, *employee* does not include an overtime-exempt employee or an employee who is covered by a valid collective bargaining agreement, if the agreement expressly provides for the wages, hours of work, and working conditions of the employee, and if the agreement provides premium wage rates for all overtime hours worked and for a regular hourly rate of pay for those employees of not less than 30% more than the state minimum wage.[1036]

On an employee's wage statement or in a separate document provided on the designated pay date with the employee's payment of wages, the employer must provide notice that sets forth the amount of paid sick leave available, or paid time off that an employer provides in lieu of sick leave. If an employer provides unlimited paid sick leave or time off, it satisfies this requirement by indicating "Unlimited" on a wage statement.[1037]

The HWHFA further requires an employer to conspicuously display a poster at its worksite(s) that contains the following information:

- an employee is entitled to accrue, request, and use paid sick days;
- the amount of sick days provided for by the paid sick leave law;

[1034] CAL. LAB. CODE § 246(f).

[1035] CAL. LAB. CODE §§ 226, 2810.5.

[1036] CAL. LAB. CODE § 2810.5.

[1037] CAL. LAB. CODE §§ 226, 246(i).

- the terms of use of paid sick days; and
- that retaliation or discrimination against an employee who requests paid sick days or uses paid sick days, or both, is prohibited and that an employee has the right to file a complaint with the state labor department against an employer that retaliates or discriminates against the employee.[1038]

The required poster is available via the California Labor Commissioner's website.[1039]

Employers also have record-keeping obligations under the HWHFA. An employer must keep, for at least three years, records documenting the hours worked and paid sick days accrued and used by each covered employee. If the employer does not maintain adequate records, it is presumed the employee is entitled to the maximum number of hours accruable under the paid sick leave law, unless the employer can show otherwise by clear and convincing evidence.[1040]

Additional Provisions

Antiretaliation Provisions. The HWHFA prohibits an employer from taking discriminatory actions against an employee in connection with the employee's rights under the law. Prohibited actions include:

- denying an employee the right to use accrued sick days; and
- discharging, threatening to discharge, demoting, suspending, or in any manner discriminating against an employee for:
  - using accrued sick days or attempting to exercise the right to use accrued sick days;
  - filing a complaint with the Division of Labor Standards Enforcement or alleging a HWHFA violation;
  - cooperating in an investigation or prosecution of an alleged HWHFA violation; or
  - opposing any policy, practice, or action that is prohibited under the HWHFA.[1041]

Moreover, the HWHFA establishes a rebuttable presumption of unlawful retaliation if an employer takes any of the above listed prohibited actions against an employee within 30 days of any of the following:

- the filing of a complaint by the employee with the Labor Commissioner or alleging a HWHFA violation;
- cooperation of an employee with an investigation or prosecution of an alleged HWHFA violation; or
- opposition by the employee to a policy, practice, or action prohibited under the HWHFA.[1042]

[1038] CAL. LAB. CODE § 247.

[1039] This poster is available at https://www.dir.ca.gov/dlse/publications/paid_sick_days_poster_template_(11_2014).pdf. It is also available in Spanish and Vietnamese.

[1040] CAL. LAB. CODE § 247.5.

[1041] CAL. LAB. CODE § 246.5(c)(1).

[1042] CAL. LAB. CODE § 246.5(c)(2).

Further, an employer's attendance policy cannot "give . . . 'an occurrence'" to an employee who has and uses accrued and available sick leave to cover an entire absence for a covered purpose. However, an attendance policy can "give . . . 'an occurrence'" to an employee who: (1) does not have any accrued and available sick leave to cover an absence for a covered purpose; (2) is absent for a noncovered purpose; or (3) uses accrued and available sick leave to cover part of an absence for a covered purpose (*e.g.*, if an employee takes an eight-hour absence and has sufficient accrued and available sick leave to cover the absence but only uses four sick leave hours, an employer can "give an 'occurrence' (or 1/2 of an 'occurrence') for the one-half day of unscheduled absence for which no paid sick leave was used.").[1043]

State Enforcement, Remedies & Penalties. The Division of Labor Standards Enforcement (DLSE), which is headed by the state Labor Commissioner, enforces the HWHFA. The Labor Commissioner is authorized to conduct investigations, hold hearings, and award remedies, including injunctive relief, reinstatement, back pay, payment of sick days unlawfully withheld, and administrative penalties.[1044] For paid sick days wrongfully withheld, the employer will face a penalty representing either three times the cash value of those days, or $250, whichever is greater but not to exceed a total penalty of $4,000. For other harms or violations (*i.e.*, discharge), the penalty will include $50 per day (or portion thereof) that the violation existed but may not exceed an aggregate total of $4,000.[1045]

The Labor Commissioner may take steps to ensure compliance, including filing a civil action, and may order the employer to pay to the state a sum of at least $50 per day (or portion thereof) that the violation occurred or continued, for each affected employee.[1046] If the Labor Commissioner or attorney general files suit and prevails, it is entitled to recover the relief and penalties mentioned above on behalf of aggrieved employees, as well as liquidated damages of $50 per day and reasonable attorneys' fees and costs.[1047] Interest will also be awarded.[1048]

Courts have held that there is no private right of action under the HWHFA. However, the California Supreme Court has granted a petition for review and will decide the following issue: "May a wage claimant prosecute a paid sick leave claim under section 248.5, subdivision (b) of the Healthy Workplaces, Healthy Families Act of 2014 (Lab. Code § 245et seq.) in a de novo wage claim trial conducted pursuant to Labor Code section 98.2?"[1049]

Individuals may sue on behalf of the public under state law, however. In that event, successful plaintiffs may recover only equitable, injunctive, or restitutionary relief, along with attorneys' fees and costs.[1050]

[1043] California Dept. of Industrial Relations, *California Paid Sick Leave: Frequently Asked Questions*, *available at*: https://www.dir.ca.gov/dlse/Sick_Leave_Law_FAQs.pdf.

[1044] CAL. LAB. CODE § 248.5(a), (b)(1).

[1045] CAL. LAB. CODE § 248.5(b)(2).

[1046] CAL. LAB. CODE § 248.5(c).

[1047] CAL. LAB. CODE § 248.5(e).

[1048] CAL. LAB. CODE § 248.5(f).

[1049] *Seviour-Iloff v. LaPaille*, 295 Cal. Rptr. 762 (Cal. Ct. App. 2022), *petition for review granted*, 518 P.3d 707 (Oct. 26, 2022). *See also, e.g.*, *Wood v. Kaiser Found. Hosps.*, 305 Cal. Rptr. 3d 112 (Cal. Ct. App. Feb. 24, 2023) (can pursue HWHFA claims via PAGA; "on behalf of the public as provided for under applicable state law" refers to Unfair Competition Law (UCL); no standalone private right of action under HWHFA).

[1050] CAL. LAB. CODE § 248.5(e).

In addition, the HWHFA provides that employers will not be assessed penalties or liquidated damages if a violation results from "an isolated and unintentional payroll error or written notice error that is a clerical or an inadvertent mistake regarding the accrual or available use of paid sick leave."[1051] In determining whether this exception applies, the finder of fact will consider whether the employer, prior to the alleged violation, adopted and followed policies and practices compliant with the HWHFA requirements.

Relationship to Other Laws. Because the definition of "family member" is broader under the HWHFA than under the CFRA and the federal FMLA, employers need to be careful in administering an employee's time off to care for a family member. For example, the FMLA and CFRA do not cover care for a grandchild. If an employee uses earned sick time to care for their grandchild, that leave cannot count against their FMLA and/or CFRA leave entitlement.

With respect to interaction with the CFRA and California's kin care law (see **3.9(b)(iii)**), the HWHFA expressly states it does not preempt, limit, or otherwise affect the applicability of any other law, regulation, requirement, policy, or standard that provides for greater accrual or use by employees of sick days, whether paid or unpaid, or that extends other protections to an employee.[1052] Thus, if an employee wishes to use accrued paid sick time for a purpose that is deemed qualifying under both the CFRA and the HWHFA, the employee could receive pay for a portion of a CFRA leave.

3.9(b)(iii) *State Guidelines on Kin Care Leave*

Under the California kin care law, which is distinct from the HWHFA, any covered employer that provides sick leave for employees via an internal policy must permit an employee to use a portion of that leave in any calendar year to care for a family member. The designation of sick leave taken for kin care reasons is made at the employee's sole discretion.[1053] As with the HWHFA, a *covered employer* is any person employing another under any appointment or contract of hire and includes the state, political subdivisions of the state, and municipalities.[1054]

The amount of sick leave that must be made available for caring for a family member is an amount not less than the sick leave that would be accrued during six months at the employee's then-current rate of entitlement per year. All conditions and restrictions on the use of sick leave by an employee also apply to the use of sick leave to care for a family member.[1055] The permissible uses of sick leave for purposes of the kin care statute match those set forth under the HWHFA.[1056]

If all paid sick leave benefits an employer provides to its employees follow the requirements of the HWHFA, those employees would likely not need to use kin care leave due to the analogous requirements of the paid sick leave law and the kin care statute. However, the kin care law does affect employers providing additional paid time off benefits that can be used for sick time *beyond* that required under the paid sick leave law. Such employers must comply with both the paid sick leave law and the kin care law. For example, if California employer offers employees 80 hours of paid time off per year, but designates

[1051] CAL. LAB. CODE § 248.5(h).

[1052] CAL. LAB. CODE § 249.

[1053] CAL. LAB. CODE § 233(a).

[1054] CAL. LAB. CODE § 233(b)(1).

[1055] CAL. LAB. CODE § 233(a).

[1056] CAL. LAB. CODE §§ 233(a), 246.5.

24 hours (or three days) as California paid sick leave, the employer must also allow an employee to use up to 40 hours of the paid time off allowance (1/2 of the annual accrual) for kin care.

The kin care law does not operate to extend the maximum period of leave to which an employee is entitled under the CFRA or the FMLA. Accordingly, if the employee's kin care leave qualifies for FMLA or CFRA protection, the kin care leave would run concurrently with the leave entitlements offered by the FMLA and CFRA.[1057]

An employer cannot take discriminatory action against an employee in connection with the use of kin care leave. An employer may not deny an employee the right to use sick leave or discharge, threaten to discharge, demote, suspend, or in any manner discriminate against an employee for using, or attempting to exercise the right to use, sick leave to attend to an illness or the preventive care of a family member, or for any other reason specified in the California paid sick leave law.[1058]

3.9(b)(iv) *Local Guidelines on Paid Sick Leave*

In addition to the statewide laws, several cities in California have enacted citywide paid sick leave ordinances. California employers with operations in Berkeley,[1059] Emeryville,[1060] Los Angeles,[1061] Oakland,[1062] San Diego,[1063] San Francisco,[1064] and Santa Monica[1065] must be attuned to their overlapping compliance obligations with both city and state paid sick leave requirements. More recently, West Hollywood[1066] enacted a generally-applicable law that is noticeably different from its predecessors, and San Francisco enacted a paid public health emergency leave (PHEL) ordinance.[1067] In addition, Los Angeles[1068] and Long Beach[1069] have ordinances applicable specifically to hotel employers that are not included in this publication. Directly below we highlight key provisions of the generally-applicable laws, and further below discuss West Hollywood and San Francisco's PHEL ordinances by themselves. The penalties for a violation of the paid leave requirements in localities vary and are not discussed here.

Due to amendments to state law made by California Senate Bill (SB) 616, **effective January 1, 2024**, California Labor Code section 246(r) provides that subdivisions (g), (h), (i), (l), (m), and (n) of section 246 preempt any local ordinance to the contrary. Additionally, section 4 of SB 616 provides as follows: "The Legislature finds and declares that establishing uniform statewide regulation of certain aspects of paid

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1057 CAL. LAB. CODE § 233(e).

1058 CAL. LAB. CODE § 233(c).

1059 BERKELEY, CAL., MUN. CODE §§ 13.100.030 *et seq.*

1060 EMERYVILLE, CAL., MUN. CODE §§ 5-37.01 *et seq.*

1061 L.A., CAL., MUN. CODE §§ 187.01 *et seq.* The Los Angeles Office of Wage Standards has issued regulations, posters, and other guidance, including frequently asked questions, concerning the paid sick leave ordinance. These materials are available at http://wagesla.lacity.org/.

1062 OAKLAND, CAL., MUN. CODE §§ 5.92.010 *et seq*.

1063 SAN DIEGO, CAL., MUN. CODE §§ 39.0101 *et seq*.

1064 S.F., CAL., LABOR & EMPLOYMENT CODE §§ 11.1 *et seq*.

1065 SANTA MONICA, CAL., MUN. CODE §§ 4.62.010.

1066 WEST HOLLYWOOD, CAL. MUN. CODE §§ 5.130.010 *et seq*.

1067 SAN FRANCISCO, CAL., LABOR & EMPLOYMENT CODE §§ 13.1 e*t seq.*

1068 LOS ANGELES MUNI. CODE §§ 186.00 *et seq*.

1069 LONG BEACH MUNI. CODE §§ 5.48.010 *et seq*.

sick leave is a matter of statewide concern and is not a municipal affair as that term is used in Section 5 of Article XI of the California Constitution. Therefore, Sections 1, 2, and 3 of this act amending Sections 245.5, 246, and 246.5 of the Labor Code apply to all cities, including charter cities." The subdivisions in section 246 cover end of employment and reinstatement, advancing leave, paystubs, rate of pay, employee notice to use leave, and when leave must be paid. Currently the extent of preemption in section 246, and SB 616 more generally, is unclear.

Covered Employers & Eligible Employees. All private employers are covered, though in Berkeley all private employers or persons with a city business license are covered. In most localities, different standards apply based on how many employees an employer has: Berkeley (25 or more, or fewer than 25, employees); Emeryville (56 or more, or 55or fewer, covered employees); Oakland and San Francisco (10 or more, or fewer than 10, employees); Santa Monica (26 or more, or 25or fewer, covered employees). However, in Los Angeles and Sand Diego all private employers are covered, regardless of size.

In most jurisdictions, to be covered an employee must work at least two hours in a week in the jurisdiction and be entitled to payment of the state minimum wage. However, in San Francisco, entitlement to payment of the state minimum wage is not required. Additionally, in Los Angeles, in addition to the two-hour requirement, an employee must work for the employer for 30 days or more in a 12-month period.

Though most laws provide that unionized workers are not covered if a collective bargaining agreement (CBA) waives any or all of a law's requirements in clear and unambiguous terms, a CBA exception does not exist in Los Angeles or San Diego.

Additionally, San Diego's law does not apply to individuals employed under a publicly subsidized summer or short-term youth employment program, or to student employees, camp counselors, or program counselors of an organized camp.

Covered Family Members. In Los Angeles and Santa Monica – and to a lesser extent, Emeryville – the state law definition of "family member" generally applies.

Berkeley, Oakland, and San Francisco essentially use the same traditional family member standard as state law, but the level of relation differs: child (biological, adopted, foster, step; ward; child of a person standing in loco parentis; child of a domestic partner); grandchild (biological, adopted, foster, step); grandparent (biological, adopted, foster, step); parent (biological, adopted, foster, step; legal guardian – in San Francisco, however, it is of an employee, spouse, or registered domestic part, and includes a person who stood in loco parentis when an employee was a minor child); sibling (biological, adopted, foster, step); spouse (including registered domestic partner).

In San Diego, the state law standard for grandchildren and grandparents is used, but the city uses similar, but different, wording to describe other traditional family members: child (biological, adopted, foster, step-child; legal ward; child of an employee standing in loco parentis; child of a domestic partner or spouse); parent (biological, adopted, foster, step; legal guardian; person who stood in loco parentis when employee was a minor child; spouse's parent); sibling (brother or sister, whether related through half blood, whole blood, or adoption; step-sibling); spouse (includes registered domestic partner).

In Berkeley, Emeryville, Oakland, and San Francisco, if employees do not have a spouse or registered domestic partner, they can designate a person for whom they can use leave. The first opportunity to designate must occur either by the date on which an employee has worked 30 hours after beginning to accrue leave (Berkeley, Oakland, and San Francisco) or by 30 calendar days after an employee began

accruing leave (Emeryville). Under the laws of Berkeley, Oakland, and San Francisco, an employee has 10 business days to make a designation, whereas Emeryville law requires 14 calendar days. The opportunity to designate must reoccur annually. Emeryville requires that the annual opportunity to designate or change a designation must be extended by January 31, whereas the laws of Berkeley, Oakland, and San Francisco do not specify when this must occur.

As of January 1, 2023, there is uncertainty in Los Angeles and Santa Monica concerning whether these jurisdictions incorporate into their local ordinance the state law "designated person" standard. Although the Los Angeles ordinance defines "family member" per state law, that provision in the local law does not use "as amended" as the Los Angeles ordinance does in other instances when it cross-references another law. Although the Santa Monica ordinance provides that employees "may use paid sick leave consistent with State sick leave laws," that provision in the local law does not use "as amended" as the Santa Monica ordinance does in other instances when it cross-references another law.

Finally, a family member in Emeryville includes a guide, signal, or service dog of an employee or family member, and in Los Angeles includes an individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship.

Accrual Start Date, Rate & Caps. Under the law, accrual generally begins when the law takes effect or when employment begins, whichever is later.[1070] Like state law, employees accrue one sick leave hour for every 30 hours worked. Moreover, in all localities except Berkeley and Oakland the laws specify that accrual is based on hours worked in the jurisdiction.

Accrual caps will differ – everywhere but Los Angeles – depending on how many employees an employer has, *i.e.*, whether the business is a "large" or "small" employer under the applicable law. Generally, the current "large" employer cap is 72 hours. The current "small" employer cap is 48 hours in Berkeley, Santa Monica, and Emeryville, and 40 hours in Oakland, San Francisco, and Santa Monica. In Los Angeles and San Diego have one cap for all employers, which is 72 hours and 80 hours, respectively. It is important to note that, if employers comply with the laws via an accrual-based system, like state law a "maximum bank" – not a hard cap – is used. A maximum bank means that employees accrue leave up to the cap, temporarily stop accruing, but resume accruing leave once they use leave.

The laws of Berkeley, Emeryville, Oakland, San Francisco, and Santa Monica expressly provide that accrued leave carries over from year to year but carry-over is limited to the applicable accrual cap. Los Angeles and San Diego laws contain language akin to state law – *i.e.*, accrued leave must carry over to the following year – but, practically speaking, carry-over operates the same way as in the other jurisdictions if a valid cap is used because employees could only carry-over to the following year the maximum amount their leave bank contains.

Like state law, employers can avoid accrual and carry-over requirements by front loading a specific amount of leave at the beginning of each year in Berkeley ("small" employers), Emeryville, San Diego, Santa Monica – and, to a lesser extent, in Los Angeles. In Berkeley and Los Angeles, employers must front load 48 hours. In Emeryville and Santa Monica, "large" employers must currently front load 72 hours, whereas "small" employers must currently front load 48 hours in Emeryville or 40 hours in Santa Monica. Note, however, that in Los Angeles, the unused portion of the 48 front-loaded hours must carry-over to

[1070] In San Francisco, when accrual begins differs depending on whether an employee was hired on or before January 1, 2017, after February 5, 2007 but before January 1, 2017, or before February 5, 2007.

the following year, and another 48-hour front-load must occur, though employers can cap overall leave at 72 hours, *e.g.*, if 48 hours were carried over and another 48 hours were front loaded – resulting in 96 hours – an employer could automatically reduce the leave bank to 72 hours.

Use Start Date, Reasons & Caps. Like state law, the laws of Emeryville, Los Angeles, and San Francisco provide that employees can begin using leave on the 90th day of employment, so an 89-day waiting period can be imposed. However, a 90-day waiting period can be imposed in Berkeley, Oakland, San Diego, and Santa Monica. Note, however, that if both a state and local law apply, the most generous standard for employees must be applied, which in this case is the state law's 89-day waiting period.

Concerning "sick" time reasons for which leave can be used, Los Angeles and Santa Monica reasons are the same provided under state law. In Emeryville, Oakland, San Diego, and San Francisco, the listed purposes are similar to state law, but worded differently, *i.e.*, physical or mental illness, injury, or medical condition; professional diagnosis or treatment for a medical condition; other medical reasons, such as pregnancy or obtaining a physical examination. Berkeley also uses similar, but different, wording: illness, injury, or medical condition; medical care, treatment, or diagnosis; other medical reason.

Concerning "safe" time, San Francisco and Santa Monica follow state law and allow leave to be used if an employee is a victim of domestic violence, sexual assault, or stalking. In Emeryville, the rules say employees that are victims can use leave for "safe" time purposes, though this is not expressly provided for in the ordinance. In Los Angeles and San Diego, leave can also be used if a family member is a victim. However, in Berkeley and Oakland, leave cannot be used for "safe" time purposes.

In Los Angeles, San Francisco, and Santa Monica the reasons for which leave can be used for "safe" time purposes are the same as state law. Other cities allow leave to be used for similar purposes, though they phrase leave uses slightly different. For example, in Emeryville, leave can be used to seek legal assistance, receive medical or psychological counseling, obtain social services, otherwise take action to protect against future domestic violence, or relocate. In San Diego, leave can be used for legal services (including preparing for or participating in any civil or criminal legal proceeding), medical attention needed to recover from physical or psychological injury or disability, services from a victim services organization, psychological or other counseling, and relocation.

Leave may be used for additional purposes in Emeryville, San Diego, and San Francisco. In Emeryville, it can be used to aid or care for a guide, signal, or service dog of an employee or family member. In San Diego, leave can be used if an employee's place of business, or a child's school or childcare provider, is closed by order of a public official due to a public health emergency. In San Francisco, leave can be used to donate bone marrow or an organ, or to care for or assist a family member that donated.

Like state law, annual use caps can be instituted in Berkeley ("small" employers), Los Angeles and San Diego; 48 hours, 48 hours, and 40 hours, respectively. However, in Berkeley ("large" employers), Emeryville, Oakland, San Francisco, and Santa Monica, if an accrual-based system is used, the only cap on use is what is available in an employee's leave bank.

West Hollywood. The West Hollywood ordinance requires all employers to provide leave benefits.

Generally, the law defines an employee as any person who, in a particular week, performs at least two hours of work in West Hollywood and is entitled to payment of the state minimum wage. What this should mean is all components of the ordinance will not apply to employees not entitled to the state minimum wage, *e.g.*, exempt executive, administrative, professional, and outside sales employees. For businesses

with unionized workforces, any provision, or the law entirely, can be waived in a bona fide collective bargaining agreement if the waiver is explicitly set forth in such agreement in clear and unambiguous terms, though unilateral implementation of terms and conditions of employment by either party to a collective bargaining relationship does not constitute a valid waiver of the ordinance's requirements.

The ordinance requires employers to provide "compensated time off" for sick leave, vacation, or personal necessity, and "uncompensated time off" that employees can use when they or their immediate family member[1071] – a child, grandchild, grandparent, parent, sibling, spouse, or domestic partner – is ill. The default standard is complying via a single bank of compensated time off that employees can use for sick, vacation, and personal necessity purposes, though corresponding rules allow for the possibility of complying via one bank of paid sick leave and another bank of vacation and personal necessity leave. Using a multi-bank approach can be a challenge, however, particularly if both state and local law applies. In the following paragraphs, we describe requirements that exist when an employer complies via a single bank of paid leave.

Leave begins to accrue when employment begins or when the law becomes operative, whichever is later. Under the ordinance, a full-time employee must accrue at least 96/52 hours of paid leave each week – with accrual based on weekly hours worked up to, but not exceeding, 40– with other employees accruing a proportionate amount. 96 hours of paid leave is the most an employee could accrue in a year. Unused paid leave carries over each year. With paid leave, employees continue to accrue until their paid leave bank contains 192 hours; or, if an employer sets a higher amount, the greater amount.

Additionally, the law requires a full-time employee to accrue at least 80/52 hours of unpaid leave each week, applying the same accrual principles as paid leave. 80 hours of unpaid leave is the most an employee could accrue in a year and overall. Unused paid and unpaid leave carries over each year.

Employees must be eligible to use accrued paid and unpaid leave after their first six months of employment or the date set per company policy if earlier. For paid leave, the law appears to set a 96-hour annual use cap for full-time employees. Although the ordinance does not address the rate of pay employees must receive when they use compensated time off, rules provide that leave is paid at the employee's current hourly base wage rate, which cannot be less than the minimum wage. For unpaid leave, after an employee exhausts all paid leave for that year, employers must allow full-time employees to take an additional 80 hours of unpaid leave. Employers must make leave available upon an employee's request and cannot unreasonably deny a request.

Although, state law purports to preempt localities from regulating certain aspects of paid sick and safe leave – including paystub requirements – West Hollywood rules, revised *after* the preemption provisions took effect, require that employers must provide employees with written notice of their compensate and

[1071] Possibly the definition of immediate family member also includes a designated person. When the ordinance was first enacted, and rules initially adopted, the latter referenced the definition of family member in the California Family Rights Act (CFRA). At that time the CFRA's definition of family member included only these "traditional" family member. Later, however, the CFRA was amended to expand family members to include a designated person. The West Hollywood rules, though revised after the CFRA amendment took effect, do not address whether the local definition of immediate family member includes the CFRA's definition, as amended. For some perspective, the West Hollywood rules do not expressly identify the "traditional" family members. Instead, they simply state "a member of their immediate family, as defined by the California Family Rights Act (CFRA)." WEST HOLLYWOOD, CAL., Minimum Wage Ordinance Administrative Regulations, Guidance for Compensated and Uncompensated Leave & Use of Compensated and Uncompensated Leave.

uncompensated time off balances, accrued leave for that pay period, and accrued leave that is available for immediate use, which employers can provide either on an employee's paystub or in a separate written document.

San Francisco Public Health Emergency Leave. San Francisco's *permanent* public health emergency leave (PHEL) ordinance (PHELO) provides PHEL leave that is *in addition to* paid leave employers offer or provide employees (*e.g.*, San Francisco paid sick leave) at the beginning of a "public health emergency," *i.e.*, a local or statewide health emergency related to any contagious, infectious, or communicable disease declared by San Francisco or California health officials (*e.g.*, COVID-19), or an air quality emergency when the Bay Area Air Quality Management District issues a Spare the Air Alert. Eventually, San Francisco's Office of Labor Standards Enforcement (SF OLSE) will develop guidelines or regulations to implement the ordinance. Until then, below we summarize what the ordinance requires.

Covered Employers, Employees & Family Members. The ordinance applies to employers with 100 or more employees *worldwide* except certain nonprofits, and to employees, but not independent contractors, who work in San Francisco. For employers with unionized workforces, the ordinance does *not* apply to employees covered by a bona fide collective bargaining agreement that expressly waives the ordinance's requirements in clear and unambiguous terms.

Under the ordinance, employees can use leave for themselves or, under certain circumstances, to care for or assist a "family member," which has the same meaning as under San Francisco's Paid Sick Leave Ordinance (PSLO), *i.e.*, child, grandchild, grandparent, parent, sibling, spouse or domestic partner, or a designated person if the employee has no spouse or domestic partner. Moreover, per corresponding frequently asked questions, an employee's designated person under the PSLO automatically is the individual's designated person under the PHELO.[1072]

Covered Uses. Employees can use PHEL when they are unable to work due to the following reasons:

1. recommendations or requirements of an individual or general federal, state, or local health order – including an order issued by the local jurisdiction where an employee or family member *resides* – related to the public health emergency, or the employee is caring for a family member subject to such an order;
2. a healthcare provider advises an employee to isolate or quarantine, or the employee is caring for a family member who has been so advised;
3. the employee is experiencing symptoms of and seeking a medical diagnosis, or has received a positive medical diagnosis, for a possible infectious, contagious, or communicable disease associated with the public health emergency, or the employee is caring for a family member who is experiencing symptoms;
4. the employee is caring for a family member whose school or place of care has been closed, or whose care provider is unavailable, due to the public health emergency; and
5. an air quality emergency, if the employee primarily works outdoors and is a member of a vulnerable population, *i.e.*, diagnosed with heart or lung disease; has respiratory problems

[1072] San Francisco Office of Labor Standards Enforcement, San Francisco Public Health Emergency Leave Ordinance Frequently Asked Questions, *available at* https://sf.gov/information/understanding-public-health-emergency-leave-ordinance.

including but not limited to asthma, emphysema, and chronic obstructive pulmonary disease; is pregnant; or is age 60or older.

Employers of *certain* healthcare provider or emergency responder employees, however, can elect to limit PHEL for *those* employees to the following scenarios:

1. a healthcare provider advises an employee to isolate or quarantine;
2. the employee is experiencing symptoms of, and is seeking a medical diagnosis or has received a positive medical diagnosis for, a possible infectious, contagious, or communicable disease associated with the public health emergency and does not meet federal, state, or local guidance to return to work; and
3. an air quality emergency, if the employee is a member of a vulnerable population, primarily works outdoors, and a healthcare provider advises the employee not to work during an air quality emergency.

Whether falling under the general ordinance's "covered uses" or the "covered uses" related to healthcare employees, employees *cannot* use PHEL for a *personal* absence related to a health order, quarantine/isolation advice, and/or air quality emergency if they can telework without increasing their exposure to disease or unhealthy air quality.

Amount of Leave. On October 1, 2022, and on January 1 of each following year – or for employees not employed on October 1 or January 1, when a public health emergency starts – employers must allocate PHEL for that year as follows, with the amount of PHEL not exceeding 80 hours:

- *Employee Works Full Time, Regular, or Fixed Schedule*: An amount equal to the number of hours the employee regularly works or takes paid leave over a two-week period.
- *Employee Whose Weekly Hours Vary*: An amount equal to: (a) the average number of hours the employee worked or took paid leave over a two-week period during the previous calendar year (or during the previous six months if not employed on October 1 or January 1); or (b) since the employee's start date if after the beginning of the previous calendar year (or since the employee's start date if employed for fewer than six months if not employed on October 1 or January 1).

Employers need not carry over unused PHEL from year to year.

Offset: If federal, state, or San Francisco law requires employers to provide paid leave or paid time off to address a public health threat, and employees may use this type of leave for covered reasons under the ordinance, employers may reduce the amount of PHEL they must provide.

Using Leave. Once PHEL is granted to an employee, employees can use PHEL immediately, regardless of how long they have been employed. They may use PHEL before using other accrued paid leave, though they may voluntarily choose to use other accrued paid leave before PHEL. Employers, however, cannot require, induce, or encourage them to do so.

For *foreseeable* absences, employers can require employees to follow reasonable notice procedures. Under the ordinance, "[a]n Employer may require a doctor's note or other documentation to confirm an Employee's status as a member of a Vulnerable Population, if that Employee uses Public Health Emergency Leave for a use inapplicable to an Employee who is not a member of a Vulnerable Population." Per corresponding frequently asked questions, if employee uses leave for an air quality emergency, an

employer may require the employee to verify they are a member of a vulnerable population, but cannot otherwise require disclosure of health information for leave use.[1073]

Finally, employers cannot otherwise require employees to disclose health information to use PHEL.

Rate of Pay. The ordinance uses the same rate of pay calculations as San Francisco's Paid Sick Leave Ordinance. For overtime-exempt employees, employers pay PHEL in the same manner they pay other forms of paid leave. For non-exempt employees, employers pay PHEL using *either* the regular rate for the workweek in which the employee uses PHEL – regardless of whether the employee works overtime that workweek – *or* by dividing total wages – excluding overtime premiums – by total hours worked in the full pay periods of the 90 days of employment before PHEL use. In both instances, the PHEL rate of pay cannot be less than the San Francisco minimum wage. Employers must pay PHEL no later than the payday for the next regular payroll period after the employee uses PHEL.

Prohibitions. As a condition of taking PHEL, employers cannot require that employees search for or find a replacement worker to cover their hours. Employers may also not require employees to use PHEL in increments of more than one hour.

Employers and other persons cannot interfere with, restrain, or deny the actual or attempted exercise of rights under the ordinance. They also cannot discharge, threaten to discharge, demote, suspend, reduce other employee benefits, or in any manner discriminate or take adverse action against any person in retaliation for exercising such rights, which include but are not limited to using PHEL, filing a complaint or informing any person about any employer's alleged violation, cooperating with SF OLSE in an investigation of alleged violations, and informing any person of their potential rights under the ordinance. A rebuttable presumption of retaliation exists if adverse action is taken within 90 days of an employee engaging in various protected activities. Protections apply to any person who mistakenly but in good faith alleges a violation.

An employer's absence control policy cannot count PHEL use as an absence that, alone or in combination with other absences, may lead to or result in discipline, discharge, demotion, suspension, or any other adverse action.

Notice, Posting & Recordkeeping. Employers must conspicuously post the city-created notice in all languages San Francisco OLSE makes it available – which will be English, Spanish, Chinese, Filipino, and any other language spoken by more than 5% of the San Francisco workforce – and, where feasible, provide it to employees via electronic communication, which may include email, text, and/or conspicuous posting on an employer's web-based or app-based platform.

If employers must provide similar notice under California's paid sick leave law, the Healthy Workplaces, Healthy Families Act of 2014, they must display the amount of PHEL available on paystubs or other mandatory written notices employees receive on payday; if employers provide unlimited paid leave or paid time off, they can indicate "unlimited."

For four years, employers must keep records documenting hours worked and PHEL taken. If an employer does not maintain or retain accurate and adequate records, there is a presumption the employer violated the ordinance, absent clear and convincing evidence otherwise.

[1073] *Available at* https://sfgov.org/olse/public-health-emergency-leave-ordinance.

3.9(c) *Pregnancy Leave*

3.9(c)(i) *Federal Guidelines on Pregnancy Leave*

Three federal statutes are generally implicated when handling leave related to pregnancy: the Pregnancy Discrimination Act, which amended Title VII of the Civil Rights Act of 1964 ("Title VII") in 1978; the Family and Medical Leave Act; and the Americans with Disabilities Act. For additional information, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

Pregnancy Discrimination Act (PDA). Under the PDA, which as part of Title VII applies to employers with 15 or more employees, disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions must be treated the same as disabilities caused or contributed to by other medical conditions under an employer's health or disability insurance or sick leave plan.[1074] Policies and practices involving such matters as the commencement and duration of leave, the availability of extensions, reinstatement, and payment under any health or disability insurance or sick leave plan must be applied to disability due to pregnancy, childbirth, or related medical conditions on the same terms as they are applied to other disabilities.

An employer must allow employees with physical limitations resulting from pregnancy to take leave on the same terms and conditions as others who are similar in their ability or inability to work. However, an employer may not compel an employee to take leave because the individual is pregnant, as long as the employee is able to perform their job. Moreover, an employer may not prohibit employees from returning to work for a set length of time after childbirth. Thus, employers must hold open a job for a pregnancy-related absence for the same length of time as jobs are held open for employees on sick or disability leave.

Family and Medical Leave Act (FMLA). A pregnant employee may take FMLA leave intermittently for prenatal examinations or for the employee's own serious health condition, such as severe morning sickness.[1075] FMLA leave may also be used for the birth or placement of a child; however, the use of intermittent leave (as opposed to leave taken on an intermittent or reduced schedule) is subject to the employer's approval.

Americans with Disabilities Act (ADA). Pregnancy-related impairments may constitute disabilities for purposes of the ADA. The federal Equal Employment Opportunity Commission (EEOC) takes the position that leave is a reasonable accommodation for pregnancy-related impairments, and may be granted in addition to what an employer would normally provide under a sick leave policy for reasons related to the impairment.[1076] An employee may also be allowed to take leave beyond the maximum FMLA leave if the additional leave would be considered a reasonable accommodation.

Several states provide greater protections for employees with respect to pregnancy. For example, states may have specific laws prohibiting discrimination based on pregnancy or providing separate protections for pregnant individuals, including the requirement that employers provide reasonable accommodations to pregnant employees to enable them to continue working during their pregnancies, provided that no undue hardship on the employer's business operations would result. These protections are discussed in

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[1074] 42 U.S.C. § 2000e(k); *see also* 29 C.F.R. § 1604.10.

[1075] 29 C.F.R. § 825.202.

[1076] EEOC, Notice 915.003, *EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues* (June 25, 2015), *available at* https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm; *see also* EEOC, *Facts About Pregnancy Discrimination* (Sept. 8, 2008), *available at* https://www.eeoc.gov//facts/fs-preg.html.

3.11(c). To the extent that a state law focuses primarily on providing job-protected leave for employees with disabling pregnancy-related health conditions, that state law is discussed below.

3.9(c)(ii) *State Guidelines on Pregnancy Leave*

The California Fair Employment and Housing Act (FEHA) prohibits discrimination in employment based upon pregnancy, childbirth, or related medical conditions.[1077] However, unlike the federal Title VII, which requires that pregnancy be treated as any other disability, California law requires employers (including employers subject to Title VII) to grant pregnant employees pregnancy disability leave during the time that they are disabled due to pregnancy, childbirth, or related medical conditions. Furthermore, employers must allow such leaves without regard to any leave policy applicable to other disabilities.

Coverage / Eligibility, Permitted Reasons & Length of Leave. The FEHA requires employers of five or more employees to grant eligible female employees who are disabled by pregnancy, childbirth, or related medical conditions a leave of absence for a reasonable period not to exceed four months.[1078] Four months is equivalent to 17.33 weeks and is per pregnancy, not per year. For employees who work more or less than 40 hours per week, or who work on variable work schedules, the number of working days that constitutes four months is calculated on a pro rata or proportional basis. If an employee's schedule varies from month to month, the employer should use the monthly average hours worked for the four months prior to the employee's leave to determine the total number of hours available.[1079] In keeping with California state law protections against discrimination for transgender workers in employment, the term "eligible female employee" includes transgender employees disabled by pregnancy.[1080]

If an employer has a more generous leave policy for similarly-situated employees with other temporary disabilities than is required for pregnancy purposes under the pregnancy regulations, the employer must provide the more generous leave to employees temporarily disabled by pregnancy. If the employer's more generous leave policy exceeds four months, the employer's policy concerning return from leave will govern.[1081]

As discussed in **3.9(a)(ii)**, pregnancy disability leave is in addition to leave under the CFRA, so the two cannot run concurrently.[1082]

Required Notice. An employee must provide timely oral or written notice sufficient to make the employer aware that the employee needs reasonable accommodation, transfer, or pregnancy disability leave, and, where practicable, the anticipated timing and duration of the reasonable accommodation, transfer, or pregnancy disability leave.[1083]

If the need for the leave is foreseeable, an employee must provide 30 days' notice of the date the leave will begin and the estimated duration. The employee must consult with the employer and make a reasonable effort to schedule any planned appointment or medical treatment to minimize disruption to

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[1077] CAL. GOV'T CODE § 12945.

[1078] CAL. GOV'T CODE §§ 12926, 12945; CAL. CODE REGS. tit. 2, § 11042.

[1079] CAL. CODE REGS. tit. 2, § 11042(a).

[1080] CAL. CODE REGS. tit. 2, § 11035(g).

[1081] CAL. CODE REGS. tit. 2, § 11042(b).

[1082] CAL. CODE REGS. tit. 2, § 11046.

[1083] CAL. GOV'T CODE § 12945(a)(1); CAL. CODE REGS. tit. 2, § 11050(a).

the employer's operations, subject to the health care provider's approval. If 30 days' notice is not possible, the employee must give notice as soon as practicable. An employer may not deny leave due to lack of notice where the need arises due to a change in circumstances, medical emergency, or other unforeseeable situations.[1084]

The employer must respond to the employee's request as soon as practicable, and in any event, no later than 10 calendar days after receiving the request. The FEHA regulations require an employer to attempt to respond to the leave request before the date the leave is due to begin. Once given, approval is deemed retroactive to the date of the first day of the leave.[1085]

Medical Certification. An employer may require medical certification as a condition of granting the leave, and as a condition of returning from leave or transfer, if it does so for other similarly-situated employees.[1086] If an employer's policy is to require certification, the employer must:

- notify the employee of the need to provide medical certification at the time the employee gives notice of the need for leave or within two days thereafter;
- provide the employee with the deadline for providing certification;
- describe what constitutes sufficient medical certification;
- notify the employee of the consequences for failing to provide medical certification; and
- provide the employee with any required certification form.[1087]

When the leave is foreseeable and the employee has provided at least 30 days' notice, the employee is required to provide the medical certification before the leave begins. When this is not practicable, the employee must provide the certification to the employer within the time frame requested by the employer (which must be at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.[1088]

In the case of a foreseeable need for leave, an employer may delay granting the leave to an employee who fails to provide timely medical certification after the employer has requested certification (*i.e.*, within 15 calendar days, if practicable) until the required certification is provided.[1089] If the need for leave is not foreseeable, or in the case of recertification, an employee must submit certification (or recertification) within the timeframe requested by the employer (which must be at least 15 days after the employer's request) or as soon as reasonably possible under the circumstances. In the case of a medical emergency, it may not be practicable for an employee to provide the required certification within 15 calendar days.[1090]

[1084] CAL. CODE REGS. tit. 2, § 11050(a).

[1085] CAL. CODE REGS. tit. 2, § 11050(a).

[1086] CAL. CODE REGS., tit. 2, § 11050(b).

[1087] CAL. CODE REGS. tit. 2, § 11050(b); *see also* CAL. CODE REGS. tit. 2, § 11050(e) (sample form included in FEHA regulations).

[1088] CAL. CODE REGS. tit. 2, § 11050(b).

[1089] CAL. CODE REGS. tit. 2, § 11050(c).

[1090] CAL. CODE REGS. tit. 2, § 11050(c).

Intermittent Leave & Reduced Schedule. Similar to CFRA leave, the FEHA permits an employee to use intermittent and reduced schedule leave to accommodate a pregnancy-related disability. An employer may account for increments of intermittent leave using the shortest period of time that the employer's payroll system uses to account for other forms of leave, provided it is not greater than one hour.[1091]

If an employee's health care provider certifies that an employee has a medical need to take intermittent leave or leave on a reduced work schedule because of pregnancy, the employer may require the employee to transfer temporarily to an available alternative position that meets the needs of the employee. The employee must meet the qualifications of the alternative position. The alternative position must have the equivalent rate of pay and benefits, and must better accommodate the employee's leave requirements than the employee's regular job, but does not have to have equivalent duties. The employee must be reinstated to the same or a comparable position.[1092]

Compensation & Benefits During Leave. An employer is not required to pay an employee during pregnancy disability leave unless the employer pays for other temporary disability leaves for similarly-situated employees. The employee may use any accrued vacation, sick leave, or other accrued PTO during the leave. California FTDI wage replacement benefits may also be available during pregnancy disability leave.[1093]

As set forth in **3.9(a)(ii)**, an employer has special obligations when an employee takes CFRA baby bonding leave immediately after using pregnancy disability leave under the FEHA. The CFRA regulations and the FEHA regulations together create an obligation to continue group health coverage for up to a maximum of seven months for an individual who takes both a pregnancy disability leave and a leave protected by the CFRA and/or FMLA. This computation results in a maximum of four months plus 12 weeks of benefits coverage, for a total of roughly 29.33 weeks of coverage.[1094] As under the CFRA, an employer may recover the cost of premiums from an employee who does not return after leave, under certain circumstances.[1095]

During pregnancy disability leave, the employee must accrue seniority and participate in employee benefit plans—including, but not limited to, life, short-term and long-term disability or accident insurance, pension and retirement plans, stock options, and supplemental unemployment benefit plans—to the same extent and under the same conditions as would apply to any other unpaid disability leave granted by the employer for any reason other than a pregnancy disability.[1096]

It is an unlawful employment practice for an employer to refuse to provide employee benefits for pregnancy, if the employer provides such benefits for other temporary disabilities, or to refuse to maintain and to pay for coverage under a group health plan for an eligible employee who takes pregnancy disability leave.[1097]

[1091] CAL. CODE REGS. tit. 2, § 11042(a).

[1092] CAL. CODE REGS. tit. 2, § 11041.

[1093] CAL. GOV'T CODE § 12945(a)(1); CAL. CODE REGS. tit. 2, § 11044(a).

[1094] CAL. GOV'T CODE § 12945.2(f)(1); CAL. CODE REGS. tit. 2, §§ 11046(c), 11092(c)(2), (4).

[1095] CAL. CODE REGS. tit. 2, § 11044(c)(3).

[1096] CAL. CODE REGS. tit. 2, § 11044(d).

[1097] CAL. CODE REGS. tit. 2, § 11039(a)(2).

Fitness for Duty. As a condition of returning from pregnancy disability leave or transfer, an employer may require the employee to obtain a release to return-to-work from the employee's health care provider stating that the individual is able to resume their original job or duties, but only if the employer has a uniformly applied practice of requiring such releases from other similarly situated employees returning to work after a nonpregnancy related disability leave or transfer.[1098]

Reinstatement. Upon granting a disability leave, an employer must provide the employee with a written guarantee of reinstatement if requested. An employee must be returned to the individual's original job, unless an employer can prove by a preponderance of the evidence that the employee would not otherwise have been employed in the same position at the time reinstatement is requested for legitimate business reasons unrelated to the employee taking pregnancy disability leave or transfer (such as a layoff pursuant to a plant closure) or to a comparable position.[1099]

The FEHA does not afford an employee returning from pregnancy disability leave any greater right to reinstatement to a comparable position or to other benefits and conditions of employment than an employee who has been continuously employed in another position that is being eliminated. An employer must be able to show that it could not return the employee to the same or a comparable position by demonstrating that it would not have offered a comparable position to the employee if the employee had not gone on leave or that there is no comparable position available.[1100]

If the employee cannot be returned to the original position, the individual must be given a comparable position for which they are qualified on the scheduled reinstatement date or within 60 calendar days of that scheduled reinstatement date. During this 60-calendar day period, the employer has an affirmative obligation to provide notice to the employee of available positions in person, by letter, telephone or email, or by links to postings on the employer's website if there is a section devoted to job openings.[1101]

Antiretaliation Provisions. Under the FEHA, it is an unlawful employment practice for an employer to discriminate, harass, or retaliate against an employee due to the individual's pregnancy or perceived pregnancy or because the employee has exercised the right to take a pregnancy disability leave or transfer.[1102] An employer is prohibited from denying, interfering with, or restraining an employee's rights to reasonable accommodation, to transfer, or to take pregnancy disability leave.[1103] Further, an employer cannot require an employee to take a leave of absence because of pregnancy or perceived pregnancy when the employee has not requested leave or transfer an employee affected by pregnancy over the employee's objections to another position.[1104]

The portion of the FEHA that addresses pregnancy accommodations is discussed in **3.11(c)(ii)**.

[1098] CAL. CODE REGS. tit. 2, § 11050(d).

[1099] CAL. CODE REGS. tit. 2, § 11043(a).

[1100] CAL. CODE REGS. tit. 2, § 11043(c)(2).

[1101] CAL. CODE REGS. tit. 2, § 11043(c)(2).

[1102] CAL. CODE REGS. tit. 2, § 11039(a)(2).

[1103] CAL. CODE REGS. tit. 2, § 11039(a)(2)(F).

[1104] CAL. CODE REGS. tit. 2, § 11039(a)(1)(G), (H).

3.9(d) *Parental Leave*

Effective January 1, 2021, the New Parent Leave Act, which entitled an eligible employee to take leave to bond with a new child within one year of the child's birth, adoption, or foster care placement, was repealed.[1105]

3.9(e) *Adoptive Parents Leave*

3.9(e)(i) *Federal Guidelines on Adoptive Parents Leave*

An eligible employee may take time off to care for a newly-adopted child as part of the individual's leave entitlement under the FMLA. For information on the FMLA, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

3.9(e)(ii) *State Guidelines on Adoptive Parents Leave*

An eligible employee may take time off to care for a newly-adopted child as part of the employee's leave entitlement under the CFRA.[1106] For additional information, see 3.9(a)(ii).

3.9(f) *School Activities Leave*

3.9(f)(i) *Federal Guidelines on School Activities Leave*

Federal law does not address school activities leave for private-sector employees.

3.9(f)(ii) *State Guidelines on School Activities Leave*

School Activities Leave. California law recognizes that parents may occasionally require time away from work to attend to needs related to their children's care and education. An employer with 25 or more employees at the same location must allow employees who are parents up to 40 hours per calendar year of time off to visit their children's school or licensed childcare provider.[1107]

Parent means a parent, guardian, stepparent, foster parent, or grandparent of, or a person who stands *in loco parentis* to, a child.[1108] If more than one parent of a child is employed by the same employer at the same worksite, the parent who first gives notice to the employer is entitled to leave. Another parent of the child may not take time off at the same time to participate in school activities without the employer's consent.[1109]

A parent may take leave for the purpose of either of the following child-related activities:

1. to find, enroll, or reenroll their child in a school or with a licensed child care provider, or to participate in activities of the school or licensed child care provider of the child, if the employee, prior to taking the time off, gives reasonable notice to the employer of the planned absence of the employee. Time off for this purpose cannot exceed eight hours in any calendar month of the year; or

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[1105] CAL. GOV'T CODE § 12945.2.

[1106] CAL. GOV'T CODE § 12945.2; CAL. CODE REGS. tit. 2, § 11088.

[1107] CAL. LAB. CODE § 230.8(a).

[1108] CAL. LAB. CODE § 230.8(e)(1).

[1109] CAL. LAB. CODE § 230.8(a)(2).

2. to address a childcare provider or school emergency, if the employee gives notice to the employer.[1110]

Childcare provider or school emergency means that an employee's child cannot remain in a school or with a childcare provider due to one of the following:

- the school or childcare provider has requested that the child be picked up, or has an attendance policy, excluding planned holidays, that prohibits the child from attending or requires the child to be picked up from the school or childcare provider;
- behavioral or discipline problems;
- closure or unexpected unavailability of the school or childcare provider, excluding planned holidays; or
- a natural disaster, including, but not limited to, fire, earthquake, or flood.[1111]

The employer may require documentation from the employee that the school visit took place. *Documentation* means whatever written verification of parental participation the school or licensed childcare provider deems appropriate and reasonable.[1112]

The employee must use any accrued vacation or personal leave during the absence, unless otherwise provided by collective bargaining agreement, and may use time off without pay if made available by the employer.[1113] In the event that all permanent, full-time employees of an employer are accorded vacation during the same period of time in the calendar year, such employees may not utilize that accrued vacation benefit at any other time for purposes of the planned absence authorized under this law.[1114]

An employer may not demote, suspend, threaten to terminate, or terminate an employee for taking time off to participate in school activities.[1115] Any employer that willfully refuses to rehire, promote, or otherwise restore an employee or former employee who has been determined to be eligible for rehiring or promotion by a grievance procedure, arbitration, or hearing will be subject to a civil penalty in an amount equal to three times the amount of the employee's lost wages and work benefits.[1116]

Leave to Attend School Disciplinary Proceedings. All employers are obligated to provide employees time off to attend to school disciplinary matters. To be eligible for this leave, an employee must be the parent or guardian of the child, must actually live with the child, and must have received written notice from the principal requesting attendance at a conference to discuss the child's suspension from school. There is no upper limit on the amount of school discipline leave an employee may take. No employer may discharge or in any manner discriminate against an employee who is the parent or guardian of a pupil for taking

[1110] CAL. LAB. CODE § 230.8(a)(1).

[1111] CAL. LAB. CODE § 230.8(e)(2).

[1112] CAL. LAB. CODE § 230.8(c).

[1113] CAL. LAB. CODE § 230.8(b)(1).

[1114] CAL. LAB. CODE § 230.8(b)(2).

[1115] CAL. LAB. CODE § 230.8(a)(1), (d).

[1116] CAL. LAB. CODE § 230.8(d).

time off, if the employee, prior to taking the time off, gives reasonable notice to the employer that they are requested to appear in the school.[1117]

3.9(g) *Blood, Organ, or Bone Marrow Donation Leave*

3.9(g)(i) *Federal Guidelines on Blood, Organ, or Bone Marrow Donation*

Federal law does not address blood, organ, or bone marrow donation leave for private-sector employees.

3.9(g)(ii) *State Guidelines on Blood, Organ, or Bone Marrow Donation*

California law guarantees leave for certain employees to donate organs or bone marrow.[1118] Employers with 15or more employees are subject to the law, and an employee is eligible to use this leave if the employee has been employed by the employer for 90 days prior to the date the leave is to begin.[1119]

Covered employers must provide the following leave to eligible employees:

- a *paid* leave of absence not exceeding 30 business days in any one-year period for the purpose of donating an organ to another person;
- a *paid* leave of absence not exceeding 5 business days in any one-year period for the purpose of donating bone marrow to another person; and
- an additional *unpaid* leave of absence not exceeding 30 business days in a one-year period for the purpose of donating an organ to another person.[1120]

The one-year period is measured from the date the employee's leave begins and consists of 12 consecutive months. Leave may be taken in one or more parts, and does not run concurrently with CFRA or FMLA leave because organ and bone marrow donation are not qualifying reasons for leave under those laws.[1121]

When requesting time off, an employee must submit written verification to their employer that the employee is an organ or bone marrow donor and that there is a medical necessity for the donation of the organ or bone marrow.[1122]

An employer may require an employee to take up to five days of earned but unused sick or vacation leave for bone marrow donation and up to two weeks of earned but unused sick or vacation leave for organ donation. Any period of time during which an employee is required to be absent from their position by reason of being an organ or bone marrow donor is not a break in the employee's continuous service for the purpose of their right to salary adjustments, sick leave, vacation, paid time off, annual leave, or seniority. During any leave, the employer must maintain and pay for coverage under a group health

[1117] CAL. EDUC. CODE § 48900.1; CAL. LAB. CODE § 230.7.

[1118] CAL. LAB. CODE § 1510.

[1119] CAL. LAB. CODE §§ 1501, 1509.

[1120] CAL. LAB. CODE § 1510.

[1121] CAL. LAB. CODE § 1510.

[1122] CAL. LAB. CODE § 1510.

plan, for the full duration of the leave, in the same manner the coverage would have been maintained if the employee had been actively at work during the leave period.[1123]

Employers must restore an employee returning from leave to the same position held by the employee when the leave began, or an equivalent position. However, an employer may decline to restore an employee because of conditions unrelated to the employee's use of organ or bone marrow donation leave, although the statute does not specify what type of conditions would give rise to a permissible refusal to reinstate.[1124]

An employer is prohibited from taking the following discriminatory actions against an employee in connection with the employee's rights under the statute:

- interfering with, restraining, or denying the exercise or the attempt to exercise a right established under the statute; or
- discharging, fining, suspending, expelling, disciplining, or in any other manner discriminating against an employee who exercises a right provided under the statute or opposes a practice made unlawful by the statute.[1125]

3.9(h) *Voting Time*

3.9(h)(i) *Federal Voting Time Guidelines*

There is no federal law concerning time off to vote.

3.9(h)(ii) *State Voting Time Guidelines*

California law provides time off to vote for employees who do not have sufficient time outside of working hours to vote at a statewide election. Such employees must be provided with up to two hours *paid* time off to vote. Although the law does not define "sufficient time outside of working hours," employees must be given enough time off work, when added to the time available outside of working hours, to enable them to vote.[1126]

Unless an employer and employee agree otherwise, the time away from work used for voting must occur at the beginning or the end of the regular working shift, whichever allows the most time for voting and the least time off from the regular shift.[1127] If employees are aware of the need for time off on the third working day prior to the election day, they must provide an employer at least two working days' notice.[1128]

The law includes a workplace posting requirement. At least 10 days before every statewide election, an employer must post a summary of employee voting leave rights at the place of employment, if practicable, or in a location where it can be seen as employees come and go to work.[1129]

[1123] CAL. LAB. CODE § 1510.

[1124] CAL. LAB. CODE § 1511.

[1125] CAL. LAB. CODE § 1512.

[1126] CAL. ELEC. CODE § 14000.

[1127] CAL. ELEC. CODE § 14000.

[1128] CAL. ELEC. CODE § 14000.

[1129] CAL. ELEC. CODE § 14001.

Employers also are prohibited from suspending or discharging an employee because of the employee's absence while serving as an election officer on Election Day.[1130]

3.9(i) *Leave to Participate in Political Activities*

3.9(i)(i) *Federal Guidelines on Leave to Participate in Political Activities*

Federal law does not address leave for private-sector employees to participate in political activities.

3.9(i)(ii) *State Guidelines on Leave to Participate in Political Activities*

California law does not address leave for private-sector employees to participate in political activities.

3.9(j) *Leave to Participate in Judicial Proceedings*

3.9(j)(i) *Federal Guidelines on Leave to Participate in Judicial Proceedings*

The Jury System Improvements Act prohibits employers from terminating or disciplining "permanent" employees due to their jury service in federal court.[1131] Employers are under no federal statutory obligation to pay employees while serving on a jury.

Employers may verify that an employee's request for civic duty is legally obligated by requiring the employee to produce a copy of the summons, subpoena, or other documentation. Also, an employer can set reasonable advance notice requirements for jury duty leave. Upon completion of jury duty, an employee is entitled to reinstatement.

An employer also may be required to grant leave to employees who are summoned to testify, to assist, or to participate in hearings conducted by federal administrative agencies, as required by a variety of additional federal statutes.[1132] For more information, see LITTLER ON LEAVES OF ABSENCE: MILITARY & CIVIC DUTY LEAVES.

3.9(j)(ii) *State Guidelines on Leave to Participate in Judicial Proceedings*

Leave to Serve on a Jury. A California employer may not discharge or in any manner discriminate against an employee for taking time off from work to serve on a jury, provided that the employee gives reasonable advance notice to the employer that the employee is required to serve.[1133] An employer is not required to compensate an employee for time spent on jury service. During jury service, however, an employee may use vacation, personal leave, or compensatory time off that is available to the employee, unless otherwise provided by a collective bargaining agreement.[1134]

Leave to Comply with a Subpoena. An employer also must permit an employee to take time off from work to appear in court to comply with a subpoena or other court order requiring that the employee serve as a witness in any judicial proceeding.[1135] As with leave taken for jury service, an employer is not required

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[1130] CAL. ELEC. CODE § 12312.

[1131] 28 U.S.C. § 1875.

[1132] *See, e.g.*, 29 U.S.C. § 660(c) (Occupational Safety and Health Act); 29 U.S.C. § 215(a)(3) (Fair Labor Standards Act); 42 U.S.C. § 2000e 3(a) (Title VII); 29 U.S.C. § 623(d) (Age Discrimination in Employment Act).

[1133] CAL. LAB. CODE § 230(a).

[1134] CAL. LAB. CODE § 230(i).

[1135] CAL. LAB. CODE § 230(a).

to compensate an employee for time spent appearing in court pursuant to a subpoena. An employee may use vacation, personal leave, or compensatory time off that is available to the employee, unless otherwise provided by a collective bargaining agreement.[1136]

3.9(k) *Leave for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime*

3.9(k)(i) *Federal Guidelines on Leaves for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime*

Federal law does not address leave for private-sector employees who are victims of crime or domestic violence.

3.9(k)(ii) *State Guidelines on Leaves for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime*

California has enacted several statutes granting leave time to employees who are victims of, or related to victims of, certain types of crimes, including domestic violence, sexual assault, or stalking. These various provisions are briefly summarized below.

California Labor Code §§ 230.2 & 230.5: Leave for Crime Victims in General. An employee may take time off from work to appear in court to be heard at any proceeding, including any delinquency proceeding, involving a post-arrest release decision, plea, sentencing, post-conviction release decision, or any other judicial proceeding related to a crime of which the employee or a family member is a victim.[1137] *Family member* includes an employee's spouse, child, stepchild, brother, stepbrother, sister, stepsister, mother, stepmother, father, stepfather, registered domestic partner, or registered domestic partner's child.[1138]

While leave is available for victims of certain types of felonies, an employee is explicitly eligible for time off if the employee, or a family member, is a victim of the following crimes:

- vehicular manslaughter;
- felony child abuse;
- assault on a child resulting in death;
- felony domestic violence;
- felony elder abuse;
- felony stalking;
- solicitation for murder;
- hit and run causing death or injury;
- felony driving under the influence (DUI) resulting in injury;
- a violent felony as defined in Penal Code section 667.5; or

[1136] CAL. LAB. CODE § 230(i).

[1137] CAL. LAB. CODE §§ 230.2(b), 230.5(a)(1).

[1138] CAL. LAB. CODE §§ 230.2(a)(1), 230.5(f).

- a serious felony as defined in Penal Code section 1192.7.[1139]

Before an employee may take time off, the employee must give the employer a copy of the notice of each scheduled proceeding that is provided to the victim by the agency responsible for providing notice, unless advance notice is not feasible. When advance notice is not feasible or an unscheduled absence occurs, the employer may not take disciplinary action against the employee if the employee, within a reasonable time after the absence, provides the employer with any of the following documentation evidencing the judicial proceeding:

- the document from the court or government agency setting the hearing;
- documentation from the district attorney or prosecuting attorney's office;
- documentation from the victim/witness office that is advocating on behalf of the victim;
- a police report indicating that the employee was a victim of one of the specified offenses;
- a court order protecting or separating the employee from the perpetrator of the offense, or other evidence from the court or prosecuting attorney that the employee has appeared in court; or
- documentation from a medical professional, domestic violence advocate or advocate for victims of sexual assault, health care provider, or counselor that the employee was undergoing treatment for physical or mental injuries or abuse resulting in victimization from the offense.[1140]

To the extent permitted by law, the employer must maintain the confidentiality of any employee taking leave for this purpose.[1141] Leave is unpaid, but the employee may use any accrued vacation, personal leave, or compensatory time off that is available under the applicable terms of employment, unless otherwise provided by a collective bargaining agreement.[1142]

An employer is prohibited from discriminating or retaliating against an employee for taking leave or for otherwise exercising their rights under the law.[1143] An employee alleging a violation of this law may file a complaint with the Department of Labor Standards Enforcement.[1144]

California Labor Code § 230: Leave for Victims of Domestic Violence, Sexual Assault, or Stalking. All California employers must permit an employee to take time off from work to respond to an incident of domestic violence, sexual assault, or stalking, where the employee or the employee's child is the victim. The time off may be used to obtain or attempt to obtain any relief, including, but not limited to, a temporary restraining order, restraining order, or other injunctive relief, to help ensure the health, safety, or welfare of the victim or their child.[1145]

[1139] CAL. LAB. CODE §§ 230.2(a)(3), 230.5(a)(2).

[1140] CAL. LAB. CODE §§ 230.2(c), 230.5(b)(1), (2).

[1141] CAL. LAB. CODE §§ 230.2(e), 230.5(b)(3).

[1142] CAL. LAB. CODE §§ 230.2(d), 230.5(e).

[1143] CAL. LAB. CODE §§ 230.2(f), 230.5(c), (d).

[1144] CAL. LAB. CODE §§ 230.2(g), 230.5(d).

[1145] CAL. LAB. CODE § 230(c).

Prior to taking this leave, the employee must give the employer reasonable advance notice of the employee's intention to take time off, unless advance notice is not feasible. When an unscheduled absence occurs, the employer may not take action against the employee if the employee, within a reasonable time after the absence, provides certification to the employer. Any of the following constitutes sufficient certification:

- a police report indicating that the employee was a victim of domestic violence or sexual assault;
- a court order protecting or separating the employee from the perpetrator of an act of domestic violence or sexual assault, or other evidence from the court or prosecuting attorney that the employee has appeared in court; or
- documentation from a medical professional, domestic violence advocate or advocate for victims of sexual assault, health care provider, or counselor that the employee was undergoing treatment for physical or mental injuries or abuse resulting in victimization from an act of domestic violence or sexual assault.[1146]

To the extent allowed by law, the employer is required to maintain the confidentiality of any victim of domestic violence or sexual assault who requests leave.[1147]

There is no requirement that the employee be compensated for absences taken under this law. However, an employee may use up to 24 hours of accrued paid sick leave under California's paid sick leave law. Otherwise, an employee may use vacation, personal leave, or compensatory time off that is available under the applicable terms of employment, unless otherwise provided by a collective bargaining agreement, although an employee's entitlement to this leave may not be diminished by any collective bargaining agreement term or condition.[1148]

Discrimination and leave interference are strictly prohibited. An employer must not discharge or in any manner discriminate against an employee for taking time off under this law.[1149] Moreover, an employer is prohibited from discriminating or retaliating against an employee because of the employee's status as a victim of domestic violence, sexual assault, or stalking, if the victim provides notice to the employer of their status as such or the employer has actual knowledge of that status.[1150]

The statute also requires an employer to provide reasonable accommodation to an employee who is a victim of domestic violence, sexual assault, or stalking who requests an accommodation for the employee's safety while at work.[1151] The employer must engage in a timely, good faith, and interactive process with the employee to determine effective reasonable accommodations.[1152] Examples specified as potential accommodations include:

[1146] CAL. LAB. CODE § 230(d).

[1147] CAL. LAB. CODE § 230(d)(3).

[1148] CAL. LAB. CODE § 230(i).

[1149] CAL. LAB. CODE § 230(c).

[1150] CAL. LAB. CODE § 230(e).

[1151] CAL. LAB. CODE § 230(f)(1).

[1152] CAL. LAB. CODE § 230(f)(4).

- implementation of safety measures;
- transfer or reassignment;
- modified schedule;
- changed work telephone and/or workstation;
- door locks installed;
- assistance in documenting domestic violence, sexual assault, or stalking that occurs in the workplace;
- new office safety procedures; and
- referral to a victim assistance organization.[1153]

In determining whether an accommodation is reasonable, the employer must consider any exigent circumstances or danger facing the employee.[1154] An employer is not required to implement any accommodation that would be an undue hardship on the employer's business operations, nor is an employer required to accommodate an employee who has not informed the employer of the individual's status as a victim or need for accommodation.[1155] The employer may request certification from the employee as to their status as a crime victim by seeking one of the forms of documentation set forth above, and may request recertification every six months thereafter. Once the employee no longer needs accommodation, the employee must notify the employer of the changed circumstances.[1156]

California Labor Code § 230.1: Additional Leave for Victims of Domestic Violence, Sexual Assault, or Stalking Applicable to Employers of 25or More Employees. In addition to the requirements imposed on all employers in Labor Code section 230, a covered employer must permit an eligible employee to take leave of up to 12 workweeks in a 12-month period to attend to any of the following:

- to seek medical attention for injuries caused by domestic violence, stalking, or sexual assault;
- to obtain services from a domestic violence shelter, program, or rape crisis center as a result of domestic violence, stalking, or sexual assault;
- to obtain psychological counseling related to an experience of domestic violence, stalking, or sexual assault; or
- to participate in safety planning and take other actions to increase safety from future domestic violence, stalking, or sexual assault, including temporary or permanent relocation.[1157]

An employee is eligible for this leave if the employee works for an employer with 25or more employees and is a victim of domestic violence, stalking, or sexual assault.[1158]

[1153] CAL. LAB. CODE § 230(f)(2).

[1154] CAL. LAB. CODE § 230(f)(5).

[1155] CAL. LAB. CODE § 230(f)(3), (6).

[1156] CAL. LAB. CODE § 230(f)(7).

[1157] CAL. LAB. CODE § 230.1(a).

[1158] CAL. LAB. CODE § 230.1(a).

Prior to using this leave, the employee must give the employer reasonable advance notice of the need for leave, unless advance notice is not feasible.[1159] As with the other crime victim leaves provided for under California law, when an unscheduled absence occurs, the employer may not take action against the employee if the employee, within a reasonable time after the absence, provides a certification to the employer. Any of the following constitutes sufficient certification:

- a police report indicating that the employee was a victim of domestic violence, stalking, or sexual assault;
- a court order protecting or separating the employee from the perpetrator of an act of domestic violence, stalking, or sexual assault, or other evidence from the court or prosecuting attorney that the employee has appeared in court; or
- documentation from a medical professional, domestic violence advocate or advocate for victims of sexual assault, health care provider, or counselor that the employee was undergoing treatment for physical or mental injuries or abuse resulting in victimization from an act of domestic violence, stalking, or sexual assault.[1160]

To the extent allowed by law, the employer is required to maintain the confidentiality of any employee who is victim of domestic violence, stalking, or sexual assault and who requests leave.[1161]

There is no requirement that the employee be compensated for absences taken under this law. However, an employee may use up to 24 hours of accrued paid sick leave under California's paid sick leave law. Otherwise, an employee may use vacation, personal leave, or compensatory time off that is available under the applicable terms of employment, unless otherwise provided by a collective bargaining agreement, though an employee's entitlement to this leave may not be diminished by any collective bargaining agreement term or condition.[1162]

The statute expressly states that it does not create a right for an employee to take unpaid leave that exceeds the unpaid leave time allowed under, or is in addition to the unpaid leave time permitted by, the federal FMLA.[1163]

3.9(l) *Military-Related Leave*

3.9(l)(i) *Federal Guidelines on Military-Related Leave*

Two federal statutes primarily govern military-related leave: the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Family and Medical Leave Act (FMLA). For more detailed information on these statutes, including notice and other requirements, see **LITTLER ON LEAVES OF ABSENCE: MILITARY & CIVIC DUTY LEAVES**.

USERRA. USERRA imposes obligations on all public and private employers to provide employees with leave to "serve" in the "uniformed services." USERRA also requires employers to reinstate employees returning from military leave who meet certain defined qualifications. An employer also may have an obligation to

[1159] CAL. LAB. CODE § 230.1(b)(1).

[1160] CAL. LAB. CODE § 230.1(b)(2).

[1161] CAL. LAB. CODE § 230.1(b)(3).

[1162] CAL. LAB. CODE § 230.1(e).

[1163] CAL. LAB. CODE § 230.1(f).

train or otherwise qualify those employees returning from military leave. USERRA guarantees employees a continuation of health benefits for the 24 months of military leave (at the employee's expense) and protects an employee's pension benefits upon return from leave. Finally, USERRA requires that employers not discriminate against an employee because of past, present, or future military obligations, among other things.

Some states provide greater protections for employees with respect to military leave. USERRA, however, establishes a "floor" with respect to the rights and benefits an employer is required to provide to an employee to take leave, return from leave, and be free from discrimination. Any state law that seeks to supersede, nullify, or diminish these rights is void under USERRA.[1164]

FMLA. Under the FMLA, eligible employees may take leave for: (1) any "qualifying exigency" arising from the foreign deployment of the employee's spouse, son, daughter, or parent with the armed forces; or (2) to care for a next of kin servicemember with a serious injury or illness (referred to as "military caregiver leave").

1. **Qualifying Exigency Leave.** An eligible employee may take up to 12 weeks of unpaid leave in a single 12-month period if the employee's spouse, child, or parent is an active duty member of one of the U.S. armed forces' reserve components or National Guard, or is a reservist or member of the National Guard who faces recall to active duty if a qualifying exigency exists.[1165] An eligible employee may also take leave for a qualifying exigency if a covered family member is a member of the regular armed forces and is on duty, or called to active duty, in a foreign country.[1166] Notably, leave is only available for covered relatives of military members called to active *federal* service by the president and is not available for those in the armed forces recalled to state service by the governor of the member's respective state.
2. **Military Caregiver Leave.** An eligible employee may take up to 26 weeks of unpaid leave in a single 12-month period to care for a "covered servicemember" with a serious injury or illness if the employee is the servicemember's spouse, child, parent, or next of kin.

3.9(l)(ii) *State Guidelines on Military-Related Leave*

California law offers protected leave for employees engaged in military service, as well as for employees whose family members are military service members in connection with deployments, training, and other periods of military service.

General Protection Against Discrimination. An employer may not discharge or otherwise discriminate against an employee because the individual is a member of the state or U.S. military or is ordered to duty or training.[1167] Moreover, an employer cannot hinder or prevent an employee from performing any military service or from attending any military encampment or place of drill or instruction from an

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[1164] USERRA provides that: (1) nothing within USERRA is intended to supersede, nullify, or diminish a right or benefit provided to an employee that is greater than the rights USERRA provides (38 U.S.C. § 4302(a)); and (2) USERRA supersedes any state law that would reduce, limit, or eliminate any right or benefit USERRA provides (38 U.S.C. § 4302(b)).

[1165] 29 C.F.R. § 825.126(a).

[1166] Deployment of the member with the armed forces to a foreign country means deployment to areas outside of the United States, the District of Columbia, or any Territory or possession of the United States, including international waters. 29 C.F.R. § 825.126(a)(3).

[1167] CAL. MIL. & VET. CODE § 394.

appropriate military authority.[1168] An employer is also prohibited from discriminating against an employee due to the employee's membership in the state Civil Air Patrol.[1169]

Military Service Leave. Employers must grant up to 17 days of temporary, unpaid leave per year to California employees who are members of the U.S. armed forces reserves, National Guard, or naval militia who are called to engage in drills, training, encampment, naval cruises, special exercises, or similar activities. The 17-day period includes the time required to travel to and from duty.[1170] In addition, private employers must grant up to 15 days of unpaid temporary leave annually, including travel time, to employees in the state military reserve for training, drills, and other inactive duty training.[1171]

In the event an employee is injured during National Guard or Naval Militia training, an employer may not restrict or terminate any collateral benefit for the employee by reason of the employee's temporary incapacitation of 52 days or less. *Collateral benefits* include health care, which may be continued at the employee's expense, life insurance, disability insurance, and seniority status.[1172]

Special reinstatement rules apply to employees who are members of the California National Guard, or members of the National Guard of other U.S. states who are employed by a private employer in California. Such employees, if taking military leave when the governor or the president of the United States issues a proclamation of a state of insurrection or a state emergency, or when the National Guard is on active duty, must be reinstated to the former position in private employment at the conclusion of active duty leave.[1173] To be eligible for reinstatement, the employee must:

- be a member of the state National Guard who was called to a period of active service by the governor or resident of the United States;
- receive a certificate of satisfactory service in the National Guard;
- remain qualified to perform the job; and
- apply for reinstatement to a full-time position within 40 days after release from service (part-time employees must apply within five days of release).[1174]

These employees, if full-time, must be restored to the same position or to a position of similar seniority, status, and pay without loss of retirement or other benefits, unless the employer's circumstances have changed such that it has become impossible or unreasonable to do so. Former part-time employees must be restored to the same position or to a position of similar seniority, status, and pay, if any exists. Neither full-time nor part-time employees may be discharged without cause within one year after reinstatement.[1175]

[1168] CAL. MIL. & VET. CODE § 394(d).

[1169] CAL. LAB. CODE §§ 1501-1502.

[1170] CAL. MIL. & VET. CODE § 394.5.

[1171] CAL. MIL. & VET. CODE § 395.9.

[1172] CAL. MIL. & VET. CODE § 394.

[1173] CAL. MIL. & VET. CODE § 395.06(a).

[1174] CAL. MIL. & VET. CODE § 395.06(b).

[1175] CAL. MIL. & VET. CODE § 395.06(a), (b).

If an employer fails or refuses to comply with any the foregoing provisions, the employee has a private right of action for any lost wages or benefits suffered by reason of the employer's violation.[1176]

Family Military Leave. Employers with more than 25employees must allow a qualified employee to take up to 10 days of unpaid leave while their service member spouse is on leave from a deployment.[1177] A qualified employee is one who:

1. is the spouse of a qualified service member; and
2. performs service for hire for an employer for an average of 20 or more hours per week, but is not an independent contractor.

A qualified service member is any of the following:

- a member of the U.S. armed forces who has been deployed during a period of military conflict to an area designated as a combat theater or combat zone by the president of the United States;
- a member of the National Guard who has been deployed during a period of military conflict; or
- a member of the reserves who has been deployed during a period of military conflict.[1178]

The employee must provide the employer with notice of intent to take leave within two business days of receiving official notice that the employee's spouse will be on leave from deployment. The employee must also submit written documentation certifying that the spouse will be on leave from deployment during the time the leave is requested.[1179]

Civil Air Patrol Leave. Employers of 15or more employees must provide not less than 10 days per year of leave, but no more than three consecutive days, to employees who are volunteer members of the California Wing of the Civil Air Patrol.[1180] To be eligible to use this leave, an employee must have been employed by that employer for at least 90 days immediately preceding the commencement of leave, and must be duly directed and authorized by a political entity that has the authority to authorize an emergency operational mission of the California Wing of the Civil Air Patrol.[1181] However, an employer is not required to grant Civil Air Patrol leave to an employee who is required to respond to either the same or another simultaneous emergency operational mission as a first responder or disaster service worker for a local, state, or federal agency.[1182]

The employee must give the employer as much notice as possible of the anticipated dates the Civil Air Patrol leave will begin and end. The employer may require certification from the proper Civil Air Patrol

[1176] CAL. MIL. & VET. CODE § 395.06(c).

[1177] CAL. MIL. & VET. CODE § 395.10(a).

[1178] CAL. MIL. & VET. CODE § 395.10(b).

[1179] CAL. MIL. & VET. CODE § 395.10(b).

[1180] CAL. LAB. CODE § 1503.

[1181] CAL. LAB. CODE § 1501.

[1182] CAL. LAB. CODE § 1503.

authority to verify the eligibility of the employee for the requested leave, and may deny the leave to be taken as Civil Air Patrol leave if the employee fails to provide the required certification.[1183]

Civil Air Patrol leave is unpaid; however, nothing in the statute prevents an employer from choosing to provide paid leave. An employer cannot require an employee to exhaust accrued vacation, personal leave, sick leave, or any other type of accrued leave as a condition of taking unpaid Civil Air Patrol Leave.[1184] Using this leave also cannot result in the loss of an employee benefit accrued before the date on which the leave began.[1185]

An employee returning from Civil Air Patrol leave must be restored to the position the employee held when the leave began, or to a position with equivalent seniority status, employee benefits, pay, and other terms and conditions of employment. An employer may decline to reinstate an employee if warranted due to conditions unrelated to the exercise of rights under the statute by the employee.[1186]

3.9(l)(iii) *Local Guidelines on Military-Related Leave*

San Francisco's Military Leave Pay Protection Act (MLPPA) requires covered employers to provide up to 30 days of supplemental pay to employees on military leave. The MLPPA covers employers with 100 or more employees, regardless of where they work. For the ordinance to apply, an employee must work in San Francisco, be a member of the reserve corps of the U.S. armed forces, National Guard, or other U.S. uniformed service organization, and be absent from work for military duty.

While covered employees are on leave for military duty – which the ordinance allows to be taken in daily increments of one or more days at a time – for up to 30 days in any calendar year, their employers must provide supplemental compensation representing the difference between the employee's gross military pay and gross pay the employee would have received had they worked their regular work schedule. As of the date of publication, the city's Office of Labor Standards Enforcement has not issued guidelines regarding calculating supplemental compensation or processing employee requests, but additional guidance is expected. The MLPPA is enforced by the Office of Labor Standards and provides for monetary penalties for violations.[1187]

3.9(m) *Other Leaves*

3.9(m)(i) *Federal Guidelines on Other Leaves*

There are no federal statutory requirements for other categories of leave for private-sector employees.

3.9(m)(ii) *State Guidelines on Other Leaves*

Volunteer Emergency Responder Leave. California offers job-protected leave to employees engaged in volunteer emergency responder services. An employer may not terminate or otherwise discriminate against an employee who takes a temporary leave to respond as a volunteer firefighter, a reserve peace officer, emergency rescue personnel, or to attend fire, law enforcement, or emergency rescue training.[1188]

[1183] CAL. LAB. CODE § 1503.

[1184] CAL. LAB. CODE § 1503.

[1185] CAL. LAB. CODE §§ 1504, 1505.

[1186] CAL. LAB. CODE § 1504.

[1187] S.F. CAL. LAB. & EMP. CODE §§ 15.1 *et seq*.

[1188] CAL. LAB. CODE § 230.3(a).

Emergency rescue personnel means any person who is an officer, employee, or member of a fire department or firefighting agency of the federal government, the State of California, a city, county, district, or other public entity in California, or of a sheriff's department, police department, or a private fire department, or of a disaster medical response entity, whether that person is a volunteer or partly paid or fully paid, while the employee is actually engaged in providing emergency services.[1189]

An employer that is a public safety agency or provider of emergency medical services will not be required to provide leave to an employee if, as determined by the employer, the employee's absence would hinder the availability of public safety or emergency medical services. An employee who is a health care provider will be required to notify their employer at the time the employee becomes designated as emergency rescue personnel and again when the employee is notified that the employee will be deployed as a result of that designation.[1190]

Employers with 50or more employees are required to provide an employee with up to 14 days of leave in any calendar year for the purpose of engaging in fire, law enforcement, or emergency rescue training. Discrimination or retaliation against an employee for using leave or due to the employee's status as a volunteer emergency responder is prohibited.[1191]

Adult Literacy Leave. California's Employee Literacy Education Assistance Act (ELEAA) applies to every private employer in California that regularly employs 25 or more employees. The ELEAA provides that any employee who reveals a literacy problem and requests assistance to enroll in an adult literacy education program is entitled to reasonable accommodation and assistance by their employer. Assistance includes, but is not limited to, providing the employee with the location of local literacy programs or arranging for a jobsite visit by a literacy education provider.[1192] An employer must make reasonable efforts, however, to keep an employee's literacy problem confidential at the workplace.[1193]

Reasonable accommodation and undue hardship standards govern the amount of time an employee can be on leave for purposes of enrollment in an adult literacy education program.[1194] These standards have not been defined. However, because most adult literacy programs are scheduled in short blocks of time—likely a limited number of hours per week—it is unlikely that leaves of an extended duration would be necessary. Depending upon an employee's scheduled work hours, an employer might provide accommodation by allowing the employee to leave work early, arrive later, or take an extended lunch period to attend the literacy program.

An employer need not pay the employee for time taken as literacy leave, and may request that the employee provide proof of enrollment in an adult literacy education program.[1195]

[1189] CAL. LAB. CODE § 230.3(d).

[1190] CAL. LAB. CODE § 230.3(c).

[1191] CAL. LAB. CODE § 230.4.

[1192] CAL. LAB. CODE § 1041.

[1193] CAL. LAB. CODE § 1042.

[1194] CAL. LAB. CODE § 1041.

[1195] CAL. LAB. CODE § 1043.

An employer cannot terminate an employee who reveals a literacy problem due to the employee's disclosure of illiteracy if the employee's performance is satisfactory.[1196] An employee who feels the individual has been denied reasonable accommodation, or has suffered discrimination due to a literacy problem, may file a complaint with the Labor Commissioner.[1197] If the Labor Commissioner determines that an employer has violated the ELEAA, the employee may be awarded reinstatement, reimbursement of wages and interest thereon, and payment of reasonable attorneys' fees.[1198]

Leave During a State of Emergency. State law protects employees who must leave work or cannot come to work due to a state of emergency from retaliation by their employers. During an emergency condition, an employer is prohibited from taking or threatening to take adverse action against any employee for refusing to report to, or leaving, a workplace or worksite within the affected area because the employee has a reasonable belief that the workplace or worksite is unsafe. *Emergency condition* means the existence of either of the following: (1) conditions of disaster or extreme peril to the safety of persons or property at the workplace or worksite caused by natural forces or a criminal act; or (2) an order to evacuate a workplace, a worksite, a worker's home, or the school of a worker's child due to natural disaster or a criminal act; however, *emergency condition* does not include a health pandemic. A reasonable belief that the workplace or worksite is unsafe means that a reasonable person, under the circumstances known to the employee at the time, would conclude there is a real danger of death or serious injury if that person enters or remains on the premises. The existence of any health and safety regulations specific to the emergency condition and an employer's compliance or noncompliance with those regulations will be a relevant factor if this information is known to the employee at the time of the emergency condition or the employee received training on the health and safety regulations mandated by law specific to the emergency condition.[1199]

When feasible, the employee must notify the employer of the emergency condition requiring the employee to leave or refuse to report to the workplace or worksite prior to leaving or refusing to report. If providing prior notice is not feasible, the employee must notify the employer as soon as possible of the emergency condition that required the employee to leave or refuse to report to the workplace or worksite after leaving or refusing to report.[1200]

However, the protected absence does not apply to the following categories of workers:

- a first responder, as defined in section 8562 of the Government Code;
- a disaster service worker, as defined in section 3101 of the Government Code;
- an employee required by law to render aid or remain on the premises in case of an emergency;
- an employee or contractor of a health care facility who provides direct patient care, provides services supporting patient care operations during an emergency, or is required by law or policy to participate in emergency response or evacuation;

[1196] CAL. LAB. CODE § 1044.

[1197] CAL. LAB. CODE § 98.7(a).

[1198] CAL. LAB. CODE § 98.7(c).

[1199] CAL. LAB. CODE § 1139.

[1200] CAL. LAB. CODE § 1139.

- an employee of a private entity that contracts with the state or any city, county, or political subdivision of the state, including a special district, for purposes of providing or aiding in emergency services;
- an employee working on a military base or in the defense industrial base sector;
- an employee performing essential work on nuclear reactors or nuclear materials or waste;
- an employee of a company providing utility, communications, energy, or roadside assistance while the employee is actively engaged in or is being called upon to aid in emergency response, including maintaining public access to services such as energy and water during the emergency;
- an employee of a licensed residential care facility;
- an employee of a depository institution, as defined in section 1420 of the Financial Code;
- a transportation employee participating directly in emergency evacuations during an active evacuation;
- an employee of a privately contracted private fire prevention resource that is operating as a qualified insurance resource, meaning personnel and equipment working for, or contracted by, an insurance company with a mission to mitigate risk to insured structures and operating in compliance with instruction and oversight of the incident management team of the authority having jurisdiction; or
- an employee whose primary duties include assisting members of the public to evacuate in case of an emergency.[1201]

An employer is also prohibited from preventing any employee from accessing the employee's mobile device or other communications device for seeking emergency assistance, assessing the safety of the situation, or communicating with a person to verify their safety.

These protections no longer apply when the emergency conditions that posed an imminent and ongoing risk of harm to the workplace, the worksite, the worker, or the worker's home have ceased.[1202]

3.10 Workplace Safety

3.10(a) *Occupational Safety and Health*

3.10(a)(i) *Fed-OSH Act Guidelines*

The federal Occupational Safety and Health Act ("Fed-OSH Act") requires every employer to keep their places of employment safe and free from recognized hazards likely to cause death or serious harm to employees.[1203] Employers are also required to comply with all applicable occupational safety and health standards.[1204] To enforce these standards, the federal Occupational Safety and Health Administration

[1201] CAL. LAB. CODE § 1139.

[1202] CAL. LAB. CODE § 1139.

[1203] 29 U.S.C. § 654(a)(1). An *employer* is defined as "a person engaged in a business affecting commerce that has employees." 29U.S.C. § 652(5). The definition of employer does not include federal or state agencies (except for the U.S. House of Representatives and Senate). Under some state plans, however, state agencies may be subject to the state safety and health plan.

[1204] 29 U.S.C. § 654(a)(2).

("Fed-OSHA") is authorized to carry out workplace inspections and investigations and to issue citations and assess penalties. The Fed-OSH Act also requires employers to adopt reporting and record-keeping requirements related to workplace accidents. For more information on this topic, see LITTLER ON WORKPLACE SAFETY.

Note that the Fed-OSH Act encourages states to enact their own state safety and health plans. Among the criteria for state plan approval is the requirement that the state plan provide for the development and enforcement of state standards that are at least as effective in providing workplace protection as are comparable standards under the federal law.[1205] Some state plans, however, are more comprehensive than the federal program or otherwise differ from the Fed-OSH Act.

3.10(a)(ii) *State-OSH Act Guidelines*

Cal-OSHA Overview. California, under agreement with Fed-OSHA, operates its own state occupational safety and health program in accordance with section 18 of the Fed-OSH Act.[1206] Thus, California is a so-called "state plan" jurisdiction, with its own detailed rules for occupational safety and health that parallel, but are separate from, Fed-OSHA standards. The California Occupational Safety and Health Act (Cal-OSHA) is by far the most stringent occupational safety and health law in the nation. Cal-OSHA covers almost every employer and place of employment in the state. An employer's duties under Cal-OSHA are governed by numerous provisions in the California Labor Code and by an extensive set of regulations embodied in title 8 of the California Code of Regulations. The state agency with responsibility for enforcing Cal-OSHA is the Division of Occupational Safety and Health (DOSH).[1207]

The responsibilities and duties of employers under Cal-OSHA are rigorous and far-reaching. They start with a set of broad statutory provisions sometimes referred to as "general duty clauses." To begin with, an employer is generally required to provide a safe and healthful place of employment and is prohibited from occupying a workplace that is not safe and not healthful.[1208] An employer must also do everything reasonably necessary to protect the life, safety, and health of employees, specifically including the furnishing of safety devices and safeguards, and the adoption of practices, means, methods, operations, and processes reasonably adequate to create a safe and healthful workplace.[1209] The California Labor Code provides that an employer must not fail or neglect to do any of the following:

- to provide and use safety devices and safeguards reasonably adequate to render the employment and place of employment safe;
- to adopt and use methods and processes reasonably adequate to render the employment and place of employment safe; and
- to do every other thing reasonably necessary to protect the life, safety, and health of employees.[1210]

These general duty clauses come into effect as a "catch all" where no specific Cal-OSHA regulation governs the work in question. Thus, a DOSH investigation may result in either a citation for a violation of a Cal-

[1205] 29 U.S.C. § 667(c)(2).

[1206] 29 U.S.C. § 667.

[1207] CAL. LAB. CODE § 6307.

[1208] CAL. LAB. CODE § 6400.

[1209] CAL. LAB. CODE § 6401.

[1210] CAL. LAB. CODE § 6403.

OSHA regulation or a "special order" based on a general duty violation when no specific violation of any regulation can be found.

Generally Applicable Workplace Safety Standards. In pursuit of its mandate that every employer provide a safe and healthy workplace, many Cal-OSHA standards require a written compliance program. If no written compliance program is specified, Cal-OSHA standards often require an organized and documented program for compliance. Most employers need at least three, and in most cases four, written compliance programs:

1. injury and illness prevention;
2. emergency action;
3. fire prevention; and
4. hazard communication.

Other employers, depending on the industry, may need additional written compliance programs such as respiratory protection, noise exposure, confined space entries, permissible exposure limits, chemical protective standards, laboratory chemical hygiene, blood-borne pathogens, forklifts and material handling, and lockout/tagout.

Employers with outdoor worksites must also comply with Cal-OSHA regulations on outdoor heat illness prevention.[1211] Employers must provide a specified amount of water to employees working outdoors as well as access to shade. Employees who need a recovery period to prevent heat-related illness may be entitled to premium pay for missed recovery periods.[1212] Additionally, employers must provide training to all employees regarding heat illness identification and prevention. Similar prevention requirements apply to employers with indoor worksites that reach or exceed 82 degrees Fahrenheit when employees are present.[1213]

The Cleaning Product Right to Know Act mandates that any employer required to maintain and make safety data sheets readily accessible to employees pursuant to Cal-OSHA standards must also make readily accessible in the same manner and to the same persons printable information for designated consumer cleaning products in the workplace relating to chemicals contained in those products.[1214]

3.10(b) *Cell Phone & Texting While Driving Prohibitions*

3.10(b)(i) *Federal Guidelines on Cell Phone & Texting While Driving*

Federal law does not address cell phone use or texting while driving.

3.10(b)(ii) *State Guidelines on Cell Phone & Texting While Driving*

California, like the majority of other states, prohibits texts and phone calls while driving. Under state law, a driver may not operate a motor vehicle while using a cellular telephone or an electronic wireless communications device unless it is specifically designed and configured to allow voice operated and

[1211] CAL. CODE REGS. tit. 8, § 3395.

[1212] CAL. LAB. CODE § 226.7.

[1213] CAL. CODE REGS. tit. 8, § 3396.

[1214] CAL. LAB. CODE § 6398.5.

hands-free operation and is used in that manner while driving.[1215] This prohibition applies to employees driving for work purposes and could expose an employer to liability. Employers therefore should be cognizant of, and encourage compliance with, the restriction.

The statute incorporates an exception where a driver may operate a handheld wireless telephone or a wireless electronic communications device in a manner requiring the use of the driver's hand, if the device is mounted on a vehicle's windshield in the same manner that a portable Global Positioning System (GPS) is mounted on or affixed to a dashboard or center console. The device cannot hinder the driver's view of the road, and this exception applies only if the driver's hand is used to activate or deactivate a feature or function of the device with a single swipe or tap of the driver's finger.[1216]

3.10(c) *Firearms in the Workplace*

3.10(c)(i) *Federal Guidelines on Firearms on Employer Property*

Federal law does not address firearms in the workplace.

3.10(c)(ii) *State Guidelines on Firearms on Employer Property*

Although California has some of the nation's toughest gun laws, there was no state statute or regulation specifically regulating firearms in the workplace or on company property until 2023, when the state enacted amendments[1217] to the law to restrict the places where concealed carry of a firearm is permitted. Of interest to employers, the amendment to the law prohibits an individual with a concealed carry license from carrying a concealed firearm onto the premises of a privately owned commercial establishment that is open to the public, unless the operator of the establishment clearly and conspicuously posts a sign at the entrance of the building or on the premises indicating that license holders are permitted to carry firearms on the property.[1218]

Firearms in Company Parking Lots. A valid concealed carry license holder may transport a firearm and ammunition into the parking area of a premises where firearms are otherwise prohibited. With the exception of a nuclear facility or any place where federal law would prohibit firearms, a person with a valid concealed carry permit may:

- Transport a concealed firearm or ammunition within a vehicle into or out of the parking area so long as the firearm is locked in a lock box.
- Store ammunition or a firearm within a locked lock box and out of plain view within the vehicle in the parking area.
- Transport a concealed firearm in the immediate area surrounding their vehicle within a prohibited parking area only for the limited purpose of storing or retrieving a firearm within a locked lock box in the vehicle's trunk or other place inside the vehicle that is out of plain view.[1219]

[1215] CAL. VEH. CODE §§ 23123, 23123.5.

[1216] CAL. VEH. CODE § 23123.5.

[1217] CAL. S.B. 2 (2023).

[1218] CAL. PENAL CODE § 26230(a)(26).

[1219] CAL. PENAL CODE § 26230.

3.10(d) *Smoking in the Workplace*

3.10(d)(i) *Federal Guidelines on Smoking in the Workplace*

Federal law does not address smoking in the workplace.

3.10(d)(ii) *State Guidelines on Smoking in the Workplace*

General Provisions. As part of an employer's duty to provide a safe and healthful work environment, Cal-OSHA requires that the vast majority of California workplaces be smoke-free. An employer may not knowingly or intentionally permit smoking at a place of employment or in an enclosed space. *Enclosed space* includes covered parking lots, lobbies, lounges, waiting areas, elevators, stairwells, and restrooms that are a structural part of the building.[1220]

An employer that permits any nonemployee access to the place of employment on a regular basis has not acted knowingly or intentionally in violation of the statute, if it has taken the following reasonable steps to prevent smoking by a nonemployee:

- posted clear and prominent no smoking signs; and/or
- has requested, when appropriate, that a nonemployee who is smoking refrain from smoking in the enclosed workplace.[1221]

Smoking means inhaling, exhaling, burning, or carrying any lighted or heated cigar, cigarette, or pipe, or any other lighted or heated tobacco or plant product intended for inhalation, whether natural or synthetic, in any manner or in any form. Smoking also includes the use of an electronic smoking device that creates an aerosol or vapor, in any manner or in any form, or the use of any oral smoking device for the purpose of circumventing the prohibition of smoking.[1222]

Posting Requirements. "No smoking" signs must be posted at all entrances to workplaces and throughout the building. If smoking is allowed in some areas of the building a sign must be posted stating, "Smoking is prohibited except in designated areas."[1223]

3.10(e) *Suitable Seating for Employees*

3.10(e)(i) *Federal Guidelines on Suitable Seating for Employees*

Federal law does not address suitable seating requirements for employees.

3.10(e)(ii) *State Guidelines on Suitable Seating for Employees*

Under California law, all working employees must be provided suitable seats when the nature of the work reasonably permits the use of seats.[1224] According to the California Supreme Court, the "nature of the work refers to an employee's tasks performed at a given location for which a right to a suitable seat is claimed, rather than a 'holistic' consideration of the entire range of an employee's duties anywhere on

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[1220] CAL. LAB. CODE § 6404.5; CAL. CODE REGS. tit. 8, § 5148.

[1221] CAL. LAB. CODE § 6404.5(d).

[1222] CAL. LAB. CODE § 6404.5(l); CAL. BUS. & PROF. CODE § 22950.5.

[1223] CAL. LAB. CODE § 6404.5(d).

[1224] California Wage Orders 1-13 &15, §14.

the jobsite."[1225] As the court explained, if the employee's job duties as "performed at a given location reasonably permit sitting, and provision of a seat would not interfere with performance of any other tasks that may require standing, a seat is called for."[1226]

Moreover, when employees are not performing duties that require standing, "an adequate number of suitable seats [must] be placed in reasonable proximity to the work area" and employees must be free to sit so long as sitting does not interfere with their tasks.[1227] If an employer seeks to be excused from the seating requirement, it must show that compliance would be "infeasible because no suitable seating exists."[1228]

If, in the opinion of the Division of Labor Standards Enforcement (DLSE) after due investigation, it is found that enforcement of the seating provision would not materially affect employees' welfare or comfort and would cause the employer an undue hardship, the DLSE may exempt the employer from the seating requirement. Such exemptions must be in writing to be effective and may be revoked after reasonable notice is given in writing. Application for exemption must be made by the employer or by the employee and/or the employee's representative to the DLSE in writing. A copy of the application must be posted at the place of employment at the time the application is filed with the DLSE.[1229]

3.10(f) *Workplace Violence Protection Orders*

3.10(f)(i) *Federal Guidelines on Workplace Violence Protection Orders*

Federal law does not address employer workplace violence protection orders. That is, there is no federal statute addressing whether or how employers might obtain a legal order (such as a temporary restraining order) on their own behalf, or on behalf of their employees or visitors, to protect against workplace violence, threats, or harassment.

3.10(f)(ii) *State Guidelines on Workplace Violence Protection Orders*

California employers may seek a restraining order on behalf of an employee who has suffered a credible threat of violence from an individual that can reasonably be construed to be carried out at the workplace (and, effective January 1, 2025, to protect an employee in cases of harassment). **Effective January 1, 2025**, a collective bargaining representative may also petition for a restraining order. At the court's discretion, it may award a restraining order for any number of other employees at the workplace, and, if appropriate, employees at the employer's other worksites.[1230] However, the statute does not permit a court to issue a restraining order or injunction prohibiting speech or other activities that are constitutionally protected or otherwise protected by California Code of Civil Procedure section 527.3 or any law, or, **effective January 1, 2025**, speech or conduct protected under the National Labor Relations Act and Government Code sections 3555 through 3559.[1231] Nothing in the law may be construed as expanding, diminishing, altering, or modifying the duty of an employer to provide a safe workplace for employees and other persons.[1232]

[1225] *Kilby v. CVS Pharmacy, Inc.*, 201 Cal. Rptr. 3d 1, 5 (Cal. 2016).

[1226] 201 Cal. Rptr. 3d at 5.

[1227] 201 Cal. Rptr. 3d at 14 (internal quotation omitted).

[1228] 201 Cal. Rptr. 3d at 18.

[1229] California Wage Orders 1-13 &15, §17.

[1230] CAL. CIV. PROC. CODE § 527.8(a).

[1231] CAL. CIV. PROC. CODE § 527.8(c), as amended by S.B. 553 (Cal. 2023).

[1232] CAL. CIV. PROC. CODE § 527.8(u).

Additionally, **effective January 1, 2025**, anyone seeking a restraining order must first provide the employee for whom the restraining order is sought the ability to remain anonymous.[1233]

A *credible threat of violence* is a knowing and willful statement or course of conduct that: (1) would place a reasonable person in fear for their safety, or for the safety of their immediate family; and (2) serves no legitimate purpose.[1234] A *restraining order* is a court "order enjoining a party from harassing, intimidating, molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, [or] abusing" the employee, or from destroying the employee's personal property.[1235] Such an order can also address contact with the employee, including "telephoning, . . . making annoying telephone calls, . . . contacting, either directly or indirectly, by mail or otherwise, or coming within a specified distance of, or disturbing the peace of, the employee."[1236]

California Code of Civil Procedure section 527.8 sets forth extensive procedural detail governing applications for an order of workplace violence protection.

Gun Violence Restraining Orders. California law allows employers, co-workers, and school employees, as well as police, immediate family members, and roommates to request that a judge issue a gun violence restraining order to confiscate firearms and ammunition from people they believe pose a danger, in the near future, to themselves or others by having a firearm in their custody or control. The restraining order request may be for an ex parte, one-year, or renewed order. The court must issue or deny an ex parte order on the same day the petition is submitted, or on the next judicial business day.[1237]

3.10(f)(iii) *State Guidelines on Workplace Violence Prevention Safety Requirements*

Effective July 1, 2024, California has created the first general industry workplace violence prevention safety requirements in the United States. The law is applicable to nearly all California employers, with very few exceptions, including employers already covered by California's existing workplace violence prevention standard for healthcare, employees teleworking from a location of their own choice that is not under the employer's control, places of employment where there are fewer than 10 employees working at the place at any given time and that are not accessible to the public, and a few other small exceptions (mostly in the public sector).

Covered employers must develop and implement a workplace violence prevention plan (as part of their Injury and Illness Prevention Plans) that meets the requirements of the new Labor Code Section 6401.9 by the law's July 1, 2024 effective date.

The substantive requirements are very similar to the workplace violence prevention standard that Cal/OSHA adopted in October 2016 (effective in April 2017) applicable exclusively to employers in the healthcare industry, which also was the first of its kind in the nation. Covered employers must establish, implement, and maintain an effective workplace violence prevention plan. Requirements for such a plan include:

[1233] CAL. CIV. PROC. CODE § 527.8(e), as amended by S.B. 553 (Cal. 2023).

[1234] CAL. CIV. PROC. CODE § 527.8(b).

[1235] CAL. CIV. PROC. CODE § 527.8(b).

[1236] CAL. CIV. PROC. CODE § 527.8(b)(6).

[1237] CAL. PENAL CODE §§ 18150 – 18190.

- designating persons responsible for the plan;
- effective procedures to obtain the active involvement of employees and authorized employee representatives in developing and implementing the plan;
- methods the employer will use to coordinate the plan with employers, when applicable;
- effective procedures for the employer to accept and respond to reports of workplace violence, and to prohibit retaliation against an employee who makes such a report;
- effective procedures to communicate with employees regarding workplace violence, including how to report a violent incident, threat or other workplace violence concern; effective means to alert employees to the presence of a workplace violence emergency; and how to obtain help from staff assigned to respond and/or law enforcement;
- procedures to identify and evaluate workplace violence hazards, including scheduled periodic inspections, and to correct any identified hazards;
- procedures for post-incident response and investigation;
- procedures to review and revise the plan as needed, including with the active involvement of employees and authorized employee representatives; and
- initial training about the plan when first established and annual training.

Recordkeeping Requirements. Employers must also keep various records specified in the new law, including:

- records of workplace violence hazard identification, evaluation and correction;
- training records;
- a violent incident log for every workplace violence incident; and
- records of workplace violence incident investigation.

These records must be maintained for at least five years and produced to Cal/OSHA upon request.[1238]

3.11 Discrimination, Retaliation & Harassment

3.11(a) *Protected Classes & Other Fair Employment Practices Protections*

3.11(a)(i) *Federal FEP Protections*

The federal equal employment opportunity laws that apply to most employers include: (1) Title VII of the Civil Rights Act of 1964 ("Title VII");[1239] (2) the Americans with Disabilities Act (ADA);[1240] (3) the Age Discrimination in Employment Act (ADEA);[1241] (4) the Equal Pay Act;[1242] (5) the Genetic Information

[1238] CAL. LAB. CODE § 6401.7; S.B. 553 (Cal. 2023).

[1239] 42 U.S.C. §§ 2000e *et seq.* Title VII applies to employers with 15 or more employees. 42 U.S.C. § 2000e(b).

[1240] 42 U.S.C. §§ 12101 *et seq.* The ADA applies to employers with 15 or more employees. 42 U.S.C. § 12111(5).

[1241] 29 U.S.C. §§ 621 *et seq*. The ADEA applies to employers with 20 or more employees. 29 U.S.C. § 630.

[1242] 29 U.S.C. § 206(d). Since the Equal Pay Act is part of the FLSA, the Equal Pay Act applies to employers covered by the FLSA. *See* 29 U.S.C. § 203.

Nondiscrimination Act of 2009 (GINA);[1243] (6) the Civil Rights Acts of 1866 and 1871;[1244] and (7) the Civil Rights Act of 1991. As a result of these laws, federal law prohibits discrimination in employment on the basis of:

- race;
- color;
- national origin (includes ancestry);
- religion;
- sex (includes pregnancy, childbirth, or related medical conditions, and pursuant to the U.S. Supreme Court's decision in *Bostock v. Clayton County, Georgia*, includes sexual orientation and gender identity);[1245]
- disability (includes having a "record of" an impairment or being "regarded as" having an impairment);
- age (40); or
- genetic information.

The Equal Employment Opportunity Commission (EEOC) is the agency charged with handling claims under the antidiscrimination statutes.[1246] Employees must first exhaust their administrative remedies by filing a complaint within 180 days—unless a charge is covered by state or local antidiscrimination law, in which case the time is extended to 300 days.[1247]

3.11(a)(ii) *State FEP Protections*

The California Fair Employment and Housing Act (FEHA) prohibits employment discrimination based on an individual's membership in a wide range of protected classes:

- race;
- color;
- religious creed (including dress and grooming practices and all aspects of religious belief, observance, and practice);
- physical and mental disability and medical condition (including being regarded as disabled);
- sex, including pregnancy, childbirth, and related medical conditions;
- sexual orientation;

[1243] 42 U.S.C. §§ 2000ff *et seq*. GINA applies to employers with 15 or more employees. 42 U.S.C. § 2000ff (refers to 42 U.S.C. § 2000e(f)).

[1244] 42 U.S.C. §§ 1981, 1983.

[1245] 140 S. Ct. 1731 (2020). For a discussion of this case, see LITTLER ON DISCRIMINATION IN THE WORKPLACE: RACE, NATIONAL ORIGIN, SEX, AGE & GENETIC INFORMATION.

[1246] The EEOC's website is available at http://www.eeoc.gov/.

[1247] 29 C.F.R. § 1601.13. Note that for ADEA charges, only state laws extend the filing limit to 300 days. 29 C.F.R. § 1626.7.

- gender;
- gender identity and expression, including transgender; (each person's understanding of their gender or the perception of a person's gender identity including transgender, male, female, a combination of male and female, neither male nor female, different gender than at birth.)
- national origin; (includes discrimination on the basis of drivers' licenses provided to undocumented persons; an employer can require employee to hold or present a driver's license only if possession is required by federal or state law, or, possession of a driver's license is required by the employer or other covered entity and is otherwise permitted by law.)
- ancestry;
- marital status, including domestic partnership;
- veteran status;
- gender expression (a person's gender related appearance or behavior or perceptions of a person's gender related appearance or behavior whether or not stereotypically associated with the person's sex assigned at birth);
- age (over 40);
- genetic information;
- military and veteran status;[1248]
- reproductive health decision-making;[1249]
- **effective January 1, 2025:** status as a victim of crime or abuse;[1250] or
- **effective January 1, 2025:** time off to serve as required by law on an inquest or trial jury (provided reasonable notice provided to employer).[1251]

Additionally, under the CROWN Act, the definition of *race* under the FEHA includes traits historically associated with race, including hair texture and protective hairstyles. This includes hairstyles such as braids, locks and twists, with some exceptions for bona fide occupational qualifications.[1252]

Effective January 1, 2025, the UNRUH Civil Rights Act amends the definition of "traits associated with race" to expand beyond hair texture and protective hairstyles.[1253]

The FEHA also prohibits discrimination on the grounds that an individual is perceived to belong to one of these protected classes or is associated with someone who falls under a protected class.[1254] Additionally, the FEHA makes it an unlawful employment practice for an employer to discharge, harass, or otherwise

[1248] CAL. GOV'T CODE § 12940(a).

[1249] CAL. GOV'T CODE §§ 12920; 12921; 12926 (y).

[1250] CAL. GOV'T CODE § 12945.8.

[1251] CAL. GOV'T CODE § 12945.8.

[1252] CAL. GOV'T CODE § 12926.

[1253] CAL. CIV. CODE § 51(a)(4).

[1254] CAL. GOV'T CODE § 12926(o).

discriminate against any person because the person has opposed any practices prohibited under the FEHA or because the person has filed a complaint, testified, or assisted in any proceeding under the FEHA.[1255]

Under amended regulations promulgated by the Fair Employment and Housing Council, pre-employment inquiries regarding an applicant's availability for work on certain days and times (including scheduling) shall not be used to ascertain the applicant's religious creed, disability, or medical condition. Further, the regulations also provide that a there is a presumption of age discrimination whenever a facially neutral practice has an adverse impact on an applicant(s) or employee(s) age 40 or older, unless the practice is job-related and consistent with business necessity.[1256]

Employers with five or more full- or part-time employees are subject to the FEHA.[1257] However, employers with even one employee are prohibited from engaging in harassment on the basis of any classification protected by the FEHA.[1258] Some types of employers are exempt, including religious associations and corporations not organized for private profit.[1259]

Employee coverage is nearly universal. The only exception is that the FEHA does not apply to any individual employed by the individual's parents, spouse, or child, or to any individual employed under a special license in a nonprofit sheltered workshop or rehabilitation facility.[1260] California has also afforded FEHA protections to unpaid interns, volunteers, and persons providing services pursuant to a contract for all purposes related to the FEHA's provisions prohibiting unlawful harassment.[1261]

3.11(a)(iii) *State Enforcement Agency & Civil Enforcement Procedures*

The California state agency charged with enforcing the FEHA is the Civil Rights Department (CRD). An individual seeking to file suit against an employer for discrimination in violation of the FEHA must first exhaust their administrative remedies by filing a discrimination complaint with the CRD. If, following receipt of a complaint, the CRD fails to resolve the case or pursue an action against the employer within 150 days, it must notify the complainant in writing of their right to file a civil action under the FEHA.[1262] This notification is commonly referred to as a "right to sue" letter. The individual may also choose to waive a CRD investigation and request a right to sue letter immediately upon filing the CRD complaint.[1263]

The statute of limitations for filing a claim with the CRD is three years from the date of the violation. This deadline can be extended under the following circumstances:

1. For a period of time not to exceed 90 days following the expiration of the applicable filing deadline, if a person allegedly aggrieved by an unlawful practice first obtained knowledge of

[1255] CAL. GOV'T CODE § 12940(h).

[1256] CAL. CODE REGS. tit. 2 §§ 11016, 11063, 11075, 11076, 11078, 11079.

[1257] CAL. GOV'T CODE § 12926(d).

[1258] CAL. GOV'T CODE § 12940(j)(4).

[1259] CAL. GOV'T CODE §§ 12926(d), 12926.2.

[1260] CAL. GOV'T CODE § 12926(c).

[1261] CAL. GOV'T CODE § 12926.

[1262] CAL. GOV'T CODE § 12965(b).

[1263] CAL. CODE REGS. tit. 2, § 10005.

the facts of the alleged unlawful practice during the 90 days following the expiration of the applicable filing deadline.

2. For a period of time not to exceed one year following a rebutted presumption of the identity of the person's employer under Section 12928, in order to allow a person allegedly aggrieved by an unlawful practice to make a substitute identification of the actual employer.
3. For a period of time, not to exceed one year from the date the person aggrieved by an alleged violation of Section 51.7 of the Civil Code becomes aware of the identity of a person liable for the alleged violation, but in no case exceeding three years from the date of the alleged violation if during that period the aggrieved person is unaware of the identity of any person liable for the alleged violation.
4. For a period of time not to exceed one year from the date that a person allegedly aggrieved by an unlawful practice attains the age of majority[1264]

The three-year statute of limitations is significantly longer than the 300-day period for filing a federal charge of employment discrimination with the federal EEOC. In a case of alleged discriminatory termination of employment, the limitations period begins to run at the date of termination, not when the employee is first informed of the discharge.[1265] In addition to the state law noted above, the statute of limitations may be equitably tolled while an employee makes good faith attempts to resolve a dispute within the framework of an employer's own internal administrative remedies.[1266]

Once the individual has obtained a right to sue letter from the CRD, the individual must file a civil action within one year of receipt of the letter.[1267]

FEHA Statute of Limitations Tolling. The Fair Employment and Housing Act (FEHA) tolls the time limit for the Department to issue a right-to-sue notice during a mandatory or voluntary dispute resolution proceeding. The tolling begins on the day the Department refers a case to the dispute resolution division and ends when the mediation record is close and returned to the division that referred it. The one-year statute of limitations for an individual to file a civil action must be tolled when:

- a charge of discrimination or harassment is timely filed concurrently with the EEOC and the Civil Rights Department;
- the investigation of the charge is deferred by the Department to the EEOC; and
- a right-to-sue notice is issued to the person who filed the complaint when the charge is deferred to the EEOC[1268]

3.11(a)(iv) *Additional Discrimination Protections*

Civil Rights. The Unruh Civil Rights Act prohibits discrimination, harassment, and retaliation in all business establishments on the basis of sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, and

[1264] CAL. GOV'T CODE § 12960.

[1265] *Romano v. Rockwell Int'l, Inc.*, 59 Cal. Rptr. 2d 20 (Cal. 1996).

[1266] *McDonald v. Antelope Valley Cmty. Coll. Dist.*, 84 Cal. Rptr. 3d 734 (Cal. 2008).

[1267] CAL. GOV'T CODE § 12965(b).

[1268] CAL. GOV'T CODE § 12965.

immigration status.[1269] The protections also apply to individuals perceived to have any characteristic within the listed categories, as well as individuals associated with a person who has or is perceived to have any such characteristic.

Financial Assistance from the State. In addition to the primary FEHA protections, the California Government Code provides that no person may be unlawfully denied benefits or subjected to discrimination based upon physical or mental disability (or any other protected class as designated under the FEHA) under any program or activity administered by the state or that receives any financial assistance from the state.[1270]

HIV/AIDS. The California Health and Safety Code provides that the results of a blood test detecting whether an individual has been exposed to the HIV virus must not be used to determine insurability or suitability for employment. Under this statute, employers may neither reject or terminate individuals whose blood tests reflect they have been exposed to the HIV virus or suffer from AIDS, nor deny them coverage under an insurance policy.[1271] The Health and Safety Code also prohibits a health facility employer from discriminating or retaliating against an employee for making a complaint, or initiating or cooperating in any governmental investigation relating to the care services or conditions of the facility.[1272]

Labor Code. Various provisions in the California Labor Code prohibit discrimination in employment based on a number of public policy grounds. For example:

- section 98.6 prohibits discrimination against employees who file a claim with the Labor Commissioner;
- section 132a prohibits an employer's retaliation against an employee who files for or receives workers' compensation benefits;
- section 232 prohibits employers from banning their employees from disclosing information about the employer's working conditions and from discriminating against an employee who discloses information about the employer's working conditions; and
- section 6310 prohibits discrimination against employees who file an Occupational Safety and Health Administration complaint.

Language. The Government Code provides that it is unlawful for an employer to adopt or enforce a policy prohibiting the use of any non-English language in the workplace, except under very limited circumstances. Such a policy is illegal unless there is a justifiable business necessity for the language restriction. No policy may be implemented unless the employer gives employees adequate notice of: (1) the circumstances and the time when the language restriction must be observed; and (2) the consequences for violating the language restriction.[1273]

Lawful Off-Duty Conduct. California law prohibits an employer from discriminating against an employee for engaging in lawful off-duty conduct, including political activities. An employer may not discharge an employee or in any manner discriminate against an employee or applicant because the employee or

[1269] CAL. CIV. CODE § 51.

[1270] CAL. GOV'T CODE § 11135.

[1271] CAL. HEALTH & SAFETY CODE § 120980(f).

[1272] CAL. HEALTH & SAFETY CODE § 1278.5.

[1273] CAL. GOV'T CODE § 12951.

applicant engaged in lawful conduct during nonworking hours away from the employer's premises.[1274] At least one California appellate court has held that the legislature did not intend this law, section 98.6, to establish a public policy against terminations for conduct not otherwise protected under the Labor Code.[1275] For example, smoking is not otherwise protected under the Labor Code.

The state Labor Commissioner may hear a claim for loss of wages due to demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employer's premises.[1276] The California courts have held that this provision does not create any substantive rights for employees, but rather provides an administrative remedy for preexisting rights.[1277]

With respect to off-duty political activities, an employer cannot make, adopt, or enforce any rule, regulation, or policy:

- forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office; or
- controlling or directing, or tending to control or direct, the political activities or affiliations of employees.[1278]

Nor may an employer use the threat of discharge to coerce or influence, or attempt to coerce or influence, employees to adopt or follow, or refrain from adopting or following, any particular course of political action or political activity.[1279]

Beginning in 2024, the FEHA prohibits discrimination against an employee for use of cannabis outside of the workplace. An employer may not require information from an applicant regarding prior cannabis use nor consider information regarding prior use obtained from the applicant's criminal history unless permitted by the FEHA or other state or federal law.[1280] An employer cannot discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalize a person, if the discrimination is based on:

- the person's use of cannabis off the job and away from the workplace; or
- an employer-required drug screening test that has found the person to have non-psychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids.

However, an employer is not prohibited from discriminating in hiring, or any term or condition of employment, or otherwise penalizing a person based on scientifically valid preemployment drug screening conducted through methods that do not screen for non-psychoactive cannabis metabolites. In addition, an employer is not required to permit an employee to possess, be impaired by, or use cannabis on the job. This law does not affect an employer's rights or obligations to maintain a drug- and alcohol-free

[1274] CAL. LAB. CODE §§ 96(k), 98.6.

[1275] *Grinzi v. San Diego Hospice Corp.*, 14 Cal. Rptr. 3d 893 (Cal. Ct. App. 2004).

[1276] CAL. LAB. CODE §§ 96(k), 98.6.

[1277] *Barbee v. Household Auto Fin. Corp.*, 6 Cal. Rptr. 3d 406 (Cal. Ct. App. 2003).

[1278] CAL. LAB. CODE §§ 1101, 1102.

[1279] CAL. LAB. CODE §§ 1101, 1102.

[1280] CAL. LAB. CODE § 12954.

workplace, or any other rights or obligations of an employer specified by state or federal law or regulation. In addition, this law does not apply to:

- an employee in the building and construction trades; or
- applicants or employees hired for positions that require a federal government background investigation or security clearance.

Further, this law does not preempt state or federal laws requiring applicants or employees to be tested for controlled substances, including laws and regulations requiring applicants or employees to be tested, or the manner in which they are tested, as a condition of employment, receiving federal funding or federal licensing-related benefits, or entering into a federal contract.[1281]

Transgender Identity and Expression. California's FEHA employment sex discrimination regulations address protections for transgender employees. In addition to defining several relevant terms, including gender identity, sex stereotype, and transitioning, the regulations clarify that fringe benefits may not be conditioned on an employee's sex, gender identity, or gender expression. The regulations also contain guidelines for bathroom facilities, physical appearance standards, and gender and name records.[1282]

Local Ordinances. Finally, California employers must also be aware that many cities and counties within the state have enacted fair employment practices ordinances to prohibit discrimination, retaliation, and/or harassment against an individual on the grounds of a protected classification. Some cities' ordinances provide greater protection than the FEHA in that they cover more protected classifications.

3.11(a)(v) *Local FEP Protections*

In addition to the federal and state laws, employers with operations in the jurisdictions listed in Table 19 are subject to local fair employment practices ordinances.

Table 19. Local Fair Employment Practices Ordinances

Locality	Notes
Alameda County	Any person who regularly employs one or more persons, or any person acting as an agent of an employer, directly or indirectly, must extend antidiscrimination protections on the basis of a person's status as having AIDS or associated conditions.[1283] There is no county-level enforcement agency that handles discrimination complaints; however, an aggrieved party may file a civil action or seek an injunction for violations of the provisions.[1284]
Berkeley	Employers with 15 or more employees must extend antidiscrimination protections on the basis of a person's sexual orientation, and family or

[1281] CAL. GOV'T CODE § 12954.

[1282] CAL. CODE REGS. tit. 2, §§ 11030, 11031, 11034.

[1283] ALAMEDA CTY., CAL., CODE OF ORDINANCES §§ 6.24.020, 6.24.030 (affirmative defenses, including *bona fide* occupational qualification).

[1284] ALAMEDA CTY., CAL., CODE OF ORDINANCES § 6.24.110.

Table 19. Local Fair Employment Practices Ordinances	
Locality	**Notes**
	relationship structure.[1285] An employer must post a workplace poster covering these protections. Alternatively, the requirement can be met by adding the words "sexual orientation" to all notices required by federal or state law, and indicating on any notice that discrimination on the basis of sexual orientation is prohibited by the Berkeley Municipal Code, sections 13.28.010 through 13.28.100.[1286] Additionally, employers that employ one or more persons, or any person acting as an agent of that employer, directly or indirectly, are subject to antidiscrimination protections on the basis of a person's status as having AIDS or associated conditions.[1287] There is no city-level enforcement agency that handles antidiscrimination claims. An aggrieved person may file a civil action in any court within jurisdiction.[1288]
Concord	Any person regularly employing five or more persons, or any person acting as an agent of an employer directly or indirectly, must extend antidiscrimination protections to the same persons and classes of persons as are protected under state and federal law.[1289] An employer must post a workplace poster covering these protections.[1290] A person alleging a violation of the ordinance may file a complaint with the Concord Human Relations Commission. Alternatively, an aggrieved person may file a civil action or request for an injunction within one year of the time the complainant alleges that the unlawful practice occurred. A complaint to the Commission is not a prerequisite to the filing of an administrative complaint or a civil action in a state or federal court.[1291]
Contra Costa County	Employers with one or more employees, or any person acting as an agent of an employer, either directly or indirectly, are subject to antidiscrimination protections on the basis of AIDS and associated conditions.[1292] An aggrieved person may file a request for investigation

[1285] BERKELEY, CAL., MUN. CODE § 13.28.030; 13.22.040.

[1286] BERKELEY, CAL., MUN. CODE § 13.28.030(E).

[1287] BERKELEY, CAL., MUN. CODE §§ 13.30.030, 13.30.040 (exceptions, including *bona fide* occupational qualification).

[1288] BERKELEY, CAL., MUN. CODE §§ 13.28.090 (for sexual orientation discrimination, an aggrieved individual may also seek an injunction), 13.30.130 (for AIDS discrimination, an aggrieved individual may also seek equitable relief).

[1289] CONCORD, CAL., CODE OF ORDINANCES §§ 9.35.040, 9.35.050 (defenses, exceptions and exemptions, including religious), and 9.35.060.

[1290] CONCORD, CAL., CODE OF ORDINANCES § 9.35.180.

[1291] CONCORD, CAL., CODE OF ORDINANCES §§ 9.35.110, 9.35.150, and 9.35.160.

[1292] CONTRA COSTA CTY., CAL., CODE §§ 460.2.004, 460-2.006 (affirmative defenses, including *bona fide* occupational qualification).

Table 19. Local Fair Employment Practices Ordinances	
Locality	**Notes**
	and mediation with the Contra Costa Human Relations Commission. Alternatively, the person may file a civil action or request for an injunction. Actions must be filed within one year of the alleged discriminatory acts.[1293]
Escondido	Employers that regularly employ one or more persons, or any person acting as an agent of an employer, directly or indirectly, must extend antidiscrimination protections on the basis of AIDS and associated conditions.[1294] There is no city-level agency that enforces the antidiscrimination provisions; an aggrieved person may file a civil action or action for an injunction.[1295]
City of Los Angeles	Employers in the City of Los Angeles are subject to antidiscrimination protections on the basis of sexual orientation.[1296] There is no city-level enforcement agency; an aggrieved party may file a civil action or seek an injunction for violations of the provisions within one year of the alleged discriminatory act.[1297]
Los Angeles County	Employers in Los Angeles County are subject to antidiscrimination protections on the basis of AIDS and related conditions.[1298] There is no county-level enforcement agency that handles antidiscrimination claims; however, the Los Angeles County Dispute Resolution Program administered by the Department of Workforce Development, Aging and Community Services may be utilized to resolve disputes arising under these provisions. An aggrieved person may file a civil action or request for injunctive relief.[1299]
Long Beach	Employers must extend antidiscrimination protections on the basis of AIDS and related conditions. The ordinance does not provide a definition of *employer*.[1300]

[1293] CONTRA COSTA CTY., CAL. CODE §§ 460-2.022, 460-2.2024.

[1294] ESCONDIDO, CAL., MUN. CODE §§ 17-202, 17-207, and 17-209 (exceptions).

[1295] ESCONDIDO, CAL., MUN. CODE § 17-211.

[1296] L.A., CAL., MUN. CODE §§ 49.72 (covering sexual orientation discrimination, and exceptions, including *bona fide* occupational qualifications), 49.80 (*bona fide* religious organizations exception). The ordinance does not provide a definition of *employer*.

[1297] L.A., CAL., MUN. CODE § 49.77.

[1298] L.A. CTY., CAL., CODE OF ORDINANCES §§ 13.70.020, 13.70.030 (covering AIDS discrimination), and 13.70.110 (exceptions). The ordinance does not provide a definition of *employer*.

[1299] L.A. CTY., CAL., CODE OF ORDINANCES § 13.70.080.

[1300] LONG BEACH, CAL., MUN. CODE §§ 8.94.010, 8.94.020 (exceptions, including *bona fide* occupational qualifications), and 8.04.130 (other exceptions).

Table 19. Local Fair Employment Practices Ordinances	
Locality	**Notes**
	Additionally, employers with five or more employees are subject to antidiscrimination protections on the basis of sexual orientation.[1301] Under both ordinances, there is no city-level enforcement agency. An aggrieved person may file a civil action or request for injunctive relief within one year of an alleged discriminatory act.[1302]
Oakland	Employers that employ one or more persons must extend antidiscrimination protections on the basis of AIDS and related conditions.[1303] Employers with 15 or more employees must post a workplace poster covering these protections. Alternatively, the requirement can be met by adding a statement that discrimination on the basis of AIDS and related other conditions is prohibited by Oakland Municipal Code to all nondiscrimination notices required by federal, state, or local law.[1304] Additionally, protected classifications include: sexual orientation and gender identity or expression. This ordinance does not provide a definition of "employer."[1305] Likewise, employers with 15or more employees must post a workplace poster stating that discrimination on the basis of sexual orientation and/or gender identity is prohibited Oakland. Alternatively, this requirement can be met by adding a statement that discrimination on the basis of sexual orientation and/or gender identity or expression is prohibited by the Oakland Municipal Code to all nondiscrimination notices required by federal or state law.[1306] Under both ordinances, there is no city-level agency that enforces the antidiscrimination protections. An aggrieved person may file a civil action or request for injunctive relief.[1307]
Pasadena	Employers that regularly employing one or more persons, or any person acting directly or indirectly as an agent of an employer, must extend antidiscrimination protections on the basis of AIDS and related

[1301] LONG BEACH, CAL., MUN. CODE §§ 5.09.010, 5.09.020 (exceptions, including *bona fide* occupational qualifications), and 5.09.030 (defining *bona fide* business requirements).

[1302] LONG BEACH, CAL., MUN. CODE §§ 8.94.100 (AIDS), 8.94.110 (AIDS), and 5.09.040 (sexual orientation).

[1303] OAKLAND, CAL., MUN. CODE §§ 9.40.030, 9.40.040, and 9.40.090A (affirmative defenses, including *bona fide* occupational qualifications).

[1304] OAKLAND, CAL., MUN. CODE § 9.40.120(A)(B).

[1305] OAKLAND, CAL., MUN. CODE § 9.44.020 (exceptions, including *bona fide* occupational qualifications).

[1306] OAKLAND, CAL., MUN. CODE § 9.44.020(C).

[1307] OAKLAND, CAL., MUN. CODE §§ 9.40.140 (AIDS), 9.44.050 (sexual orientation).

Table 19. Local Fair Employment Practices Ordinances	
Locality	**Notes**
	conditions.[1308] There is no city-level enforcement agency that handles antidiscrimination claims; an aggrieved person may file a civil action or request for injunctive relief within one year of the alleged discriminatory act.[1309]
Richmond	Employers that regularly employ one or more persons, or any person acting as an agent of an employer, directing or indirectly, must extend antidiscrimination protections on the basis of AIDS or associated conditions.[1310] There is no city-level enforcement agency that handles antidiscrimination claims; an aggrieved person may file a civil action or request for injunctive relief within two years of the alleged discriminatory act.[1311]
Riverside County	Employers that regularly employ one or more persons, or any person acting as an agent of an employer, directing or indirectly, must extend antidiscrimination protections on the basis of AIDS or associated conditions.[1312] There is no county-level agency that enforces the antidiscrimination provisions; an aggrieved person may file a civil action or request for injunctive relief. No statute of limitations is given in the ordinance.[1313]
Sacramento	Employers that employ five or more employees, including the owner, and any managerial or supervisorial employees, are subject to antidiscrimination protections on the basis of sexual orientation and gender identity.[1314]An employer with 15 or more employees must post a workplace poster covering these provisions. Alternatively, this requirement can be met by adding the words "sexual orientation or gender identity" to all notices required by federal or state law, and indicating on the notice that discrimination on the basis of sexual orientation or gender identity is prohibited.[1315]

[1308] PASADENA, CAL., MUN. CODE §§ 8.82.020, 8.82.030, 8.82.080, and 8.82.100 (religious organizations and health and safety exceptions).

[1309] PASADENA, CAL., MUN. CODE § 8.82.090.

[1310] RICHMOND, CAL., CODE OF ORDINANCES §§ 9.44.020, 9.44.030 (affirmative defenses, including *bona fide* occupational qualifications).

[1311] RICHMOND, CAL., CODE OF ORDINANCES §§ 9.44.110, 9.44.120.

[1312] RIVERSIDE CTY., CAL., CODE OF ORDINANCES §§ 9.08.030, 9.08.070 (exceptions, including *bona fide* occupational qualifications), and 9.08.100 (other exceptions).

[1313] RIVERSIDE CTY., CAL., CODE OF ORDINANCES § 9.08.120.

[1314] SACRAMENTO, CAL., CITY CODE §§ 9.20.020 (exceptions, including *bona fide* occupational qualifications), 9.20.080 (religious exemption).

[1315] SACRAMENTO, CAL., CITY CODE § 9.20.020(C)(1)(2).

Table 19. Local Fair Employment Practices Ordinances	
Locality	**Notes**
	Additionally, employers must extend antidiscrimination protections on the basis of AIDS and related conditions. This ordinance does not provide a definition of employer.[1316] There is no city-level agency that enforces these ordinances. An aggrieved person may file a civil action or request for injunctive relief within one year (AIDS) or one year and 6 months (sexual orientation) of the alleged unlawful practice.[1317]
Salinas	Protected classifications include: sexual orientation; gender identity; and gender expression.[1318] A person alleging a violation of the ordinance may file a civil action or request an injunction in any court of competent jurisdiction within two years that the unlawful practice occurred.[1319] Employers are required to provide notice to employees by posting a workplace poster.[1320]
Santa Barbara County	Employers that regularly employ one or more persons, or any person acting as an agent of an employer, directly or indirectly, must extend antidiscrimination protections on the basis of AIDS or HIV infection.[1321] There is no county-level enforcement agency that handles antidiscrimination complaints; an aggrieved person may file a civil action or request for injunctive relief. No statute of limitations is given in the ordinance.[1322]
Santa Clara	Protected classifications include: age (18 years or older); race; color; creed; religion; national origin; ancestry; physical or mental disability; marital status; sex; gender; gender identity; sexual orientation; and medical condition, including AIDS, AIDS related conditions, and conditions delineated in California Government Code section 12926(i). The antidiscrimination protections apply to any person who, for compensation, regularly employs five or more individuals, not including the employer's parents, spouse, or children, for each working day in any

[1316] SACRAMENTO, CAL., CITY CODE §§ 9.20.030, 9.20.040, 9.20.110 (general public health and safety exception), and 9.20.120 (religious exemption).

[1317] SACRAMENTO, CAL., CITY CODE §§ 9.20.090 and 9.20.110 (sexual orientation), 9.24.140 (AIDS).

[1318] SALINAS, CAL., CODE OF ORDINANCES §§ 5-14.02, 5-14.03, 5-14.04, 5.14-05, and 5-14.12.

[1319] SALINAS, CAL., CODE OF ORDINANCES § 5-14.15.

[1320] SALINAS, CAL., CODE OF ORDINANCES § 5-14.10.

[1321] SANTA BARBARA CTY., CAL., CODE OF ORDINANCES §§ 18-63, 18-68 (exceptions, including *bona fide* occupational qualifications), and 18-71 (additional exceptions).

[1322] SANTA BARBARA CTY., CAL., CODE OF ORDINANCES § 18-73.

Table 19. Local Fair Employment Practices Ordinances	
Locality	**Notes**
	20 or more calendar weeks in the current or previous calendar year.[1323] There is no city-level agency that enforces the provisions; an aggrieved person may file a civil action within one year of the alleged discriminatory act.[1324]
San Diego	Any person that regularly employs five or more persons must extend antidiscrimination protections on the basis of sexual orientation and gender identity.[1325] Additionally, any person who regularly employs one or more persons, or any person acting directly or indirectly as an agent of any employer, are subject to antidiscrimination protections on the basis of AIDS and related conditions.[1326] Under both ordinances, there is no city-level enforcement agency. An aggrieved person may file a civil action or request for injunctive relief. Actions under the sexual orientation provisions must be filed within one year of the alleged discriminatory acts. No statute of limitations is given in the ordinance regarding a complaint on the basis of AIDS status discrimination.[1327]
San Francisco	All employers with a business tax registration from the City of San Francisco that employ more than five employees including the owner and any management and supervisorial employees must extend antidiscrimination protections on the basis of: race; color; ancestry; national origin; place of birth; sex; age; religion; creed; disability; sexual orientation; gender identity; weight; and height.[1328] This ordinance, known as "Article 33," covers employees, independent contractors, and applicants for employment.[1329] An employer must post a workplace poster covering these protections.[1330]

[1323] SANTA CLARA, CAL., CITY CODE §§ 9.55.020, 9.55.030, and 9.55.080 (exceptions, including for reasonable business purposes, certain promotional activities, and *bona fide* requirements).

[1324] SANTA CLARA, CAL., CITY CODE § 9.55.100.

[1325] SAN DIEGO, CAL., MUN. CODE §§ 52.9602, 52.9603 (exceptions, including *bona fide* occupational qualifications; employer may still establish and enforce conduct and dress codes), and 52.9615 (religious exemption).

[1326] SAN DIEGO, CAL., MUN. CODE §§ 52.9502, 52.9504 (exceptions, including *bona fide* occupational qualifications), and 52.9509 (health and safety exception).

[1327] SAN DIEGO, CAL., MUN. CODE §§ 52.9511 (AIDS), 52.9609, and 52.9611 (sexual orientation).

[1328] S.F., CAL., POLICE CODE § 3303 (exceptions, including *bona fide* occupational qualifications).

[1329] S.F., CAL., POLICE CODE § 3303.

[1330] S.F., CAL., POLICE CODE § 3303.

Table 19. Local Fair Employment Practices Ordinances	
Locality	**Notes**
	Additionally, employers are subject to antidiscrimination protections on the basis of AIDS or associated conditions, and any disease or affliction that cannot be transmitted by casual contact. These ordinances do not provide definitions of *employer*.[1331] Any person who believes that they have been discriminated against in violation of the Article 33 provisions or the provisions barring discrimination on the basis of AIDS may file a complaint with the San Francisco Human Rights Commission. Additionally, an aggrieved person may file a civil action or request for equitable relief. A complaint to the Human Rights Commission is not a prerequisite to the filing of a civil action. The pendency of a complaint before the Human Rights Commission does not bar any civil action, but a final judgment in any civil action involving the same parties and claims bars any further proceedings by the Human Rights Commission. Under Article 33, judicial actions or requests to the Human Rights Commission must be filed within one year of the alleged discriminatory acts. Under the AIDS and other diseases and affiliations discrimination provisions, judicial actions or requests to the Human Rights Commission must be filed within two years of the alleged discriminatory acts.[1332]
San Jose	Persons that employ one or more persons, or any person acting directly or indirectly as an agent of an employer, are subject to antidiscrimination protections on the basis of HIV, AIDS, and related conditions.[1333] There is no city-level enforcement agency; an aggrieved person may file a civil action or request for injunctive relief within two years of the alleged discriminatory act.[1334]
San Mateo	Employers must extend antidiscrimination protection on the basis of AIDS or associated conditions. The ordinance does not provide a definition of employer.[1335] An aggrieved individual may file an allegation with the County of San Mateo Department of Health Services. No statute of limitation is given in the ordinance.[1336]

[1331] S.F., CAL., POLICE CODE §§ 3803 (AIDS discrimination; exceptions, including *bona fide* occupational qualifications), 3813 (AIDS), and 3852 (other disease discrimination; exceptions, including *bona fide* occupational qualifications).

[1332] S.F., CAL., POLICE CODE §§ 3307 and 3309 (Article 33), 3811 and 3812 (AIDS), 3856 and 3857 (diseases and afflictions).

[1333] SAN JOSE, CAL., CODE OF ORDINANCES §§ 10.48.020, 10.48.030 (exceptions, including *bona fide* occupational qualifications).

[1334] SAN JOSE, CAL., CODE OF ORDINANCES §§ 10.48.110, 10.48.120.

[1335] SAN MATEO CTY., CAL., ORDINANCE CODE §§ 3.104.020 (exceptions, including *bona fide* occupational qualifications), 3.104.090.

[1336] SAN MATEO CTY., CAL., ORDINANCE CODE § 3.104.080.

Table 19. Local Fair Employment Practices Ordinances	
Locality	**Notes**
Sunnyvale	Protected classifications include: AIDS and related conditions. The antidiscrimination protections apply to employers that regularly employer one or more persons, or any person acting directly or indirectly as an agent of an employer.[1337]

3.11(b) *Equal Pay Protections*

3.11(b)(i) *Federal Guidelines on Equal Pay Protections*

The Equal Pay Act requires employers to pay male and female employees equal wages for substantially equal jobs. Specifically, the law prohibits employers covered under the federal Fair Labor Standards Act (FLSA) from discriminating between employees within the same establishment on the basis of sex by paying wages to employees at a rate less than the rate at which the employer pays wages to employees of the opposite sex for equal work on jobs "the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."[1338] The prohibition does not apply to payments made under: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a differential based on a factor other than sex.

An employee alleging a violation of the Equal Pay Act must first exhaust administrative remedies by filing a complaint with the EEOC within 180 days of the alleged unlawful employment practice. Under the federal Lilly Ledbetter Fair Pay Act of 2009, for purposes of the statute of limitations for a claim arising under the Equal Pay Act, an unlawful employment practice occurs with respect to discrimination in compensation when: (1) a discriminatory compensation decision or other practice is adopted; (2) an individual becomes subject to such a decision or practice; or (3) an individual is affected by application of such decision or practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.[1339]

3.11(b)(ii) *State Guidelines on Equal Pay Protections*

Beyond the FEHA, California has an equal pay law. An employer cannot pay any of its employees at a wage rate less than that paid to employees of the opposite sex, or another race or ethnicity, for substantially similar work, unless the employer demonstrates reasons for the wage differential.[1340] Prior salary cannot, by itself, justify any disparity in compensation. Acceptable factors for a wage differential include:

- a seniority system;
- a merit system;
- a system that measures earnings by quantity or quality of production; and/or
- a *bona fide* factor other than sex, such as education, training, or experience.

[1337] SUNNYVALE, CAL., MUN. CODE §§ 9.76.020, 9.76.030 (exceptions, including *bona fide* occupational qualifications).

[1338] 29 U.S.C. § 206(d)(1).

[1339] 42 U.S.C. § 2000e-5.

[1340] CAL. LAB. CODE § 1197.5. California's equal pay law does not cover individuals employed as outside salespeople.

The final rationale applies only if the employer can show that the *bona fide* factor: (1) is not based on or derived from a sex-based differential in compensation; (2) is job related with respect to the position in question; and (3) is consistent with a business necessity.[1341]

Substantially similar work must be viewed as a composite of skill, effort, and responsibility, where performed under similar working conditions. *Business necessity* means an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve. The employer cannot rely on the business necessity defense, however, if the employee is able to demonstrate that an alternative business practice exists that would serve the same business purpose without producing the wage differential.[1342]

Thus, an employer must meet a high standard to demonstrate that any pay difference is tied to an absolute business necessity. The employer also must demonstrate that its reliance on any or all of the above factors is reasonable, and that one or more of these factors accounts entirely for any wage differential.[1343] Merely pointing to one factor or prior salary as a partial explanation is not sufficient.[1344] As a result, an employer's burden in defending against an equal pay claim under California law is much greater than the burden in defending a claim under the federal Equal Pay Act.[1345]

In addition, an applicant's or current employee's prior salary does not justify any disparity in compensation. However, this provision cannot be interpreted to mean that an employer may not make a compensation decision based on a current employee's existing salary, so long as any wage differential resulting from that compensation decision is justified by one or more of the factors identified above.[1346]

Further, as discussed in **3.7(b)(v)**, the equal pay law prohibits employers from preventing employees from disclosing their own wages, discussing the wages of others, or inquiring as to other employees' wages. Employers are also forbidden from discriminating or retaliating against any employee for invoking the employee's own rights under law, or assisting others in invoking their rights.

All employers must provide a pay scale for a current employee's current job position upon the employee's request. In addition, employers of 15 or more employees must include the pay scale for a position in any job posting. If the employer uses a third party to announce and publish job postings, the employer must provide the pay scale to the third party and the third party must include the pay scale in the job posting. *Pay scale* means the salary or hourly wage range that the employer reasonably expects to pay for the position.[1347]

An employee alleging a violation of California's equal pay law may file an administrative complaint with the California Division of Labor Standards Enforcement or may elect to file a civil action within two years

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[1341] CAL. LAB. CODE §§ 1197.5(a)(1), 1199.5.

[1342] CAL. LAB. CODE § 1197.5(a)(1)(D).

[1343] CAL. LAB. CODE § 1197.5(a)(2), (3).

[1344] CAL. LAB. CODE § 1197.5(a)(3).

[1345] *See* 29 U.S.C. § 206, which permits an employer to rebut an allegation of discrimination in pay by showing that some other factor or reason resulted in the pay differential.

[1346] CAL. LAB. CODE § 1197.5(a)(4), (b)(4).

[1347] CAL. LAB. CODE § 432.3.

of the alleged violation, or within three years if alleging a willful violation.[1348] An employee is not required to exhaust administrative remedies before filing suit. Employees who can prove they were discharged, or discriminated or retaliated against in violation of the law are entitled to seek reinstatement, recover lost wages and benefits, and obtain equitable relief.[1349] An individual alleging a violation of the pay scale requirements may file a complaint with the Labor Commissioner within one year of the date the individual learned of the alleged violation. Upon finding that an employer has violated the pay scale requirements, the Labor Commissioner may order the employer to pay a civil penalty of no less than $100 and no more than $10,000 per violation.[1350]

Reporting Employee Compensation Data

California employers with 100 or more employees must file an annual pay data report with the California Civil Rights Department that discloses certain pay data according to race, ethnicity, and gender. The report must show data within each of the following job categories:

- executive- or senior-level officials and managers;
- first- or mid-level officials and managers;
- professionals;
- technicians;
- sales workers;
- administrative support workers;
- craft workers;
- operatives;
- laborers and helpers; and
- service workers.[1351]

Employers must submit the following information in the annual pay data report:

- the number of employees by race, ethnicity, and gender in the above 10 categories;
- within each of the above job categories, for each combination of race, ethnicity, and gender, the mean and median hourly rate (using W-2s);
- the number of employees by race, ethnicity, and gender whose annual earnings fall within each of the pay bands used by the U.S. Bureau of Labor Statistics in the Occupational Employment Statistics Survey (also using W-2s); and
- the total number of hours worked by each employee counted in each pay band during the reporting year.

[1348] CAL. LAB. CODE § 1197.5.

[1349] CAL. LAB. CODE § 1197.5(k).

[1350] CAL. LAB. CODE § 432.3.

[1351] CAL. GOV'T CODE § 12999(b)(1).

For covered employers with multiple establishments, there must be a separate report with the above pay data to cover each establishment.[1352]

Private employers with 100 or more employees hired through labor contractors in the prior calendar year must submit a separate pay data report covering labor contractors. A *labor contractor* is "an individual or entity that supplies, either with or without a contract, a client employer with workers to perform labor within the client employer's usual course of business."[1353] Covered employers must disclose the ownership names of all labor contractors used to supply workers.

Reports are due annually on the second Wednesday in May.[1354] Employers must upload their data files using the California Pay Data Reporting Portal.[1355]

Failure to file the report can lead to civil penalties of $100 per employee for the first offense and $200 per employee for subsequent violations. Additionally, the law authorizes the California Civil Rights Department to recover the costs of compelling an employer to comply with the reporting requirements. The law also authorizes the Department to request the Employment Development Department to provide it with the names and addresses of all businesses with 100 or more employees to ensure each complies with the report filing requirements. This list, while meant for auditing purposes, is a public record.[1356]

3.11(c) *Pregnancy Accommodation*

3.11(c)(i) *Federal Guidelines on Pregnancy Accommodation*

As discussed in **3.9(c)(i)**, the federal Pregnancy Discrimination Act (PDA), which amended Title VII, the Family and Medical Leave Act (FMLA), and the Americans with Disabilities Act (ADA) may be implicated in determining the extent to which an employer is required to accommodate an employee's pregnancy, childbirth, or related medical conditions.

Additionally, the Pregnant Workers Fairness Act (PWFA) makes it an unlawful employment practice for an employer of 15 or more employees to:

- fail or refuse to make reasonable accommodations for the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on its business operations;
- require a qualified employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than any reasonable accommodation arrived at through the interactive process;
- deny employment opportunities to a qualified employee, if the denial is based on the employer's need to make reasonable accommodations for the qualified employee;

[1352] CAL. GOV'T CODE § 12999(b)(2).

[1353] CAL. GOV'T CODE § 12999(a)(2), (k)(2).

[1354] CAL. GOV'T CODE § 12999(a)(2).

[1355] The reporting portal is available at https://pdr.calcivilrights.ca.gov/s/.

[1356] CAL. GOV'T CODE § 12999(f), (l).

- require a qualified employee to take leave, whether paid or unpaid, if another reasonable accommodation can be provided; or
- take adverse action related to the terms, conditions, or privileges of employment against a qualified employee because the employee requested or used a reasonable accommodation.[1357]

A *reasonable accommodation* is any change or adjustment to a job, work environment, or the way things are usually done that would allow an individual with a disability to apply for a job, perform job functions, or enjoy equal access to benefits available to other employees. Reasonable accommodation includes:

- modifications to the job application process that allow a qualified applicant with a known limitation under the PWFA to be considered for the position;
- modifications to the work environment, or to the circumstances under which the position is customarily performed;
- modifications that enable an employee to enjoy equal benefits and privileges of employment as are enjoyed by other similarly situated employees without known limitations; or
- temporary suspension of an employee's essential job function(s).[1358]

The PWFA also provides for reasonable accommodations related to lactation, as described in **3.4(a)(iii)**.

An employee seeking a reasonable accommodation must request an accommodation.[1359] To request a reasonable accommodation, the employee or the employee's representative need only communicate to the employer that the employee needs an adjustment or change at work due to their limitation resulting from a physical or mental condition related to pregnancy, childbirth, or related medical conditions. The employee must also participate in a timely, good faith interactive process with the employer to determine an effective reasonable accommodation.[1360] An employee is not required to accept an accommodation. However, if the employee rejects a reasonable accommodation, and, as a result of that rejection, cannot perform (or apply to perform) an essential function of the position, the employee will not be considered "qualified."[1361]

An employer is not required to seek documentation from an employee to support the employee's request for accommodation but may do so when it is reasonable under the circumstances for the employer to determine whether the employee has a limitation within the meaning of the PWFA and needs an adjustment or change at work due to the limitation.

Reasonable accommodation is not required if providing the accommodation would impose an undue hardship on the employer's business operations. An *undue hardship* is an action that fundamentally alters the nature or operation of the business or is unduly costly, extensive, substantial, or disruptive. When

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[1357] 42 U.S.C. § 2000gg-1. The regulations provide definitions of *pregnancy*, *childbirth*, and *related medical conditions*. 29 C.F.R. § 1636.3.

[1358] 29 C.F.R. § 1636.3.

[1359] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1636.3.

[1360] 29 C.F.R. § 1636.3.

[1361] 29 C.F.R. § 1636.4.

determining whether an accommodation would impose an undue hardship, the following factors are considered:

- the nature and net cost of the accommodation;
- the overall financial resources of the employer;
- the number of employees employed by the employer;
- the number, type, and location of the employer's facilities; and
- the employer's operations, including:
  - the composition, structure, and functions of the workforce; and
  - the geographic separateness and administrative or fiscal relationship of the facility where the accommodation will be provided.[1362]

The following modifications do not impose an undue hardship under the PWFA when they are requested as workplace accommodations by a pregnant employee:

- allowing an employee to carry or keep water near and drink, as needed;
- allowing an employee to take additional restroom breaks, as needed;
- allowing an employee whose work requires standing to sit and whose work requires sitting to stand, as needed; and
- allowing an employee to take breaks to eat and drink, as needed.[1363]

The PWFA expressly states that it does not limit or preempt the effectiveness of state-level pregnancy accommodation laws. State pregnancy accommodation laws are often specific in terms of outlining an employer's obligations and listing reasonable accommodations that an employer should consider if they do not cause an undue hardship on the employer's business.

Where a state law focuses primarily on providing job-protected leave for pregnancy or childbirth—as opposed to a pregnancy accommodation—it is discussed in **3.9(c)(ii)**. For more information on these topics, see **LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES**.

3.11(c)(ii) *State Guidelines on Pregnancy Accommodation*

As discussed in **3.9(c)(ii)**, the FEHA requires employers of five or more employees to provide certain protections to an employee because of the employee's pregnancy, childbirth, or related medical condition. In addition to the leave requirements and other protections, covered employers must also provide reasonable accommodations to an employee if the employee requests an accommodation on the advice of their health care provider.[1364] An employer must engage in a good faith interactive process to identify and implement the employee's request for reasonable accommodation.[1365]

[1362] 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1630.2(p).

[1363] 29 C.F.R. § 1636.3.

[1364] CAL. GOV'T CODE § 12945(a)(3).

[1365] CAL. CODE REGS. tit. 2, §§ 11040(a), 11050(a).

Reasonable accommodation of an employee affected by pregnancy means any change in the work environment or in the way a job is customarily done that is effective in enabling an employee to perform the essential functions of a job. Reasonable accommodations may include:

- modifying work practices or policies;
- modifying work duties;
- modifying work schedules to permit earlier or later hours, or to permit more frequent breaks (*e.g.*, to use the restroom);
- providing furniture (*e.g.*, stools or chairs) or acquiring or modifying equipment or devices;
- providing lactation breaks;
- transfer to a less strenuous or hazardous position or to less strenuous or hazardous duties;
- providing intermittent leave or leave on a reduced work schedule because of pregnancy (in such cases, the employer may require the employee to transfer temporarily to an available alternative position that meets the needs of the employee); or
- providing pregnancy disability leave of up to four months, if the employee is disabled by pregnancy.[1366]

Affected by pregnancy means that because of pregnancy, childbirth, or a related medical condition, it is medically advisable for an employee to transfer or otherwise to be reasonably accommodated by the employer. *Disabled by pregnancy* means that if, in the opinion of the employee's health care provider, the employee is unable because of pregnancy to perform any one or more of the essential functions of the job or to perform any of these functions without undue risk to the employee, to the pregnancy's successful completion, or to other persons.[1367]

A covered employer who has a policy, practice, or collective bargaining agreement requiring or authorizing the transfer of temporarily disabled employees to less strenuous or hazardous positions for the duration of the disability must also transfer a pregnant employee who so requests. Further, covered employers must temporarily transfer a pregnant employee to a less strenuous or hazardous position for the duration of the pregnancy if the employee so requests, with the advice of their physician, if the transfer would be a reasonable accommodation. However, the employer is not required to create additional employment that the employer would not otherwise have created, or to discharge any employee, transfer any employee with more seniority, or promote any employee who is not qualified to perform the job.

There is no eligibility requirement, such as minimum hours worked or length of service, before an employee affected or disabled by pregnancy is eligible for reasonable accommodation, transfer, or disability leave.[1368] *Permissible defenses* to an employer's refusal to provide a reasonable accommodation include bona fide occupational qualification, business necessity or where the practice is otherwise required by law.[1369]

[1366] CAL. GOV'T CODE § 12945(a); CAL. CODE REGS. tit. 2, §§ 11035, 11040.

[1367] CAL. CODE REGS. tit. 2, § 11035(a), (f).

[1368] CAL. CODE REGS. tit. 2, § 11037.

[1369] CAL. CODE REGS. tit. 2, § 11039(b).

The sections on required notice, medical certification, fitness for duty, and antiretaliation provisions discussed in 3.9(c)(ii) apply to requests for reasonable accommodation.

3.11(d) *Harassment Prevention Training & Education Requirements*

3.11(d)(i) *Federal Guidelines on Antiharassment Training*

While not expressly mandated by federal statute or regulation, training on equal employment opportunity topics—*i.e.*, discrimination, harassment, and retaliation—has become *de facto* mandatory for employers.[1370] Multiple decisions of the U.S. Supreme Court[1371] and subsequent lower court decisions have made clear that an employer that does not conduct effective training: (1) will be unable to assert the affirmative defense that it exercised reasonable care to prevent and correct harassment; and (2) will subject itself to the risk of punitive damages. EEOC guidance on employer liability reinforces the important role that training plays in establishing a legal defense to harassment and discrimination claims.[1372] Training for all employees, not just managerial and supervisory employees, also demonstrates an employer's "good faith efforts" to prevent harassment. For more information on harassment claims and employee training, see LITTLER ON HARASSMENT IN THE WORKPLACE and LITTLER ON EMPLOYEE TRAINING.

3.11(d)(ii) *State Guidelines on Antiharassment Training*

As summarized below, California requires all employers to take steps to prevent discrimination and harassment in the workplace.

Mandatory Training for Supervisory Employees. California is one of a handful of states that requires mandatory harassment prevention training. Under the FEHA, employers of five or more employees are obligated to provide:

- at least two hours of classroom or other effective interactive training and education regarding sexual harassment to all supervisory employees; and
- at least one hour of classroom or other effective interactive training and education regarding sexual harassment to all nonsupervisory employees in California within six months of their assumption of a position.

Each employee must thereafter receive training and education once every two years.[1373]

Supervisory employee "means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action" if the individual's exercise of that authority is not simply routine or clerical "but requires the use of independent

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[1370] Note that the Notification and Federal Employee Anti-Discrimination and Retaliation ("No FEAR") Act mandates training of federal agency employees.

[1371] *Burlington Industries, Inc. v. Ellerth*, 524U.S. 742(1998); *Faragher v. City of Boca Raton*, 524U.S. 775(1998); *see also Kolstad v. American Dental Assoc.*, 527U.S. 526(1999).

[1372] EEOC, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, June 18, 1999, *available at* http://www.eeoc.gov/policy/docs/harassment.html; *see also* EEOC, *Select Task Force on the Study of Harassment in the Workplace: Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (June 2016), *available at* https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm.

[1373] CAL. GOV'T CODE § 12950.1(a).

judgment."[1374] A *new supervisor* is an employee hired or promoted to a supervisory position after the date the employer last provided sexual harassment prevention training.[1375]

For the purpose of determining employer coverage, full-time, part-time, and temporary employees—as well as contractors (those providing work under a contract for each working day in 20 consecutive weeks in the current calendar year or preceding calendar year)—must be counted. There is no requirement that the five employees or contractors work at the same location or all reside in California.[1376]

For seasonal and temporary employees, or any employee that is hired to work for less than six months, an employer must provide training within 30 calendar days after the hire date or within 100 hours worked, whichever occurs first. In the case of a temporary employee employed by a temporary services employer to perform services for clients, the temporary services employer must provide the training, not the client.[1377] Sexual harassment prevention training for migrant and seasonal agricultural workers, as defined in the federal Migrant and Seasonal Agricultural Worker Protection Act, must be consistent with training for nonsupervisory employees pursuant to Labor Code section 1684(a)(8).[1378]

The training and education required by this law must include information and practical guidance regarding the federal and state statutory provisions concerning the prohibition against and the prevention and correction of sexual harassment. It must also address the remedies available to victims of sexual harassment in employment. The training and education must include practical examples aimed at instructing supervisors in the prevention of harassment and must be presented by trainers or educators with knowledge and expertise in the prevention of harassment. The required training and education program must also contain a component on harassment based on gender identity, gender expression, and sexual orientation. The program must include practical examples of harassment based on gender identity, gender expression, and sexual orientation, and must be presented by trainers or educators with knowledge and expertise in those areas.[1379]

The FEHA administrative regulations establish extensive requirements for the content of the training, the qualifications of the trainer, the level of interactivity, and the manner in which length of training is measured. Employers are required to track employee compliance by keeping records of any harassment training, and the regulations include specific requirements for the contents of the employer's training records.[1380]

Covered employers are also required to include prevention of abusive conduct as a component of the two-hour minimum required harassment training. Supervisors must receive ongoing abusive conduct prevention training every two years.[1381] The FEHA regulations set forth extensive and specific requirements for the content of the abusive conduct prevention training component. While there is not

[1374] CAL. GOV'T CODE § 12926(t).

[1375] CAL. CODE REGS. tit. 2, § 11024(a)(7).

[1376] CAL. CODE REGS. tit. 2, § 11024(a)(5).

[1377] CAL. GOV'T CODE § 12950.1(h)(1).

[1378] CAL. GOV'T CODE § 12950.1(h)(2).

[1379] CAL. GOV'T CODE § 12950.1(c).

[1380] CAL. CODE REGS. tit. 2, § 11024(b), (c).

[1381] CAL. GOV'T CODE § 12950.1(b).

a specific amount of time or ratio of the training that needs to be dedicated to the prevention of abusive conduct, it should be covered in a meaningful manner.[1382]

The Civil Rights Department will develop and publish separate online training courses for supervisory and nonsupervisory employees. An employer may develop its own training module or may direct employees to view the CRD online training courses, and this will comply with and satisfy the employer's obligations as set forth in sections 12950 and 12950.1.[1383]

Optional Bystander Intervention Training. An employer may provide bystander intervention training that includes information and practical guidance on how to enable bystanders to recognize potentially problematic behaviors and to motivate bystanders to take action when they observe problematic behaviors. The training and education may include exercises to provide bystanders with the skills and confidence to intervene as appropriate and to provide bystanders with resources they can call upon that support their intervention.[1384]

Harassment Prevention Education for All Employees. In addition to the mandatory training and education requirements, the FEHA requires *all employers* to take "reasonable steps to prevent discrimination and harassment from occurring."[1385] Employers must ensure a workplace free of sexual harassment by:

1. posting the CRD's workplace discrimination and harassment poster in a prominent and accessible location in the workplace;[1386]
2. posting a poster developed by the CRD regarding transgender rights in a prominent and accessible location in the workplace;[1387]
3. distributing a copy of the CRD-185 brochure on sexual harassment to all employees;[1388]
4. and developing and implementing a written harassment, discrimination, and retaliation prevention policy.[1389]

The FEHA regulations set forth extensive requirements for the content of the written prevention policy.[1390] A claim that mandated information did not reach a particular individual or individuals does not, in and of itself, result in the liability of any employer to any present or former employee or applicant in a sexual harassment action. Conversely, an employer's compliance with these requirements does not insulate the employer from liability from claims asserted by any current or former employee or applicant.[1391]

[1382] CAL. CODE REGS. tit. 2, § 11024(c)(2)(M).

[1383] CAL. GOV'T CODE § 12950.1(j), (k).

[1384] CAL. GOV'T CODE § 12950.2.

[1385] CAL. GOV'T CODE § 12940(k); CAL. CODE REGS. tit. 2, § 11023(a).

[1386] The poster is available from the CRD at https://hrnt.jhu.edu/policies/Posters/California/ca%20disc.pdf.

[1387] CAL. GOV'T CODE § 12950(a)(2).

[1388] The CRD-185 brochure is available at https://calcivilrights.ca.gov/posters/.

[1389] CAL. GOV'T CODE § 12950(b); CAL. CODE REGS. tit. 2, § 11023(b).

[1390] *See* CAL. CODE REGS. tit. 2, § 11023(b), (c).

[1391] CAL. GOV'T CODE § 12950(d).

Employers must disseminate the harassment, discrimination, and retaliation prevention policy using one or more of the following methods:

- printing and providing a copy to all employees with an acknowledgment form for the employee to sign and return;
- sending the policy via email with an acknowledgment return form;
- posting current versions of the policies on a company intranet with a tracking system ensuring all employees have read and acknowledged receipt of the policies;
- discussing policies upon hire and/or during a new hire orientation session; and/or
- any other way that ensures employees receive and understand the policies.[1392]

Any employer whose workforce at any facility or establishment contains 10% or more of individuals who speak a language other than English as their spoken language must translate the policy into every language that is spoken by at least 10% of the workforce.[1393]

Violation of these requirements does not afford a stand-alone private right of action. For an employee to establish an actionable claim under this law, the employee must also plead and prevail on an underlying claim of discrimination, harassment, or retaliation.[1394]

Mandatory Training for Janitorial Workers. In addition to the generally applicable requirements above, the Property Service Workers Protection Act requires covered employers to provide in-person sexual harassment prevention training to employees every two years. A covered employer is an entity that employs one or more covered workers and that enters into contracts, subcontracts, or franchise arrangements to provide janitorial services. A covered worker means a janitor, including any individual predominantly working, whether as an employee, independent contractor, or a franchisee, as a janitor. The Division of Labor Standards Enforcement will develop and publish the training program standards.[1395]

3.12 Miscellaneous Provisions

3.12(a) *Whistleblower Claims*

3.12(a)(i) *Federal Guidelines on Whistleblowing*

Protections for whistleblowers can be found in dozens of federal statutes. The federal Occupational Safety and Health Administration ("Fed-OSHA") administers over 20 whistleblower laws, many of which have little or nothing to do with safety or health. Although the framework for many of the Fed-OSHA-administered statutes is similar (*e.g.*, several of them follow the regulations promulgated under the Wendell H. Ford Aviation Investment and Reform Act (AIR21)), each statute has its own idiosyncrasies, including who is covered, timeliness of the complaint, standard of proof regarding nexus of protected activity, appeal or objection rights, and remedies available. For more information on whistleblowing protections, see LITTLER ON WHISTLEBLOWING & RETALIATION.

[1392] CAL. CODE REGS. tit. 2, § 11023(c).

[1393] CAL. CODE REGS. tit. 2, § 11023(d).

[1394] CAL. CODE REGS. tit. 2, § 11023(a)(2).

[1395] CAL. LAB. CODE §§ 1420, 1429.5.

3.12(a)(ii) *State Guidelines on Whistleblowing*

The California Labor Code prohibits an employer, or any person acting on the employer's behalf, from retaliating against an employee who: (1) reports a violation of a federal, state, or local rule; (2) refuses to participate in an activity that would result in such a violation or noncompliance with a state or federal rule or regulation; or (3) exercised these rights in former employment.[1396]

The protection against retaliation covers an employee's disclosure to a person with authority over the employee, or disclosure to another employee who has authority to investigate, discover, or correct the violation or noncompliance. It also protects employees who provide information to, or testify before, any public body conducting an investigation, hearing, or inquiry.[1397] Moreover, the whistleblower protection applies to an employee regardless of whether disclosing information is part of the employee's job duties. Notably, the law also prohibits an employer or a person acting on behalf of the employer from retaliating against an employee because the employee is a family member of a person who has, or is perceived to have, engaged in protected conduct under the statute.[1398]

To prevail on a whistleblower claim of discrimination, the employee must demonstrate that the employer took adverse action against the employee in retaliation for making a protected disclosure. Once an employee demonstrates that protected activity was a contributing factor in the alleged prohibited action against the employee, the employer may establish an affirmative defense by showing that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in protected activities.[1399] The employer must satisfy the "clear and convincing" burden of proof on this defense, which is higher than the usual "preponderance of the evidence" standard.

3.12(b) *Labor Laws*

3.12(b)(i) *Federal Labor Laws*

Labor law refers to the body of law governing employer relations with unions. The National Labor Relations Act (NLRA)[1400] and the Railway Labor Act (RLA)[1401] are the two main federal laws governing employer relations with unions in the private sector. The NLRA regulates labor relations for virtually all private-sector employers and employees, other than rail and air carriers and certain enterprises owned or controlled by such carriers, which are covered by the RLA. The NLRA's main purpose is to: (1) protect employees' right to engage in or refrain from *concerted activity* (*i.e.*, group activities attempting to improve working conditions) through representation by labor unions; and (2) regulate the collective bargaining process by which employers and unions negotiate the terms and conditions of union members' employment. The National Labor Relations Board (NLRB or "Board") enforces the NLRA and is responsible for conducting union elections and enforcing the NLRA's prohibitions against "unfair" conduct by employers and unions (referred to as *unfair labor practices*). For more information on union organizing and collective bargaining rights under the NLRA, see LITTLER ON UNION ORGANIZING and LITTLER ON COLLECTIVE BARGAINING.

1396 CAL. LAB. CODE § 1102.5.

1397 CAL. LAB. CODE § 1102.5.

1398 CAL. LAB. CODE § 1102.5.

1399 CAL. LAB. CODE § 1102.6.

1400 29 U.S.C. §§ 151 to 169.

1401 45 U.S.C. §§ 151 *et seq*.

Labor policy in the United States is determined, to a large degree, at the federal level because the NLRA preempts many state laws. Yet, significant state-level initiatives remain. For example, *right-to-work laws* are state laws that grant workers the freedom to join or refrain from joining labor unions and prohibit mandatory union dues and fees as a condition of employment.

3.12(b)(ii) *Notable State Labor Laws*

California is not a right-to-work state and does not have a right-to-work law. Nonetheless, California has enacted a number of laws that affect labor organizations and their membership. This publication highlights a few of these provisions.

As for wages, for example, section 514 of the California Labor Code requires "not less than 30% more than the state minimum wage for employees deemed overtime exempt under a collective bargaining agreement."[1402]

Several restrictions apply for employers in the context of a strike or labor dispute. For example, employers seeking to hire in that scenario must be upfront about the situation in any solicitation or advertisement. All such advertisements must clearly identify "the existence of the strike or labor dispute, the name of the person placing the advertisement, and the company he or she represents that authorized the advertisement or solicitation."[1403] Failure to comply with these requirements is a misdemeanor.[1404]

The labor code relatedly prohibits the willful and knowing use of professional strikebreakers (as defined in the statute) to replace employees during a strike or lockout.[1405] A violation constitutes a misdemeanor.[1406] Several courts around the country have determined that similar strikebreaker legislation is preempted by the National Labor Relations Act.[1407] While those decisions cast doubt on the validity of the California statute, there are no California court decisions specifically addressing whether the statute is preempted.

Finally, in the event of a strike, all unpaid wages earned by striking employees must be paid on the next regular payday without reduction. Any deposit, money, or other guarantee previously required by the employer from the employee must be returned to each striking employee.[1408] Violation of this section is also a misdemeanor.[1409]

[1402] CAL. LAB. CODE § 514.

[1403] CAL. LAB. CODE § 973.

[1404] CAL. LAB. CODE § 974.

[1405] CAL. LAB. CODE §§ 1133, 1134, and 1134.2.

[1406] CAL. LAB. CODE § 1136.

[1407] *See, e.g.*, *Illinois ex rel. Barra v. Archer Daniels Midland Co*., 1982 WL 31262 (C.D. Ill. June 25, 1982), *vacated on procedural grounds*, 704 F.2d 934 (7th Cir. 1983); *Chamber of Commerce v. State*, 445 A.2d 353 (N.J. 1982).

[1408] CAL. LAB. CODE § 209.

[1409] CAL. LAB. CODE § 215.

4. END OF EMPLOYMENT

4.1 Plant Closings & Mass Layoffs

4.1(a) *Federal WARN Act*

The federal Worker Adjustment and Retraining Notification (WARN) Act requires a covered employer to give 60 days' notice prior to: (1) a *plant closing* involving the termination of 50 or more employees at a single site of employment due to the closure of the site or one or more operating units within the site; or (2) a *mass layoff* involving either 50 or more employees, provided those affected constitute 33% of those working at the single site of employment, or at least 500 employees (regardless of the percentage of the workforce they constitute).[1410] The notice must be provided to affected nonunion employees, the representatives of affected unionized employees, the state's dislocated worker unit, and the local government where the closing or layoff is to occur.[1411] There are exceptions that either reduce or eliminate notice requirements. For more information on the WARN Act, see LITTLER ON REDUCTIONS IN FORCE.

4.1(b) *State Mini-WARN Act*

The California Worker Adjustment and Retraining Notification Act (Cal-WARN) expands upon the federal WARN Act. Cal-WARN's employer coverage is broader than that under federal WARN. A *covered establishment* is any industrial or commercial facility that employs 75or more employees currently or within the preceding 12 months. An *employer* is a person or entity that directly or indirectly owns and operates a covered establishment. A parent corporation, moreover, is an employer as to any covered establishment directly owned and operated by its subsidiary. An *employee* is a person employed by an employer for at least six of the 12 months preceding the date on which Cal-WARN notice is required.[1412]

Cal-WARN does not apply where the business closing or layoff is the result of the completion of a particular project or undertaking of an employer that is subject to one of the following wage orders (provided the employees were hired with the understanding that their employment was limited to the duration of that project or undertaking):

- Wage Order 11 (Broadcasting Industry);
- Wage Order 12 (Motion Picture Industry); or
- Wage Order 16 (Certain On-Site Occupations in Construction, Drilling, Logging and Mining Industries).[1413]

These provisions do not apply to seasonal employment where employees were hired understanding that their employment was seasonal and temporary.[1414]

[1410] 29 U.S.C. § 2101(1)-(3). Business enterprises employing: (1) 100 or more full-time employees; or (2) 100 or more employees, including part-time employees, who in aggregate work at least 4,000 hours per week (exclusive of overtime) are covered by the WARN Act. 20 C.F.R. § 639.3.

[1411] 20 C.F.R. §§ 639.4, 639.6.

[1412] CAL. LAB. CODE § 1400.5.

[1413] CAL. LAB. CODE § 1400.5(g)(1).

[1414] CAL. LAB. CODE § 1400.5(g)(2).

Triggering Events. The following events trigger an employer's obligation to provide Cal-WARN notification:

- mass layoff: a layoff (*i.e.*, a separation from a position for lack of funds or lack of work) during any 30-day period of 50 or more employees at a covered establishment;
- relocation: the removal of all or substantially all of the industrial or commercial operations in a covered establishment to a different location at least 100 miles away; and
- termination: the cessation or substantial cessation of industrial or commercial operations in a covered establishment.[1415]

Cal-WARN therefore requires notification in response to a wider range of events than the federal WARN. In addition, unlike federal WARN, Cal-WARN does not require that terminations be aggregated over a 90-day period under any circumstances.

Notice Requirements. For a mass layoff, relocation, or termination at a covered establishment, employers must provide written notice 60 days before the order takes effect. The notice must be provided to affected employees, the California Employment Development Department (EDD), the local workforce investment board, and the chief elected official of each city and county government within which the termination, relocation, or mass layoff occurs. The requirements for the content of the notice are the same as those set forth under the federal WARN Act.[1416]

There are two exceptions to the notice obligation. Notice is not required:

- if the event is necessitated by a physical calamity or act of war; or
- in situations involving a relocation or termination if the EDD determines that:
  - at the time notice would have been required, the company was actively seeking capital or business;
  - had the capital or business been obtained, the company could have avoided or postponed the relocation or termination; and
  - the employer reasonably and in good faith believed that giving notice would have precluded it from obtaining the needed capital or business.[1417]

4.1(c) *Call Center Mini-WARN*

The Cal-WARN law includes provisions specific to call center employers. *Call center employer* means an employer of a covered establishment under the California WARN who operates a call center. *Call center* means a facility or other operation where employees, as their primary function, receive telephone calls or other electronic communication for the purpose of providing customer service or other related functions.[1418]

[1415] CAL. LAB. CODE §§ 1400.5. *But see International Bhd. of Boilermakers v. NASSCO*, 226 Cal. Rptr. 3d 206 (Cal. Ct. App. 2017) (furlough of three to five weeks triggered the California WARN Act).

[1416] CAL. LAB. CODE § 1401.

[1417] CAL. LAB. CODE §§ 1401, 1402.5.

[1418] CAL. LAB. CODE § 1400.5.

Triggering Events. The relocation of a call center triggers an employer's obligation to provide call center Cal-WARN notification. *Relocation of a call center* includes when the employer intends to move its call center, or one or more facilities or operating units within a call center comprising at least 30 percent of the call center's or operating unit's total volume when measured against the average call volume for the previous 12 months, or substantially similar operations to a foreign country.[1419]

Notice Requirements. A call center employer may not order a relocation of its call center, or one or more of its facilities or operating units within a call center, unless notice of the relocation is provided in accordance with Section 1401 of Cal-WARN. If a call center employer is required to provide notice under subdivision (a) of Section 1401 and as a call center, the call center employer may provide a single notice; however, a notice of the relocation of a call center shall include "This notice is for the relocation of a call center" at the top of the notice.[1420]

4.1(d) *State Mass Layoff Notification Requirements*

Outside of the Cal-WARN requirements, California does not require that an employer notify the state unemployment insurance department or another department in the event of a mass layoff.

4.2 Documentation to Provide When Employment Ends

4.2(a) *Federal Guidelines on Documentation at End of Employment*

Table 20 lists the documents that must be provided when employment ends under federal law.

Table 20. Federal Documents to Provide at End of Employment

Category	Notes
Health Benefits: Consolidated Omnibus Budget Reconciliation Act (COBRA)	Under COBRA, the administrator of a covered group health plan must provide written notice to each covered employee and spouse of the covered employee (if any) of the right to continuation coverage provided under the plan.[1421] The notice must be provided not later than the earlier of: • the date that is 90 days after the date on which the individual's coverage under the plan commences or, if later, the date that is 90 days after the date on which the plan first becomes subject to the continuation coverage requirements; or • the first date on which the administrator is required to furnish the covered employee, spouse, or dependent child of such employee notice of a qualified beneficiary's right to elect continuation coverage.
Retirement Benefits	The Internal Revenue Service requires the administrator of a retirement plan to provide notice to terminating employees within certain time

[1419] CAL. LAB. CODE §§ 1409.

[1420] CAL. LAB. CODE §§ 1410.

[1421] 29 C.F.R. § 2590.606-1. Model notices and general information about COBRA is available from the U.S. Department of Labor's Employee Benefits Security Administration at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra.

Table 20. Federal Documents to Provide at End of Employment	
Category	**Notes**
	frames that describe their retirement benefits and the procedures necessary to obtain them.[1422]

4.2(b) *State Guidelines on Documentation at End of Employment*

Table 21 lists the documents that must be provided when employment ends under state law.

Table 21. State Documents to Provide at End of Employment	
Category	**Notes**
Health Benefits: mini-COBRA, etc.	**Mini-COBRA.** Under California law, and in addition to the notice required by federal law pursuant to COBRA concerning continuation coverage, all employers must provide separating employees with a written description of the Health Insurance Premium Program established by the State Department of Health Services. Employers must utilize the standardized written description prepared by the State Department of Health Services.[1423] Moreover, it is the responsibility of all California employers to provide all eligible employees an outline of coverage or similar explanation of all benefits provided under employer-sponsored health coverage, including, but not limited to, provider information for health maintenance organizations and preferred provider organizations. All employers must provide to employees, upon termination, notification of all continuation, disability extension, and conversion coverage options under any employer-sponsored coverage for which the employee may remain eligible after employment with that employer terminates.[1424] More specifically, every employer, insurer, or administrator responsible for notice must, within 14 days of receiving a notice of a qualifying event, provide a qualified beneficiary with the premium information, enrollment forms, and disclosures necessary to allow the qualified beneficiary to formally elect continuation coverage. This information must be sent to the qualified beneficiary's last known address. The notice must state: • The employee must notify the insurer within 60 days of termination if they wish to receive continued coverage benefits.

[1422] See the section "Notice given to participants when they leave a company" at https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-notices.

[1423] CAL. LAB. CODE § 2807.

[1424] CAL. LAB. CODE § 2808.

Table 21. State Documents to Provide at End of Employment	
Category	**Notes**
	• Failure to notify the insurer within the required 60 days will disqualify the qualified beneficiary from receiving continuation coverage. • An employee who wishes to continue coverage under the group benefit plan must request the continuation in writing and deliver the written request by first-class mail, or other reliable means of delivery, including personal delivery, express mail, or private courier company, to the disability insurer within the 60-day period following the later of: (1) the date that the insured's coverage under the group benefit plan terminated or will terminate by reason of a qualifying event; or (2) the date the insured was sent the notice of eligibility of continued coverage. • The employee is required to pay the policy premium if they elect continued coverage, and the first premium payment must be delivered by first-class mail, certified mail, or other reliable means of delivery, including personal delivery, express mail, or private courier. • The first premium payment must equal an amount sufficient to pay all required premiums and all premiums due, and that failure to submit the correct premium amount within the 45-day period will disqualify the employee from receiving continuation coverage.[1425] Additionally, every disclosure form issued for a group benefit plan must include the following notice: "Please examine your options carefully before declining this coverage. You should be aware that companies selling individual health insurance typically require a review of your medical history that could result in a higher premium or you could be denied coverage entirely."[1426] **Other Benefits Notifications.** Group medical benefit plans must give employees whose coverage was terminated by employers the right to convert to a nongroup policy without evidence of insurability, unless coverage was terminated for certain reasons specified in the law. If the employer's self-insurance plan is exempt from the federal Employee Retirement Income Security Act (ERISA), the employer must notify employees of the availability, terms, and conditions of conversion coverage within 15 days after termination of the group coverage.[1427]
Unemployment Notice	**Generally.** When an employer discharges, lays off, or places an employee on leave of absence, it must provide the employee the following notices no later than the effective date of the action:

[1425] CAL. INS. CODE § 10128.54(b).

[1426] CAL. INS. CODE § 10128.54(f).

[1427] CAL. HEALTH & SAFETY CODE § 1373.6.

Table 21. State Documents to Provide at End of Employment	
Category	**Notes**
	• written notice of unemployment insurance benefit rights, by providing "California's Programs for the Unemployed" (Form DE-2320); and • written notice regarding the change in the employee's status, which must contain, at a minimum: ▪ employer's name; ▪ employee's name; ▪ employee's Social Security number; ▪ whether the action was a discharge, a layoff, a leave of absence, or a change in status from employee to independent contractor; and ▪ the date of the action.[1428] **Multistate Workers.** For multistate workers, whenever an individual covered by an election is separated from employment, an employer must notify the worker immediately as to the jurisdiction under whose unemployment compensation law the worker's services have been covered. If at the time of termination the individual is not located in the elected jurisdiction, an employer must notify the employee as to the procedure for filing interstate benefit claims.[1429]

4.3 Providing References for Former Employees

4.3(a) *Federal Guidelines on References*

Federal law does not specifically address providing former employees with references.

4.3(b) *State Guidelines on References*

An employer may, but is not required, to furnish a truthful statement concerning the reason for the discharge of an employee or for the employee's voluntary resignation.[1430] The law protects as privileged communications concerning the job performance or qualifications of an applicant for employment, based on credible evidence, made without malice, by a current or former employer of the applicant to a prospective employer of the applicant. An employer may answer whether or not the employer would rehire a current or former employee.[1431] A current or former employer is authorized to answer whether

[1428] CAL. UNEMP. INS. CODE § 1089; CAL. CODE REGS. tit.22, § 1089-1. Form DE-2320 is available at http://www.edd.ca.gov/pdf_pub_ctr/de2320.pdf. It is also available in Armenian, Cantonese, Mandarin, Hmong, Laotian, Punjabi, Spanish, and Vietnamese at http://www.edd.ca.gov/Payroll_Taxes/Forms_and_Publications.htm.

[1429] CAL. CODE REGS. tit. 22, § 454(a)-5.

[1430] CAL. LAB. CODE § 1053.

[1431] CAL. CIV. CODE § 47.

the decision to not rehire is based upon the employer's determination that the former employee engaged in sexual harassment.[1432]

California law forbids blacklisting, which is the intentional prevention of the future employment of an employee by the former employer.[1433] Blacklisting usually occurs when the former employer makes misrepresentations to prospective employers that an individual should not be hired. It should be distinguished from a reference, which is essentially a request for information about job performance.

[1432] CAL. CIV. CODE § 47.

[1433] CAL. LAB. CODE § 1050.