

# DOING BUSINESS IN CALIFORNIA: A GUIDE FOR EMPLOYERS



## Introduction

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

## Wage and Hour Laws

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

### **Application to Employees Based Outside California**

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



In the past decade, several court rulings have addressed the issue of when an out-of-state employee working in California must be paid per California's Labor Code. While there is still no bright line rule, the more the employee works in state, for consecutive days, on a regular basis, the more likely it is that they will need to be paid overtime and meal premiums per the California Labor Code. The analysis is fact-specific and evolving.

### **Minimum Wage**

As of January 1, 2025, the minimum hourly wage in California for all businesses regardless of size is \$16.50. The minimum exempt salary for California employees increased from \$66,560 to \$68,640 annually or \$5,720 monthly. An increasing number of cities are setting their own minimum wages, including Alameda, Belmont, Berkeley, Burlingame, Cupertino, Daly City, East Palo Alto, El Cerrito, Emeryville, Foster City, Fremont, Half Moon Bay, Hayward, Long Beach, Los Altos, Los Angeles (City), Los Angeles County (unincorporated areas), Malibu, Menlo Park, Milpitas, Monterey Park, Mountain View, Novato, Oakland, Palo Alto, Pasadena, Petaluma, Redwood, San Carlos, San Diego, San Francisco, San Jose, San Leandro, San Mateo, Santa Clara, Santa Monica, Santa Rosa,

Sunnyvale and West Hollywood. Federal minimum wage remains at \$7.25 per hour, where it has been since 2009 (despite unsuccessful efforts to raise it).

Minimum wage increases for specific industry employers, such as health care facilities, began on October 16, 2024, and are required for those who (1) work for certain “health care facilities” that are covered in the new law and (2) provide health care services or support the provision of health care. The amount of minimum wage increase varies across different employers and will increase in phases in June 2025 and beyond. As a part of this process, the California Department of Industrial Relations released FAQs to assist employers in complying with the increase.

Fast food workers also received an increase to \$20 per hour, beginning April 1, 2024. The California Fast Food Council has the authority to raise the fast-food minimum wage effective January 1, 2025, but did not do so. The hourly minimum wage established by the Council can increase every year by either 3.5% or the increase in the consumer price index, whichever is smaller. The Council is empowered both to make future increases to the minimum wage and to adopt other minimum employment standards for fast-food restaurants. To be considered a “fast-food restaurant,” the restaurant must meet all the following criteria: (1) must be a limited service restaurant, meaning a restaurant that offers limited or no table service, where customers order food or beverage items and pay for those items before the items are consumed, (2) the restaurant is part of a restaurant chain of at least 60 establishments nationwide, and (3) the restaurant is primarily engaged in selling food and beverages for immediate consumption. The following restaurants are exempt from the wage increase: (1) restaurants that operate a bakery that “produces” and sells “bread” as a stand-

alone menu item as of September 15, 2023, and continues to do so, (2) restaurants located in grocery establishments, (3) restaurants connected to or operating in conjunction with an airport, a hotel, an event center that is over 20,000 square feet or has more than 1,000 seats (for example, a sports stadium, concert hall, or racetrack), a theme park, a museum, a gambling establishment, and (4) restaurants that are subject to a concession agreement or food service contract.

Covered exempt computer professional employees must be paid a minimum of \$56.97 per hour, or \$118,657.43 in annual salary effective January 1, 2025.

### **Daily Overtime**

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

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

based or formulaic bonuses, shift premiums and service charges.

### **Alternative Workweek Schedules**

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

### **Meal and Rest Periods**

California law requires employers to “provide” unpaid meal periods to employees and to “authorize and permit” their employees to take paid rest breaks. As long as employees are informed of their rights to take these breaks and are given a genuine opportunity to take them, the law is technically satisfied, although proof remains an uphill battle absent excellent record-keeping practices. Employers are required to keep records of meal periods, which employers typically satisfy by having employees clock out for unpaid meal periods. California courts have placed the burden of proof on the employer to show that it has complied with these requirements. An employee is entitled to a timely, unpaid, uninterrupted meal period of not less than 30 minutes before five hours of work is completed. The employee must be free to leave the premises. Employees are entitled to a second meal period of 30 minutes if they work more than 10 hours in a day. An employee may voluntarily choose not to take the first meal period if their work schedule for that day is six hours or less. The employee could waive the second meal period if the total hours worked on that workday is not more than 12. Employees are also entitled to a paid 10-minute off-duty, uninterrupted rest break

for every four hours of work, or major fraction thereof. A “major fraction” is considered more than two hours’ work, and employees must work 3.5 hours to be entitled to the break.

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

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

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

### **Vacation Policies**

In California, accrued vacation time is considered a form of earned wages and cannot be forfeited. An employer may not institute a “use-it-or-lose-it” policy. Employees must be allowed to carry over their accrued vacation. If employees quit or are terminated, they must be paid for all unused accrued vacation based on their rate of pay when the employment ends. To prevent the uncontrolled increase of vacation days, employers may set a cap on the accrual of unused vacation time of at

least one-and-a-half times the employee's annual accrual. The failure to pay an employee for all accrued, but unused, vacation time can be quite costly, including because such a failure may give rise to "waiting time penalties."

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

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

### **Overtime Exemptions**

California law provides exemptions from overtime pay for certain "executive," "administrative" and "professional" employees. For these exemptions to apply, the employees must be "primarily engaged in" the duties that meet the requirements of the particular exemption, customarily and regularly exercise discretion and independent judgment in carrying out those duties, and earn a monthly salary equivalent to no less than twice the California minimum wage for full-time employment (40 hours per week). The exemptions are similar to those provided under federal law. Federal law, however, only requires that an employee's "primary duties" meet the test for each exemption. In California, an employee must spend more than half their time (i.e., be "primarily engaged in") performing the duties that meet the applicable

test and meet the "salary test" or earn a minimum month's salary of no less than two times the state minimum wage. As noted above, the state minimum wage has increased each year, so the minimum salary level also raises each year. In 2025 it is \$68,640 (much higher than the federal exempt classification threshold). California has also adopted an overtime exemption for computer software and design professionals earning a high hourly rate. The comparable federal exemption covers computer professionals earning far less. There is no "highly compensated" exemption in California as there is under federal law

### **Deductions From Wages**

California law severely restricts the circumstances in which an employer may deduct damages or debts owed by employees from their wages. An employer may not deduct from an employee's wages any amount to compensate the employer for loss or damage caused by an employee's simple negligence. It may deduct an amount sufficient to compensate for loss or damage resulting from an employee's gross negligence, willful misconduct or dishonesty. The burden of proof is on the employer to establish that such deduction is appropriate. In addition, an employer may not deduct any amount from an employee's final paycheck to recover an unpaid debt (such as a loan or cash advance) unless the employee specifically agrees to the deduction in writing at the time of termination.

### **Notice to Employees**

#### **(aka Pay Notice or Wage Theft Form)**

Employers must give newly hired, non-union, non-exempt employees written notice of their rate (or rates) of pay, the basis on which the wages are to be calculated (such as hourly, piece rate, commission, etc.), the applicable overtime rates, the designated regular pay day, and the name and mailing address of the employer. The written notice must also include a summary of the employee's Paid Sick Leave rights. Employers

must also notify employees within seven days of any changes to this information. Pay notice forms are available on the Division of Labor Standards Enforcement's (DLSE) website.

Beginning on January 1, 2024, employers were required to utilize a new form for all non-exempt new hires working in California. Employers must advise employees in the revised Notice (1) of the increased amount of California paid sick leave to which employees were entitled as of 2024 and (2) whether employees are working in a county that is subject to a federal or state emergency or disaster declaration. Employers who changed their paid sick leave policies to comply with updated 2024 requirements may also need to update the wage theft forms for their existing non-exempt employees.

The new Notice form published by the California Department of Industrial Relations (DIR) can be accessed here: [https://www.dir.ca.gov/dlse/lc\\_2810.5\\_notice.pdf](https://www.dir.ca.gov/dlse/lc_2810.5_notice.pdf).

### **Itemized Wage Statement and Paycheck Requirements**

The California Labor Code requires that specific information be provided on employees' paychecks and itemized wage statements (pay stubs).

Violating these provisions can be significant, especially in class action lawsuits. Violations of seemingly minor technical requirements can expose employers to extraordinary damages. The Labor Code requires the following information be printed on the pay stub:

- Gross wages earned
- Total number of actual hours worked (not required for salaried exempt employees)
- The number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis
- All deductions (all deductions made on written orders of the employee may be aggregated and shown as one item)

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

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

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

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

### **Final Paycheck**

Most states require that departing employees receive their final paychecks on the next regular payday following the discharge. In California, all wages, including accrued but unused vacation, are due immediately upon an involuntary termination or layoff. Employees who quit with more than 72 hours' notice must be paid on the last day of work. For employees who quit with fewer than 72 hours of notice, wages and unused vacation must be paid within 72 hours after notice is given. There are stiff penalties for not paying wages in full

upon termination, including up to 30 days of pay at the employee's regular rate as a "waiting time penalty."

### **Expense Reimbursements**

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

### **Hospitality Specific Ordinances**

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

### **Predictive Scheduling (Fair Workweek Ordinances)**

Predictive scheduling ordinances are a growing trend across the U.S. These laws generally require employers to post schedules ahead of time and restrict their ability to make last minute changes. While there is no statewide predictive scheduling law, California cities are starting to roll out these ordinances, mostly for large retail employers, but sometimes for additional types of businesses. As of 2025, Los Angeles, San Francisco, Emeryville, Berkeley, and San Jose have some version of a predictive scheduling ordinance either pending or on the books.

### **Rounding**

Many employers round time to the nearest seven minutes to allow employees some leeway to punch in early or late (often known as quarter hour rounding). In 2022, a California Court

of Appeal rejected an employer's quarter-hour rounding policy, even though evidence showed its neutral application. This issue may ultimately be addressed by the California Supreme Court, which has indicated a hostility towards rounding in prior decisions. In the meantime, employers can avoid litigation risk on this issue by suspending rounding practices. Keep in mind that for union workforces, any change in practice may be construed as a bargaining issue.

### **Criminal Penalties**

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

## **Leave Laws**

### **California Family Rights Act**

In 2021 the California Family Rights Act (CFRA) changed dramatically. Since then, employers with five or more employees must allow employees who work for a covered employer to take 12 weeks of unpaid, job-protected leave if they have worked a minimum of 1,250 hours in the 12 months prior to taking leave. Leave may be taken for an employee's own serious health condition; to care for a family member with a serious health condition; for baby bonding, foster placement or adoption; or for military exigencies. Covered employers will also need to maintain health coverage under the same terms as an active employee. CFRA will sometimes run concurrently with FMLA but will never run concurrently with PDL (see below). In addition, CFRA leave covers some relative categories not covered under the

FMLA, including grandparents, grandchildren, adult children, parents-in-law, siblings, and as of 2023 a “designated person” who the employee can identify at the time the employee requests the leave. This means that someone who takes CFRA leave for one of these family members (or a designated person) may also be entitled to a separate 12 weeks of FMLA.

### **Bereavement Leave**

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

### **Reproductive Loss Leave**

Effective January 1, 2024, eligible employees were entitled to receive up to five days of unpaid, protected time off for a reproductive loss event, which includes a failed adoption, failed surrogacy, miscarriage, stillbirth or unsuccessful assisted reproduction. The five days of leave do not need to be taken consecutively. However, the leave must be completed within three months of the reproductive loss event. If, prior to or immediately following a reproductive loss event, an employee is on or chooses to go on leave under the Pregnancy Disability Leave law, the California Family Rights Act, or any other leave entitlement under state or federal law, the employee shall complete their

reproductive loss leave within three months of the end date of the other leave. If the eligible employee suffers more than one reproductive loss event within 12 months, an employee may take up to 20 days of leave collectively. An employee may use accrued PTO/Paid sick leave/vacation for this leave.

### **Pregnancy Disability Leave**

Employers with five or more employees must provide Pregnancy Disability Leave (PDL) of up to four months for employees disabled by pregnancy and pregnancy-related conditions from their first day of employment. PDL applies whether or not an employer is covered by the FMLA or its California equivalent (CFRA). PDL does not run concurrently with CFRA. Thus, an employee could take four months of PDL and then take another leave of up to 12 weeks under CFRA to bond with the newborn child (known as “baby bonding leave”). Employers must maintain group health benefits for employees on PDL and CFRA and must provide reinstatement.

### **Lactation Breaks**

Employees who are breastfeeding must be provided with unpaid breaks for expressing milk and a private location, other than a bathroom, for such a purpose. In addition, employees will be provided with a private space that is safe, clean, and free of hazardous materials, contain a surface area for a breast pump and personal items, a place to sit, as well as electricity, extension and charging cords, with access to a cooler or refrigerator for storing milk and a sink with running water.

The company will also provide reasonable accommodations to an employee’s or applicant’s known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation will cause an undue hardship.

### **Paid Family Leave**

Under Paid Family Leave (PFL), employees in California can receive benefits to replace a portion



of wages lost when they are on leave from work to care for a sick family member, to bond with a new child or for military exigency leave. PFL is funded through employee contributions and is administered by the state. PFL does not create an additional right to a leave of absence. Rather, it is a benefit that runs concurrently with a leave of absence. Employers are required to advise employees of their PFL rights by posting the state notice advising employees of these rights, and they must provide newly hired employees with the state-published pamphlet setting forth these rights. PFL leave is available for FMLA and CFRA leaves, but also for time off that does not qualify as either (for example for a newly hired employee who does not meet the one-year or 1,250-hour eligibility threshold). As of January 1, 2025, California employers can no longer require employees to use up to two weeks of accrued vacation prior to receiving PFL benefits, making the benefits immediately available. This change provides greater flexibility for employees seeking paid family leave.

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

### **Parental or ‘Baby Bonding’ Leave**

There is no requirement for employers to provide paid parental leave in California (except in San Francisco). However, under the CFRA, employers of five or more employees must allow employees who work for a covered employer to take 12 weeks of unpaid, job-protected leave if they have worked a minimum of 1,250 hours in the 12 months prior to taking leave. Employees can take leave for the purpose of bonding with a newborn child, adopted child or foster child within a year of the birth or placement. Covered employers will also need to maintain health coverage under the same terms as an active employee. The CFRA also prohibits discrimination and retaliation against an employee for taking parental leave.

### **School Issues and Activities**

An employer with 25 or more employees must allow the parent, guardian, stepparent, foster parent, or grandparent of, or a person who stands in loco parentis to, a child to take time off up to 40 hours each year: (1) to find, enroll, or reenroll his or her 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 his or her child if the employee, prior to taking the time off, gives reasonable notice to the employer of the planned absence of the employee and the time off does not exceed eight hours in any calendar month of the year or (2) to address a child care provider or school emergency, if the employee gives notice to the employer. “Child care provider or school emergency” means that an employee’s child cannot remain in a school or with a child care provider due to one of the following:

- A. The school or child care provider has requested that the child be picked up, or has an attendance policy, excluding planned holidays, which prohibits the child from attending or requires the child to be picked up from the school or child care provider.
- B. Behavioral or discipline problems.
- C. Closure or unexpected unavailability of the school or child care provider, excluding planned holidays.
- D. A natural disaster, including, but not limited to, fire, earthquake or flood.

### **Volunteer Civil Service**

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

### **Time Off to Vote**

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

shifts. Because California has statewide elections almost every year, and often more than once in a year, voting leave may be an issue every March and November and whenever there is a “Special Election.”

### **Participation in Judicial Proceedings**

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

### **Organ and Bone Marrow Donation Leave**

Employees are entitled to paid time off to donate bone marrow or organs. Employees may receive up to five business days per year for bone marrow donation, and up to 30 business days per year for organ donation. Employees may take an additional unpaid leave of up to 30 days for organ donation purposes. This applies to employers with 15 or more employees.

### **Leave for Victims of Crimes**

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

member” is defined as child (biological, adoptive, foster, step, etc.), parent (biological, adoptive, foster, stepparent, etc.), sibling (biological, foster, half-sibling, etc.) or partner (whether married or a registered domestic partner). Also included is any other individual whose close association with the employee is the equivalent of a family relationship.

Employees who have been the victim of direct or threatened physical, psychological or financial harm as a result of the commission or attempted commission of a crime or delinquent act may take unpaid time off work to appear at any proceeding in which a right of the victim is at issue. Employees are also entitled to appear at any proceeding when the victim is the person’s immediate family member.

### **Expanded Time Off for Victims of Violence**

Starting in 2025, state law broadens the definition of who qualifies as a victim entitled to time off for jury duty, court appearances, and related activities. Employees will now be protected if they are victims of “qualifying acts of violence,” including domestic violence, sexual assault, stalking, threats of or acts causing bodily injury or death, or brandishing a firearm or other dangerous weapon. Employers must allow affected employees to use vacation, personal leave, paid sick leave or other applicable compensatory time off for a wide range of activities associated with jury duty, to appear in court as a witness, or for activities associated with qualifying acts of violence, such as obtaining medical attention, obtaining services of a domestic violence shelter, or taking time off from work to obtain a restraining order. Similar to employees who may have qualifying disabilities, an employee who is the victim of violence may also request reasonable accommodations to help ensure their safety while at work. Employers will be required to engage in an interactive process with employees making these requests and must do so in a timely manner and in good faith.

Employers must provide written notice of these rights to employees at the time of hire and once a year afterward. The written notice also must be provided upon the request of the employee, and whenever the employer becomes aware that an employee or member of the employee's family may be a victim of violence or a crime. The California Civil Rights Division will be required to develop and post, on or before July 1, 2025, a form that employers may use to comply.

### **Mandatory Paid Sick Leave**

All California employers regardless of their size must provide Paid Sick Leave (PSL) benefits to employees at the rate of one hour for every 30 hours worked. It may be frontloaded or accrued. Employers using the "front-loading" method of allowing paid sick leave must now supply five days or 40 hours, whichever is greater, at the beginning of the year. Employers using a different accrual process must now guarantee an employee has at least 40 hours of accrued sick leave by the 200th calendar day of employment, in addition to the requirement that employees have at least three days (24 hours) by the 120th day of employment. This requirement applies to all employees working in California — whether part-time or full-time, temporary or permanent, exempt or non-exempt — with limited exceptions for certain union and construction employees, providers of in-home support services, airline flight deck and cabin crew employees with equivalent benefits, and public-sector employees receiving a retirement allowance.

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

Employees can also use this time off if they are the victim of a crime or to assist any family members who are victims of specified crimes. This expansion includes situations where employees need time off to deal with the aftermath of a crime, such as attending court proceedings or managing medical

care. Employers can cap the amount of PSL hours an employee can accrue to 80 hours or 10 days per year and can limit the amount of PSL that can be used to 40 hours or five days, whichever is greater, per year.

Santa Monica, San Francisco, Oakland, Berkeley, Los Angeles, San Diego and Emeryville have also implemented local PSL ordinances. Additionally, Los Angeles and Long Beach have mandatory paid time off ordinances solely applicable to hotel workers.

Employers subject to these local PSL ordinances must comply with both the local and state laws.

Where the laws conflict, employers should apply the provision that is more generous to employees.

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

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

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

The DIR has provided an updated paid sick leave poster on the agency's website and it can also be found here [https://www.dir.ca.gov/dlse/publications/paid\\_sick\\_days\\_poster\\_template\\_\(11\\_2014\).pdf](https://www.dir.ca.gov/dlse/publications/paid_sick_days_poster_template_(11_2014).pdf).

### **Emergency Conditions**

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

## Discrimination and Harassment

Employers face greater risks in employment discrimination cases in California because of the nature of California juries and because, unlike under Title VII, there are no caps on the compensatory or punitive damages a plaintiff employee may recover. Moreover, the antidiscrimination statutes have been drafted and interpreted more broadly than Title VII.

### Protected Classes

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

### Harassment

In addition to prohibiting harassment, California law requires employers to “take all reasonable steps necessary to prevent and correct harassment and discrimination.” Employers are strictly liable for

hostile environment harassment by a supervisor. Liability arises for harassment based on any protected class. Individual managers and supervisors can be held personally liable for harassment.

### Third-Party Harassment

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

### Sexual Favoritism

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

### Policies and Training as a Defense

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

Under Title VII, the employer’s policies against harassment and the employee’s failure to make use of the company’s internal procedures to complain of harassment will provide employers with a defense to liability. In California, the employer cannot completely escape liability. Employers can reduce their liability if they can show they took reasonable steps to correct and prevent the harassment. Under this “avoidable consequences doctrine,” “a person injured by another’s wrongful conduct will not be compensated for damages that the injured person could have avoided by reasonable effort or expenditure.” An employer can

establish this defense by setting forth evidence that it “took effective steps to encourage victims to come forward with complaints of unwelcome sexual conduct, and to respond effectively to their complaints and to preserve confidentiality.” Written policies and training can serve as such evidence.

### **Harassment Prevention Training**

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

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

Janitorial employees are subject to alternate training requirements effective January 1, 2024.

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

### **Discrimination Claims; Combination of Characteristics**

Effective January 1, 2025, SB 1137 clarifies that FEHA bars discrimination and harassment on grounds of a person’s intersectionality, that is, on the grounds the person has a combination of two or more protected characteristics. For instance, the statute will deem it illegal for an employer to reject job applicants because they have a specific combination of race and veteran status, such as Latino veterans. This brings FEHA into line with Title VII, which already protects intersectionality.

### **Fair Pay Act and Pay Transparency Requirements**

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

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

### **Disability Discrimination**

The FEHA defines disability far more broadly than the Americans with Disabilities Act (ADA). Under the ADA, an employee must show that they suffer from a physical or mental impairment that “substantially limits” a major life activity, and mitigating measures may prevent a finding of disability. In contrast, under the FEHA, the employee only needs to show that the physical or mental disability “limits” (not substantially limits)

a major life activity. Mitigating measures are not considered in determining whether a condition constitutes a disability. Under the FEHA, an employee can bring a separate claim for failure to engage in the interactive process, so good documentation is especially important. Finally, under the FEHA, an employee can establish that they are limited in the major life activity of “working” even if they are only limited from performing a particular job as opposed to a broad range of jobs.

### **Age Discrimination**

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

### **Discrimination: Driver’s License**

Effective January 1, 2025, it is an unlawful employment practice under the FEHA for an employer to include a statement in various employment materials that an applicant must have a driver’s license, unless the employer reasonably expects the duties of the position to require driving, and the employer reasonably believes that satisfying that job function using an alternative form of transportation (bike, carpooling, ride sharing, walking, etc.) would not be comparable in travel time or cost to the employer, as specified.

### **Retaliation and Whistleblowing**

California has several statutes protecting whistleblowers, including California Labor Code Section 1102.5. As of January 1, 2024, and the passage of the Equal Pay and Anti-Retaliation Protection act, there is a rebuttable presumption of a causal connection if there is an adverse action within 90 days of any protected activity under certain provisions of the California Labor Code. Contemporaneous documentation is particularly helpful to rebut the presumption.

### **New Workplace Posting Requirements**

Pursuant to [AB 2299](#), the California Labor Commissioner has developed a “model list of employees’ rights and responsibilities under the whistleblower laws,” and employers will be required to display the list in the workplace along with the telephone number for a state whistleblower hotline beginning January 1, 2025. Employers should ensure they update this and other applicable workplace posting requirements on a periodic basis.

### **Continuing Violation Doctrine**

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

### **Reasonable Accommodation for Drug/Alcohol Rehabilitation**

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

### **Pay Data Reporting**

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

## Domestic Partners

### Insurance

California law imposes no direct requirement on employers to offer benefits for domestic partners. The “California Insurance Equality Act,” however, requires that all health care service plans and health insurance policies, as well as all other insurance policies regulated by the California Department of Insurance, provide benefits to registered domestic partners of employees that are equal to those offered to spouses. Insurers are required to make available to employers group policies that would comply with this requirement. An employer would, in theory, only be able to purchase a plan that provides equal coverage for registered domestic partners. These requirements would not affect employers that are self-insured. Employers that do provide benefits for domestic partners, such as medical coverage, may require proof of registered domestic partnership status or termination of that status but only if similar proof is also requested for spouses.

### Other Benefits

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

### Government Contracts

Companies that wish to bid for contracts with the state of California or to renew existing contracts

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

### Discrimination

California law also provides that domestic partners are entitled to the same rights, protections and benefits granted to spouses. Because the FEHA prohibits discrimination based on marital status, the same law prohibits discrimination based on participation in a domestic partnership. The limits of this provision have not been tested in court but should apply to any terms and conditions of employment that do not involve the provision of benefits under plans governed by ERISA. Employers may not impose a “no employment of domestic partners” rule. They can, under certain circumstances, refuse to place one domestic partner under the direct supervision of the other domestic partner, or to place both domestic partners in the same department, division or facility.

### Same-Sex Marriage

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

## Other Employment Issues

### Covenants Not to Compete

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

- Where a person sells the goodwill of a business.
- Where a partner agrees not to conduct a like business in connection with the dissolution of that partnership.

- Where a member of a limited liability company agrees not to conduct a like business in connection with the dissolution of that limited liability company.
- Or where a restrictive covenant is necessary to protect a company's trade secrets.

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

Effective January 1, 2024, SB 699 clarified that existing law prohibits noncompetition covenants regardless of where or when the agreement was signed, even if the covenant was signed outside of the state. An employer commits a civil violation for entering into or enforcing a void noncompete. Employees also have a private cause of action against their employer.

Under AB 1076, which amended Section 16600 and added Section 16600.1 to the California Business and Professions Code, employers were required to contact all current or former employees (who were employed after January 1, 2022, and had contracts containing a noncompete clause), informing them that the noncompete clause is void. The notice was required by February 14, 2024, to be in writing and delivered to both the last known physical address and email address of the employee. Failure on the part of the employer to send this notice constitutes a violation of California's Unfair Competition Law. Additionally, California law provides that employers commit a civil violation by entering into or attempting to enforce a void restrictive covenant and creates a private right of action for California employees to seek injunctive relief, damages, and attorney fees. Moreover, while "no rehire" or "no future employment" provisions are commonplace in other states, California law prohibits employers from using blanket "no rehire" provisions in settlement agreements, unless the employer has made a good

faith determination that the employee engaged in sexual harassment or sexual assault. Put another way, only harassers can be denied future employment.

### **Fair Chance / 'Ban the Box' Laws**

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

### **Independent Contractors**

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

- A. The company is unable to control or direct what the worker does. In essence, the company tells the worker what to accomplish and the worker determines how to do so.
- B. The worker must perform tasks outside of the hiring entity's usual course of business. So, for example, a driver for a ride service, a delivery person for a delivery service or a



seamstress for a clothing company, cannot be independent contractors no matter how little control the company has over them.

- C. The worker must be engaged in an independently established trade, occupation or business. Here, courts will look at factors such as whether the business is incorporated or licensed, whether it is advertised and whether it offers services to the public or other potential customers.

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

The state legislature passed AB 5 in 2019, which applies the ABC test to the California Labor Code but with numerous exemptions, including licensed insurance agents, certain licensed health care professionals and licensed lawyers, architects, engineers and accountants. AB 5 was amended by AB 2257 in 2020 to add additional categories of exemptions, including freelance writers, newspaper editors, translators, landscape architects, and some other professions. In November 2020, California voters passed Proposition 22, which created a hybrid model between contractors and employees; essentially a “contractor-plus limited benefits” model.

These are fact-intensive inquiries in a rapidly evolving area of law. Employers should consult qualified counsel to determine whether individuals can properly be classified as independent contractors.

#### **Freelance Worker Protection Act**

Effective January 1, 2025, SB 988 requires that independent contractors providing services worth

more than \$250 must have a written agreement outlining specific terms and conditions of the engagement, specifying the scope of work, payment terms, deadlines, and other essential details.

#### **Right of Privacy**

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

#### **Drug Testing**

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

Medical marijuana has been available in the state for some time, and as of January 1, 2018, recreational use has also been legal. However, employers have still been allowed to drug test in appropriate circumstances and need not permit employees to use marijuana or be under the influence at work. Employers that screen for marijuana may want to consider providing notice to their applicants and/or workers.

Since January 1, 2024, employers have been prohibited from discriminating against employees and applicants on the basis of drug tests showing the presence of non-psychoactive cannabis metabolites or the person's use of cannabis off the job and away from the workplace. Notably, employers can still maintain a drug and alcohol-free workplace. Employees still cannot possess cannabis while at the workplace or be impaired by or use cannabis while on the job. Employers may still test for controlled substances as a condition of employment. This law does not apply to employees in the building and construction trades and those requiring a federal background investigation or clearance.

### **Consumer Credit Reports**

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

### **Garment Industry Workers**

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

### **Warehouse Workers**

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

### **Cal-WARN**

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

to 100 full-time employees under federal law) who have worked six of the prior 12 months. Cal-WARN applies to a mass layoff (50 or more employees during a 30-day period), a relocation or a termination (as that term is specifically defined). Cal-WARN requires notice to all employees. Notice to a union will not suffice.

### **Cal-COBRA**

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

### **Workplace Safety**

California's Division of Occupational Safety and Health, commonly referred to as Cal-OSHA, acts to regulate and protect workers and the public from safety hazards. Cal-OSHA has jurisdiction over every employer and place of employment in California. It enforces and administers all occupational safety and health standards and regulations. Cal-OSHA will conduct inspections of California workplaces in response to a report of an industrial accident, a complaint about an occupational safety and health hazard or as part of an inspection program targeting industries that have a high rate of occupational hazards, fatalities, injuries or illnesses. Employers in the state have a legal obligation to provide and maintain a safe and healthy workplace for employees, and every employer in California must have a written, effective injury and illness prevention program.

### **Workplace Violence Prevention**

Effective July 1, 2024, California required employers to create a workplace violence prevention plan, train employees, and prepare/maintain records regarding workplace violence.

Under SB 553, “workplace violence” is defined as “any act of violence or threat of violence that occurs in a place of employment that results in, or has a high likelihood of resulting in, injury, psychological trauma, or stress, regardless of whether the employee sustains an injury.”

Employers needed to prepare a written prevention plan that is accessible to employees, keep a “log” of every “workplace violence incident” and train workers when the plan is first established and then train annually. Detailed records must also be maintained. The Department of Industrial Relations published a model plan.

### **Captive Audience Ban**

Effective January 1, 2025, no employee is required to attend a company-sponsored meeting that discusses religious or political matters, including union representation, in violation of the California Worker Freedom from Employer Intimidation Act. Employees may not be discharged, discriminated, retaliated against or subjected to any other adverse action for declining to attend or declining to participate in, receive, or listen to such a meeting that has the purpose of communicating the company’s religious or political opinions.

### **Health Care**

San Francisco requires medium and large employers to spend a minimum amount per hour on health care services for their employees. In 2025, companies with 100 or more employees are required to spend a minimum of \$3.85 per hour per employee. Companies with 20 to 99 workers are required to spend a minimum of \$2.56 per hour per employee. These rates are adjusted annually. Employers can meet their spending obligation by purchasing insurance, paying into public programs for the uninsured, contributing to health savings accounts or by direct reimbursement to employees for their health care expenses. Companies that already offer insurance

will be required to pay into a health care plan the city has established for uninsured adults within the city if their cost per employee per hour is less than the mandated minimum.

### **COVID-19**

California employers should not just follow CDC and federal guidance, but ensure they follow state (including Cal-OSHA) and local guidance as well. Regulations are very jurisdiction specific.

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

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

### **Litigation**

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

### **Summary Judgment**

A motion for summary judgment in California state court must be filed and served at least 81 days (increased from 75 days as of January 1, 2025) before the date of the hearing. Since any motion must be heard at least 30 days before the initially scheduled trial date, this means that the motion

must be filed and served at least 111 days before trial. Opposition briefs are due 20 days before the hearing on the motion, with reply briefs due 11 days prior. California also requires that cases ordinarily be tried within one year of the filing of the complaint (not its service). The effects of the pandemic are still causing additional delays in the California court system.

Defendants thus have precious little time to conduct all necessary discovery and file for summary judgment. The standard for summary judgment is also less favorable to defendants. While California's summary judgment standard was amended years ago, purportedly to bring it in line with the federal standard, California courts have held that there are still significant differences. To obtain summary judgment, defendants must present evidence of non-liability and not simply point out that plaintiffs do not have the evidence to prove their case.

#### **Choice of Law Provisions in Employment Contracts and Arbitration Agreements**

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

Arbitration agreements (including class action waivers) are enforceable in California, as long as they are not procedurally or substantively unconscionable. That said, an employer that enforces an arbitration agreement must pay the fees necessary to

commence (and sustain) that arbitration within 30 days after such fees are due, or risk being held to have materially breached the agreement and be sent back to court.

Currently, it is still permissible to require arbitration (even with a class action waiver) as a condition of employment in California. However, there were several key court cases on arbitration in the past few years, including a U.S. Supreme Court case that addressed whether and to what extent an action under California's Private Attorney General Act (PAGA) could be compelled to arbitration. With recent PAGA Reform (explained below), it is particularly important to update any sections dealing with PAGA claims.

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

#### **Wage and Hour Class Actions**

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

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

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

### **Private Attorney General Act (PAGA)**

The Private Attorneys General Act of 2004 (PAGA) allows employees claiming violations of wage and hour laws to bring civil actions on behalf of the state directly against their employers for penalties rather than having to rely upon state agencies to do so. It is an additional, and common, weapon for employee plaintiffs to use against their employers. PAGA claims can get very expensive when there are different types of wage-and-hour violations. Lawsuits that include PAGA claims require court approval to settle, and a copy of the settlement agreement must go to the Labor and Workforce Development Agency (LWDA).

In 2020, the California Supreme Court held that settling an individual employee's wage-and-hour claims does not provide grounds to dismiss the PAGA claims filed by that employee. In a PAGA action, the state receives 75% of the recovery and the aggrieved employees share 25%, but attorneys' fees for plaintiff's counsel are often calculated off the entire amount. Accordingly, these cases are often driven by the possible recovery of attorneys' fees. PAGA also makes class and collective actions more complicated to litigate, especially when

there is an arbitration provision (see discussion above). A PAGA notice must be timely sent to the employer and the LWDA before a PAGA claim can be filed in court.

In July 2024, California enacted several reforms to PAGA that may help employers in some key respects of defending claims filed after June 19, 2024. There are several important aspects to PAGA reform, including:

First, PAGA plaintiffs can only sue an employer for violations that they "personally suffered" within the one-year statute of limitations period (which is one year and 65 days before the PAGA claim is filed).

Second, employers can defend PAGA cases on grounds that a trial is not manageable and would require too many mini-trials on a variety of small issues.

Third, there are more cure options than ever before, although the devil is in the details.

Finally, some penalties are reduced, especially when there is a good-faith dispute, and violations were not willful or intentional. Plus, PAGA reform permits courts to reduce "stacked" penalties for violations resulting from the same payroll/policy error. Moreover, if employers take "all reasonable steps" (as that term is defined), to comply with PAGA then PAGA penalties can be capped at 15% or 30% of the statutory amounts.

The best news for employers is that PAGA reform generally seeks to reward employers who proactively and promptly fix wage-and-hour practices. This means that a payroll and practices audit (preferably under attorney-client privilege), and audit and fast action upon receipt of a PAGA letter (generally within 60 days) can really limit overall exposure. Moreover, periodic audits are also beneficial. The other good news is that the statute of limitations is only one year, although if violations continue beyond the lawsuit filing, the penalties accrue per pay period until the case is resolved.

## Settlement Agreements

Settlement agreements for employees in California have particularized requirements with regard to many provisions including no rehire, non-

disparagement and litigation assistance. They must also include a reference to Section 1542 of the Civil Code. Make sure your settlement agreements are reviewed by California counsel.

## What Employers Can Do to Protect Themselves

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

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