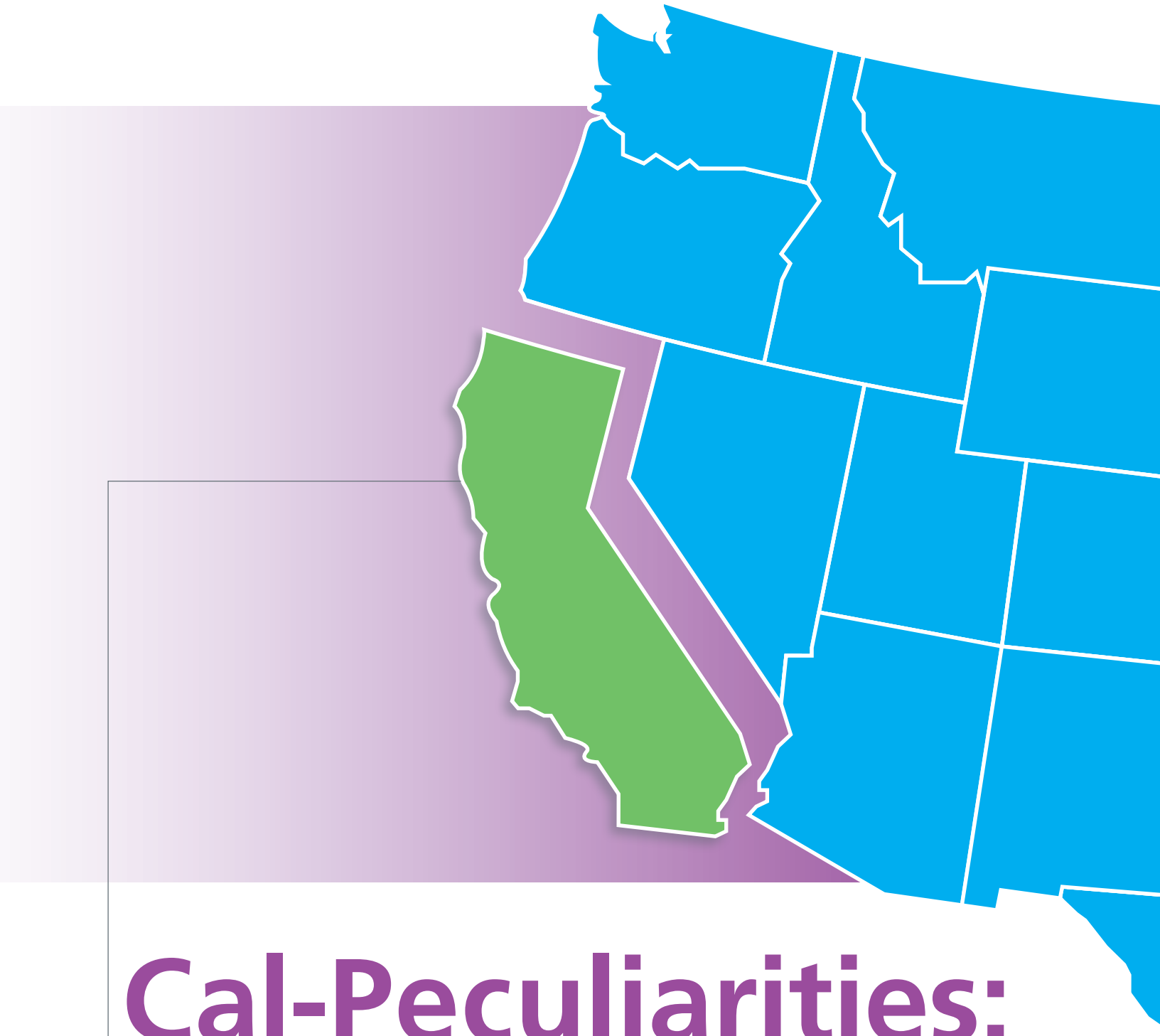
SEYFARTH SHAW

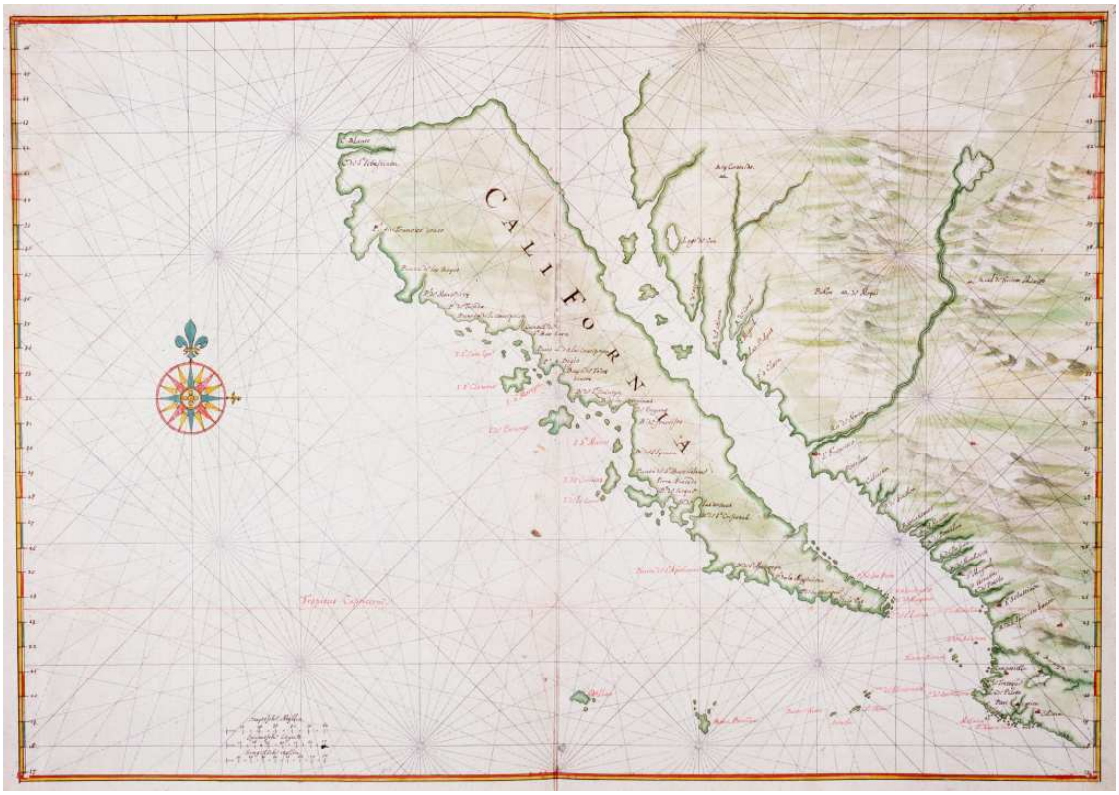


Cal-Peculiarities:

2014 | HOW CALIFORNIA EMPLOYMENT LAW IS DIFFERENT

About Our Cover

Yes, we know: California really is a contiguous part of the North American continent. Yet 17th century mapmakers saw it otherwise. When they outlined the western contours of our region, they extended the Gulf of California far north to make California a yam-shaped island in the Pacific Ocean:



If maps such as this are now historical oddities, they nonetheless reflect a persistent view that California is a world apart. Author Carey McWilliams explored this theme in his 1946 classic, *Southern California: An Island on the Land*, to argue that Southern California is, metaphorically, an island in profound cultural ways.

We think much the same is true of California generally when it comes to labor and employment law. So while the early maps were cartographically incorrect, their symbolism remains powerful. Hence our cover.

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Authors' Note

At annual intervals since the turn of this century, we've cataloged how California law deviates from prevailing American labor and employment law. The result—this steadily growing volume—summarizes legislative, judicial, and regulatory developments that have made California a uniquely challenging environment for private employers. (We do *not* address special challenges facing public employers or government contractors.) We highlight these California peculiarities to help corporate counsel and human resources professionals avoid legal pitfalls without treating what is provided here as the final word (a point emphasized in the disclaimer that follows).

This 2014 edition contains significant contributions from the following Seyfarth lawyers, all members or friends of our Calfornia Workplace Solutions Group: Emily Barker, Jeff Berman, Jonathan Brophy, Robert Buch, Nick Clements, Andrew Crane, Chris Crosman, Andrea Dekoning, Pam Devata, Lindsay Fitch, Barri Friedland, Kerry Friedrichs, Michele Haydel Gehrke, John Giovannone, Carrie Grove, Sarah Hamilton, Maya Harel, Chris Hasbrouck, Josh Henderson, Gaye Hertan, Tim Hix, Whitney Houston-Davis, Dana Howells, Ray Kepner, Sophia Kwan, Kristina Launey, Patty Lee, Eric Lloyd, Hayley Macon, Laura Maechtlen, Casey McCoy, Brandon McKelvey, Jim McNairy, Robert Milligan, Kamran Mirrafati, Anthony Musante, Tim Nelson, Elizabeth Olson, Scott Page, Dana Peterson, David Rosenberg, Tim Rusche, Josh Salinas, Kiran Seldon, Joan Smiles, Fritz Smith, Chelsea Spuck, Pritee Thakarsey, Coby Turner, Kristen Verrastro. Elisabeth Watson, Claudia Wilson, Simon Yang, Julie Yap, Ken Youmans, and Ann Marie Zaletel. And we had superb production assistance from Aeree Lee, Trina Bazarte, Sarah Guigliano, and Lauren Leibovitch.

To review the latest insights on the peculiarities of California employment law, please subscribe to Seyfarth's *California Peculiarities Employment Law Blog* (www.calpeculiarities.com/subscribe).

David Kadue and Colleen Regan, *Co-Editors in Chief*

Important Disclaimer

We have been representative, not exhaustive, in cataloging California peculiarities. This book is general commentary, not legal advice. We disclaim liability as to anything done or omitted in reliance on this publication. Readers should refrain from acting on any discussion in this publication without obtaining specific advice applying current law to particular circumstances. Thus, while we aim to provide authoritative information, this book is not legal advice. (From *A Declaration of Principles* adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations.)

Legal Notice

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Glossary

Term	Definition	Section Number
ADA	Americans with Disabilities Act	6.3
ADEA	Age Discrimination in Employment Act	6.4
ALRA	California Agricultural Labor Relations Act	18.1
ALRB	California Agricultural Labor Relations Board	18.1
AWS	Alternative Workweek Schedules	7.1.6.2
Berman hearing	Wage claim hearing before Labor Commissioner	1.5, 5.1
CalGINA	California Genetic Discrimination Act	4.2, 6.2
CCRAA	California Consumer Credit Reporting Agencies Act	4.11
CFRA	California Family Rights Act	2.3
COBRA	Consolidated Omnibus Budget Reconciliation Act	8.3
DFEH	California Department of Fair Employment and Housing	1.1
DIR	California Department of Industrial Relations	1.3
DLSE	California Division of Labor Standards Enforcement	1.5
DOL	U.S. Department of Labor	7.2.3
DOSH	California Division of Occupational Safety and Health	1.10
DWC	California Division of Workers' Compensation	1.8
EDD	California Employment Development Department	1.6
ERISA	Employee Retirement Income Security Act	7.8.6, 7.11.5, 8.4, 17.8
FCRA	Fair Credit Reporting Act	4.11

Term	Definition	Section Number
FAA	Federal Arbitration Act	5.1.
FEHA	California Fair Employment and Housing Act	1.1
FEHC	California Fair Employment and Housing Commission	1.1
FEHC	California Fair Employment and Housing Council	1.1
FLSA	Fair Labor Standards Act	5.10, 7.1
FMLA	Family and Medical Leave Act	2.3
FTDI	California Family Temporary Disabilities Insurance	2.4
HIPP	Health Insurance Premium Program	9.2.4.2
ICRAA	California Investigative Consumer Reporting Agencies Act	4.11.2
IRCA	Immigration Reform and Control Act of 1986	5.13
IWC	California Industrial Welfare Commission	1.4, 7.1
Labor Commissioner	Head of DLSE, enforcer of the Labor Code	1.5
LWDA	California Labor and Workforce Development Agency	1.2, 5.11
MMPI	Minnesota Multiphasic Personality Inventory	4.12
Ninth Circuit	U.S. Court of Appeals for the Ninth Circuit, covering California and several other western states	Introduction
NLRA	National Labor Relations Act	18.1
ODA	Order, Decision, or Award of Labor Commission	1.5.1
PAGA	California Labor Code Private Attorneys General Act of 2004	5.11
PDLL	Pregnancy Disability Leave Law	2.1
PTO	Paid Time Off	7.8
RMIs	Repetitive Motion Injuries	14.8

Term	Definition	Section Number
SDI	State Disability Insurance	1.6
SSN	Social Security Number	4.8
UCL	Unfair Competition Law	5.10, 6.15
UIAB	Unemployment Appeals Board	1.7, 15.3
USERRA	Uniformed Services Employment and Reemployment Rights Act	2.12, 13.4.3
WARN	Worker Adjustment and Retraining Notification	13.1
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Introduction

When employers across America face a labor law issue on the Left Coast, they often hear "California is different." For better or worse, California ***is*** different.

California is also important, both as the nation's most populous state and as a trend-setter in employment law.

Several sources have contributed to California's continuing expansion of employee rights (and employer obligations). The chief source would be the legislation codified in the California Labor and Government Codes. Also highly significant have been expansive judicial decisions. These decisions come not only from state judges but also from federal judges applying California law. Most of these federal judges are within the Ninth Circuit of the United States Court of Appeals, the federal appellate circuit most friendly to plaintiffs' rights (and the circuit most often reversed by the United States Supreme Court). A final important source of California employment law would be the enforcement activities and interpretations of California administrative agencies.

This volume assumes extensive knowledge of federal labor and employment law in the private sector. Our principal focus is on the peculiar aspects of California law that can bewilder even the most sophisticated private employers who are used to doing business elsewhere.

Highlighted immediately below are some important areas of California labor and employment law.[1] The reader with particular subjects in mind can consult the Table of Contents and Glossary (both at the front of this volume) and the Index of Terms and the Index of Statutory Provisions (both at the back).

So what's peculiar about California employment law? Here's a partial overview:

"Bounty Hunter" or "Sue Your Boss" Lawsuits

California:

- has created civil penalties—generally $100 per employee per pay period for a first violation and twice that for further violations—for employer failures to comply with numerous, often obscure, provisions of the California Labor Code and the IWC Wage Orders,
- permits aggrieved employees to step into the shoes of the California Labor Commissioner, under the Private Attorneys General Act ("PAGA"), to collect these civil penalties, and to keep, as a bounty, 25% of the take (see §§ 5.11, 7.11), and
- permits PAGA claims on behalf of all aggrieved employees even when the plaintiff cannot satisfy the requirements for a class action (see § 5.11.1).

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Leaves

California:

- creates a right to unpaid leave for up to four months (17.33 weeks) for pregnancy-related disabilities, in addition to any available family leave and any related disability leave (see § 2.1),
- enables employees who are on authorized family leave to be paid, for up to six weeks (see § 2.4),
- creates a right to unpaid leave of up to ten days for employees married to military personnel who themselves are on leave from a military conflict (see § 2.12),
- creates a right to paid leave for organ or bone marrow donation (see § 2.14),
- permits employees who accrue paid sick leave to use up to one-half their annual entitlement for "kin care" (to attend sick relatives) (see § 2.10),
- treats employer-paid time off as the equivalent of sick leave (for purposes of "kin care") if the paid time off can be used for any purpose (see § 2.10), and
- allows employees who are victims of certain crimes and of domestic violence, sexual assault, or stalking to take time off to attend to their issues in court (see §§ 2.6, 2.7).

Employee Privacy—Protected Activities and Confidential Information

The California Constitution creates a right to privacy that applies to private employers as well as the government. California also:

- entitles employees to designate attorneys to negotiate on their behalf with employers regarding conditions of employment,
- forbids employers to discriminate against employees or applicants for lawful off-premises, off-duty conduct (see § 3),
- forbids employers to inquire about certain marijuana-related convictions, or about participation in pre- or post-trial diversion programs, or about convictions that have been judicially dismissed or ordered sealed,
- forbids employers from requesting or requiring employees or job applicants to disclose personal social media usernames or passwords,
- forbids unconsented tape-recording of confidential communications,
- forbids audio and videotaping of restrooms, locker rooms, and changing rooms,
- forbids use of credit background checks for most positions, and
- entitles employees to workplace privacy against intrusions by their employer (see § 4).

Arbitration and Predispute Jury Waivers

California declines to enforce predispute jury-trial waivers not specifically authorized by statute (see § 5.1). Further, California subjects mandatory arbitration agreements to certain peculiar conditions:

- they must be "mutual," requiring the employer as well as the employee to use arbitration instead of litigation in initiating claims (including claims for injunctive relief to prevent unfair competition),
- they must (as to statutory claims) provide full discovery and have the employer pay all costs unique to arbitration,
- they must, as a practical matter, permit many employment-related class actions,
- they cannot provide for unreasonably short statutes of limitations, and
- they generally cannot be enforced if they have more than one "unconscionable" provision (see § 5.1).

Litigation Issues

California courts:

- have permitted class-action lawyers to obtain private contact information for the defendant's current and former employees, subject only to individual decisions to affirmatively opt out, even where the current plaintiff is not even a member of the class and the lawyers are trolling for new clients, and even if the employees have signed forms stating that they do not want to be contacted by third parties (see §§ 4.10, 5.10.4), and
- have required that employers suffering a judgment for back pay to satisfy the judgment in full, without employer tax withholding, and thereby risk the censure of the IRS, which holds that back pay requires employer withholding (see § 5.14).

Discrimination

California protects from employment discrimination not only the traditionally protected bases (race, color, religion, gender, national origin, age, and disability), but also a host of additional bases, such as military and veteran status, sexual orientation, gender expression, genetic characteristics, political affiliation, marital status, breastfeeding, religious dress and grooming practices, and gender identity (see § 6.2), and extends marital-status protections to registered domestic partners (see § 8.1.1).

Disability Discrimination

California:

- defines “disability” very broadly to include conditions, as well as impairments, that create any restriction on a major life activity,
- expressly requires employers to engage in an interactive process regarding accommodations requested by disabled employees, and
- can effectively require employers to deal with an employee on leave through the employee’s attorney (see § 6.3).

Age Discrimination

California:

- forbids employers to rely on compensation levels in deciding which employees to dismiss, if that criterion adversely affects employees over age 40 and
- endorses the adverse impact theory of liability in age discrimination actions as well as in discrimination actions generally, without expressly recognizing an employer defense for reliance on reasonable factors other than age (see § 6.4).

Sex Discrimination

California:

- entitles women as well as men to wear pants in the workplace (see § 6.8) and
- has expanded the prohibition against sex discrimination to include discrimination on the basis of “breastfeeding or medical conditions related to breastfeeding” as well as “gender,” defined to mean “actual sex” or perception thereof, including the employee’s “gender, gender identity, and gender expression” (see § 6.9).

Religious Discrimination

California:

- explicitly protects religious dress and grooming practices,
- requires religious accommodation absent “undue hardship,” which California defines much more narrowly than federal law does, and
- forbids employers to use segregation in the workplace as a means of a religious accommodation (see § 6.10).

Harassment

California:

- applies harassment law to all private employers, no matter how small,
- protects from harassment not only employees and applicants but also independent contractors,
- makes both supervisors and co-workers personally liable for perpetrating discriminatory workplace harassment,
- requires large employers to train supervisors to prevent sexual harassment,
- makes employers vicariously liable for supervisor-perpetrated harassment, using a broad definition of "supervisor,"
- specifies that sexual harassment may be actionable even if not motivated by sexual desire, and
- denies employers a defense they would have under federal law—the *Ellerth/Faragher* defense, which absolves the employer of liability if it took reasonable measures to prevent and correct harassment and if the plaintiff unreasonably failed to use those measures (see § 6.5).

National Origin Discrimination

California generally forbids English-only rules in the workplace (see § 6.6).

Wage and Hour

California:

- requires employers to provide new hires with written notice of such things as pay rates, paydays, employer names, as well as any other information the Labor Commissioner deems "material and necessary" (see § 16.1.2),
- requires employers to provide, with each payment of wages, a highly detailed itemized statement (see § 16.3),
- imposes premium overtime pay requirements for work over eight hours a day, and for work on a seventh consecutive work day, as well as for work over 40 hours a week (see § 7.1.6),
- imposes a high minimum wage (see § 7.1.4),
- requires employers to provide employees with paid rest breaks and unpaid meal periods, and to pay an additional hour of pay for each day of violation (see §§ 7.1.10, 7.1.11),
- requires employers, upon pain of large penalties, to provide suitable seats to employees where the nature of the work reasonably permits (see § 7.1.14), and
- extends wage and hour law into areas not covered by federal law (see § 7).

Vacation

California:

- treats vacation as wages earned and vested on a daily basis,
- requires that all unused vacation be paid upon termination of employment at the final rate of pay, regardless of when the vacation was earned or whether the employee was eligible to take vacation,
- treats as the equivalent of vacation any paid time off that can be used for any purpose, including some floating holidays and some sabbaticals, and
- prohibits "use it or lose it" vacation provisions, although employers may place a "reasonable" cap on the further accrual of vacation pay for employees who fail to take enough paid vacation (see § 7.8).

Employee Access to Information

California:

- entitles employees and former employees access to, and copies of, personnel and payroll records upon request (see § 10),
- requires employees to post a wide variety of notices, listed in part at www.dir.ca.gov/dlse/WorkplacePostings.htm, and
- requires a notice to new hires, on a single form, regarding the name of the employer, rates of pay, the identity of the workers' compensation carrier, and other such basic information.

Covenants Not to Compete

California broadly bans even narrowly drawn restraints on trade and thus complicates employers' efforts to enforce various employee covenants that would be enforceable in other states (see § 12.1).

Workers' Compensation

California makes it unlawful, absent "business necessity," to dismiss an employee on workers' compensation leave even pursuant to a policy setting a uniform maximum length for all leaves (see § 17).

Independent Contractors

California imposes fines of up to $25,000 on employers who willfully misclassify employees as independent contractors (see § 19.7). California requires defendants rather than plaintiffs to bear the burden of proof as to whether a plaintiff is an employee or an independent contractor, and has permitted plaintiffs challenging their classification as independent contractors to rely on secondary factors to show employee status, even where the primary factor of the right to control indicates independent contractor status (see §19.2).

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Preface to the 2014 Edition

New Legislation

In 2013, the California Legislature created the following additional compliance challenges for California employers, all effective January 1, 2014 unless otherwise noted.

- **Minimum Wage Increase:** The minimum wage will increase to $9.00 (in July 2014), and then to $10.00 (in January 2016) (see § 7.1.4).
- **Whistleblowing Made Easier:** Employees now generally need not exhaust administrative remedies before suing under a Labor Code Section, and protected reports of suspected misconduct now extend to the conduct of co-workers, to violations of local laws, and to internal reports to employer personnel. What's more, even in the absence of any employee report, an employer may be liable for retaliation if it acts simply in the belief that an employee has disclosed or may disclose relevant information (see § 3.5.).
- **Immigrant Protections:** Employers must not engage in retaliatory reporting of suspected citizenship or immigration status and must not discriminate against an employee for attempting to update personal information (see §§ 3.5.7, 3.5.8).
- **Time Off and Accommodations for Victims:** Employers must not take adverse actions against victims of stalking and victims of certain offenses who take time off to attend to their issues in court. Employers must engage in the interactive process and reasonably accommodate victims of stalking, domestic violence, and sexual assault (see §§ 2.6, 2.7).
- **Sexual Desire:** Sexual harassment can include sexually harassing conduct that is not motivated by sexual desire (see § 6.5).
- **Recovery Periods:** The protections for meal and rest breaks—and the corresponding one-hour-of-pay remedies—now also extend to "recovery periods" to permit an employee to cool down to prevent heat illness (see § 7.1.12).
- **Employer Recovery of Attorney Fees Limited still Further:** Prevailing employers can now recover costs in defending an employee's claim for unpaid wages only if the employee brought the action "in bad faith" (see § 5.10.1).
- **Criminal Inquiries:** Employers must not ask an applicant for employment to disclose, or deny employment because of, information concerning a conviction that has been judicially dismissed or ordered sealed (see § 4.2).

Judicial Developments

- **Leave Stacked Upon Leave:** A California appellate court held that an employee severely disabled by pregnancy could rely upon disability leave under the FEHA after she had exhausted her four months of leave under the PDLL (see § 2.1).
- **Arbitration**
    - Although the U.S. Supreme Court directed the California Supreme Court to reconsider whether Federal Arbitration Act preempted reliance on state public-policy concerns to invalidate an arbitration agreement, the California Supreme Court responded in an opinion suggesting that California courts could use public-policy considerations to invalidate arbitration agreements under a broad notion of California's unconscionability doctrine, which the FAA does not preempt (see § 5.1).
    - Courts applying California law continue to find ways to deny enforcement to arbitration agreements (see § 5.1.3).
- **Wrongful Termination:** A California appellate court that a low-wage employee could sue for constructive discharge in violation of public policy for being denied reimbursement for his auto expenses (see § 5.2).
- **Anti-SLAPP Motions:** An individual defendant who cross-complained against a sexual harassment plaintiff by suing her for defamation found himself on the wrong end of an anti-SLAPP motion that required him to pay her attorney fees (see.§ 5.5.8).
- **Employer Liability for Unintentional Employee Torts:** A 2013 California appellate decision held that an employer could be liable for damage an employee caused on her way home from work, driving a personal vehicle she was required to use for business, even though the accident occurred while she was on a detour to buy yogurt and practice yoga (see § 5.8.4).
- **Excessive Attorney Fees for Plaintiffs:** California courts have continued to award attorney fees to only partially successful plaintiffs, and in amounts that dwarf the amount of the plaintiff's actual damages (see § 5.12.5).
- **Associational Disability Rights:** An employee fired for taking unauthorized leave to donate a kidney to his sister could sue for disability discrimination (see § 6.3.1.2).
- **Seating Claims:** Employers hit with seating claims generally have removed the cases to federal court, but thus far have not persuaded the Ninth Circuit to restrict the scope of these claims. A 2013 Ninth Circuit decision held that plaintiffs can pursue seating claims without first requesting their employer for a seat. And in another case, the Ninth Circuit, rather than addressing employer arguments that would restrict the scope of seating claims, has referred the issues for resolution by the California Supreme Court, whose rulings are rarely employer-friendly (see § 7.1.14).
- **Separate Pay for Every Hour of Work:** A California appellate court has held that nonexempt employees paid for only productive time must be paid separately for their rest breaks (see § 7.3.2).

- **Issues Pending Review in 2014 Before the California Supreme Court:**
  - Can a plaintiff prevail on a claim for terminating a medical leave, and employment, even where the employer acted in an honest, if mistaken, belief that the plaintiff had abused the leave in violation of company policy? (See § 2.3.6.)
  - Is an arbitration agreement substantively unconscionable on a theory that it permits the parties to seek injunctive relief in court and that this sort of relief is more likely to be sought by the employer rather than the employees? (See § 5.1.3.2.)
  - Does the Federal Arbitration Act preempt California doctrines that would invalidate arbitration agreements calling for waiver of class actions and representative actions, including PAGA actions? (See § 5.1.3.4.)
  - In a case challenging exempt classification, can a class action be tried through the use of representative testimony and statistical sampling, where many of the class members admit they were properly classified? (See § 5.10.4.1.)
  - Can a plaintiff succeed on an employment discrimination claim notwithstanding the employer's defense, based on after-acquired evidence and unclean hands, that the plaintiff used false documents to obtain employment in the first place? (See § 5.13.1.)
  - Are construction site security guards entitled to pay for all nighttime "on call" hours, or may the employer deduct for sleeping time? (See § 7.3.3.)
  - Can a franchisor be vicariously liable for sexual harassment committed by a supervising employee of a franchisee? (See § 7.14.)
  - Do common issues, justifying a class certification, predominate in a claim by newspaper contractors that they have been employees misclassified as independent contractors? (See § 19.1.)

1. California Employment Law Agencies

Most statutory provisions regulating California employers appear in the Labor Code or the Government Code. Statutory provisions are available online at www.leginfo.ca.gov. The Department of Industrial Relations, which interprets Labor Code provisions, has information online at www.dir.ca.gov. The Department of Fair Employment and Housing, which interprets employment discrimination provisions in the Government Code, has information online at www.dfeh.ca.gov.

Below is a partial listing of California employment law agencies. For more, see www.ca.gov.

Agricultural Labor Relations Board

California Apprenticeship Council

CAL-OSHA Appeals Board

CAL-OSHA Standards Board

Commission on Health and Safety and Workers' Compensation

Department of Fair Employment and Housing

Department of Industrial Relations

Division of Apprenticeship Standards

Division of Labor Standards Enforcement

Division of Labor Statistics and Research

Division of Occupational Safety and Health

Division of Workers' Compensation

Employment Development Department

Fair Employment and Housing Council

Industrial Medical Council

Industrial Welfare Commission

Labor and Workforce Development Agency

State Compensation Insurance Fund

State Mediation and Conciliation Service

Workers' Compensation Appeals Board

1.1 The Department of Fair Employment and Housing (DFEH), Enforcing the Fair Employment and Housing Act (FEHA)

The DFEH, founded in 1959, enforces the FEHA and other civil rights laws, including the Unruh Civil Rights Act and the Ralph Civil Rights Act. The DFEH investigates and prosecutes allegations of discriminatory practices in employment, housing and public accommodations, and discriminatory practices involving "hate violence."[2] For more information, see www.dfeh.ca.gov.

Formerly, California had a Fair Employment and Housing Commission (FEHC), which promulgated regulations,[3] conducted administrative hearings on DFEH complaints, levied fines, and awarded damages. The FEHC also ordered employers to implement written harassment policies and post notices of violations. In 2013, however, the Legislature abolished the FEHC and, with it, the administrative adjudication of FEHA claims. In the FEHC's place is a Fair Employment and Housing Council (new FEHC), located within the DFEH. The new FEHC consists of seven volunteer members appointed by the Governor, with the power to issue regulations but without the power to adjudicate. New regulatory projects are planned, including interpretations of the CFRA and the FEHA.

The DFEH, meanwhile, now has authority to file lawsuits to seek all remedies, including attorney fees, after it first engages in mandatory dispute resolution through its internal Dispute Resolution Division, which offers its services free of charge to the parties. The Legislature has also established a Fair Employment and Housing Enforcement and Litigation Fund to hold attorney fees and costs awarded to the DFEH in civil actions, which the Legislature can use to help defray costs of the DFEH.

1.2 The Labor and Workforce Development Agency (LWDA)

Created through a consolidation of state departments in 2002, the Labor and Workforce Development Agency contains the Department of Industrial Relations (DIR), the Employment Development Department (EDD), the Workforce Investment Board, the Employment Training Panel, the Public Employment Relations Board, Business Investment Services, the Unemployment Insurance Appeals Board, and the Agricultural Labor Relations Board (ALRB). The LWDA was organized to provide more efficiency in California's workforce training programs, and to coordinate enforcement and worker disability programs operated by DIR and EDD. For more information, see www.labor.ca.gov.

1.3 Department of Industrial Relations (DIR)

The DIR exists to improve working conditions and advance employment opportunities in California. The DIR oversees the Division of Workers Compensation, Cal-OSHA, the Industrial Welfare Commission (see § 1.4), the Division of Labor Standards Enforcement (see § 1.5), and

the Division of Apprenticeship Standards. The DIR has formed a Labor Enforcement Task Force, to combat the underground economy in California, thereby reducing the prevalence of underpaid wages and taxes. The Task Force includes representatives of many government branches, such as the DIR, the EDD, the Contractor's State Licensing Board, the Bureau of Automotive Repair, the California Attorney General, and the Department of Insurance.

1.4 Industrial Welfare Commission (IWC)

The IWC, a five-member body appointed by the Governor, ascertained the hours and conditions of labor and employment in various occupations, trades, and industries, investigates the health, safety, and welfare of those employees, and promulgated wage orders that have the force of statutes (see § 7.1).[4] Initially established in 1913, the IWC spent its first 60 years focusing on the wages, hours, and working conditions of women and children. Its jurisdiction broadened to employees generally after courts held that female-protective violation was unlawful.[5] Although the California Legislature defunded the IWC in 2004, the IWC wage orders remain in effect, and are enforced by the DLSE.[6]

1.5 The California Labor Commissioner

1.5.1 Complaints for unpaid wages with the Division of Labor Standards Enforcement (DLSE)

The head of the DLSE is known as the "Labor Commissioner."[7] Employees claiming unpaid wages may file a claim with a local office of the DLSE, which will investigate. In recent years, the DLSE has ratcheted up its enforcement and collection efforts, through the Bureau of Field Enforcement, particularly in the car wash, restaurant, construction, garment and agriculture industries.[8] The DLSE has no jurisdiction over bona fide independent contractors and only limited jurisdiction over claims by federal, state, county or municipal employees, and employees working under collective bargaining agreements.

The DLSE schedules settlement conferences and administrative hearings (called "Berman hearings") before Deputy Labor Commissioners in various branch offices throughout the state. Within ten days after service of the notice and the complaint, the defendant (the employer) may file an answer. Within 30 days of the complaint, the DLSE notifies the parties whether a hearing will be held, whether the DLSE will prosecute the matter itself, or whether no further action will be taken.[9] A hearing, if held, is to occur within 90 days of that determination. A continuance of a hearing is rarely granted.[10] Claims that involve a large number of employees and records may attract the attention of the DLSE's Bureau of Field Enforcement, which may require the employer to undergo an audit.

The DLSE can seek liquidated damages for an employer's failure to pay minimum wage,[11] and has three years to collect statutory penalties and fees.[12] As of 2013, the DLSE has yet another enforcement tool: a Labor Commissioner order, decision or award, once final and filed with the county recorder, creates a lien on the employer's real property as if it were a final judgment creating a judgment lien.[13]

1.5.1.1 the conference

The conference determines if the claim can be resolved without a hearing. The parties bring evidence to support their positions, but do not testify under oath. If the case is not resolved at the conference, then the Deputy Labor Commissioner determines whether to dismiss the claim or set the matter for a hearing.

1.5.1.2 the Berman hearing

This hearing occurs in an informal setting, but is a formal proceeding. The parties and witnesses testify under oath, and the proceedings are tape-recorded. The hearing officer is not bound by formal rules of evidence and has wide discretion to accept evidence and decide whether to assess penalties. Within 15 days of the hearing, the Labor Commissioner serves on the parties an Order, Decision, or Award (ODA), setting forth the hearing officer's decision and the amount awarded, if any.

Can an employee waive a Berman hearing if the employee has signed an arbitration agreement? In 2011, the California Supreme Court held that waiver of the Berman hearing would contravene public policy, and that California law prohibiting waiver of a Berman hearing is not preempted by the Federal Arbitration Act.[14] The United States Supreme Court then reversed this decision and remanded for further consideration in light of its decision in *AT&T Mobility, LLC v. Concepcion*.[15] On remand, the California Supreme Court yielded and reversed itself and agreed that the FAA would preempt any categorical ban on a Berman-hearing waiver. The California Supreme Court nonetheless held that California's policy against unconscionability might still apply to void an arbitration provision that would deprive an employee of the right to a Berman hearing before arbitration is required.[16]

1.5.1.3 appeal to civil court

Within ten days after service of notice of an ODA, a party may seek judicial review by filing an appeal to the court.[17] The court clerk will then set the matter

de novo, which means that the parties try the case again from the start, with each party presenting evidence and witnesses.

The Labor Code discourages employer appeals from DLSE awards by requiring that the appealing employer post a bond, by making interest run on the amount of the award, by entitling the employee to costs and attorney fees on the appeal even if the award on appeal is less than the award from the Labor Commissioner (so long as the court makes an award greater than zero), and by permitting the employee to raise new claims on appeal that the employee failed to raise before the DLSE.

i. undertaking required of employer on appeal

Employers who appeal a DLSE award must post with the reviewing court an undertaking in the amount of the award.[18] Employers wishing to appeal must first post the undertaking.[19] If the employer loses at trial or withdraws its appeal, then the employer must pay the amount of the award within ten days of the court's judgment or withdrawal of the appeal; otherwise, the undertaking will be forfeited to the employee.[20]

ii. interest

All awards accrue interest (at the legal rate of 10%) from the date due to the date paid.[21]

iii. costs and attorney fees

The DLSE may represent a claimant who cannot afford counsel.[22] In an appeal from an ODA, the appealing party who is "unsuccessful" is liable for the other party's costs and reasonable attorney fees on appeal.[23] Although appealing employees who received less from the court than was awarded by the DLSE are "unsuccessful" in this sense,[24] the California Legislature has deemed that an appealing employee "is successful if the court awards an amount greater than zero."[25]

iv. new employee claims can arise at trial

In one case, an employee prevailed before the Labor Commissioner on claims for unpaid overtime. When the employer appealed from the ODA for a trial *de novo* in court, the court permitted the employee to add new claims.[26]

1.5.2 Complaints for retaliation

The DLSE also hears complaints that a person has suffered discrimination in violation of law under the jurisdiction of the DLSE.[27]

1.5.3 Records inspection

The Labor Code permits the DLSE to inspect the records of any "employer" to determine if the minimum wage has been paid, and to "enforce the payment of any sums found, upon examination, to be owing to the employees."[28]

1.5.4 The DLSE Manual

The DLSE published, in 2002, a comprehensive *Enforcement Policies and Interpretations Manual*, available online (www.dir.ca.gov/dlse/Manual-Instructions.htm) and subject to periodic revision. DLSE interpretations typically favor the view of the law that is most onerous for employers. The *Manual* itself deserves no judicial respect, as it amounts to an "underground regulation", an administrative pronouncement issued without following the administrative procedure by which an agency gives notice of a proposed regulation and considers public comment before promulgating a final rule.[29] The *Manual* is very useful, however, to the extent that it summarizes opinion letters (discussed immediately below) that the DLSE has issued in specific situations.

1.5.5 DLSE opinion letters

The DLSE has issued opinion letters in response to particular situations presented by individual employees and employers. The precise amount of judicial deference owed to DLSE opinion letters is unclear. The interpretations found in these opinion letters lack the legal respect owed to a formal administrative interpretation. Emphasizing this point, one of the first executive orders of the Schwarzenegger Administration—Executive Order S-2-03—placed DLSE opinion letters "under review to determine their legal force and effect" and emphasized that DLSE opinions "are advice in specific cases only."[30] The DLSE under the Schwarzenegger Administration withdrew certain opinion letters, principally involving the alternative work week, bonuses, compensatory time off, use of vacation time to offset partial-day absences for salaried employees, and caps on vacation-pay earnings.

Nonetheless, California courts interpreting wage orders have suggested that the "DLSE's interpretation of an IWC [wage] order is entitled to great weight."[31] Courts seem to adopt or reject the reasoning of a DLSE opinion letter depending on whether the court independently finds the DLSE's reasoning persuasive.[32]

1.5.6 Compliance Monitoring Unit

The DLSE's Compliance Monitoring Unit (CMU) focuses on enforcing prevailing-wage requirements on public works. Awarding bodies must notify the CMU each time a public works contract is awarded.

1.6 California Employment Development Department (EDD)

1.6.1 General administration

The EDD collects payroll taxes for the state and administers programs concerning Job Service, Unemployment Insurance, State Disability Insurance (SDI), the Workforce Investment Act, and the Welfare-to-Work program.

SDI is a partial wage-replacement insurance plan for California workers, funded through mandatory employee payroll deductions. SDI provides short-term benefits to eligible workers who suffer a loss of wages when they cannot work due to a non-work-related illness or injury, or a medically disabling condition resulting from pregnancy or childbirth.

The EDD also administers the employee-funded Paid Family Leave program, which provides partial wage-replacement for employees who are eligible for an otherwise unpaid leave to care for an ill or injured family member.

For more information, see www.edd.ca.gov.

1.6.2 Payroll tax audits regarding independent contractor classifications

As California's largest tax collection agency, the EDD conducts payroll tax audits of California businesses, often after workers have filed claims for unemployment insurance benefits against businesses that have not paid any payroll taxes with respect to those workers. The EDD frequently challenges the classification of workers as independent contractors instead of employees. During a payroll tax audit, the EDD obtains accounting records and visits on site. The review period is generally up to three years. The audit aims to see if everyone paid for services was properly classified as an employee or independent contractor and if wages and taxes were properly reported. Audits, if they go badly for the employer, can result in an assessment of additional taxes due. The employer may petition for a reassessment or for a hearing before an administrative law judge.

The significance of correct classification looms especially large in light of the hefty potential civil penalties for employers and their outside, non-attorney advisors who engage in "willful misclassification" of workers as independent contractors.[33]

1.6.3 EDD regulations and checklists

The EDD has issued comprehensive regulations to apply the common law to questions of whether workers are employees or independent contractors. The regulations state that the most important factor is the right of the principal to control the manner and means of accomplishing the desired results, but also list ten other factors to consider.[34] The regulations give guidance on the specific application of these rules in a number of particular industries, including real estate, home health care, computer services, newspaper distribution, process servers, banking, and cosmetology.[35] A comprehensive EDD checklist provides guidance in determining whether the service provider is an employee or an independent contractor.

1.7 California Unemployment Insurance Appeals Board (UIAB)

The UIAB hears claims for unemployment and disability benefits. These cases are appeals from administrative determinations made by the EDD. The UIAB also hears petitions from taxpayers concerning assessments made by the EDD's Tax Branch. The initial hearings and decisions are heard in eleven Offices of Appeals throughout the state. These offices conduct the first level of appeal. An administrative law judge presides, and takes tape-recorded testimony under oath (see § 15.3.). A losing party at the first level may appeal to the second level.[36] For more information, see http://www.cuiab.ca.gov/index.asp.

1.8 Division of Workers' Compensation (DWC)

Workers' compensation cases brought by injured workers ("applicants") are heard by workers' compensation referees employed by the DWC. Rehabilitation disputes are heard by a consultant in the DWC Rehabilitation Unit, whose decision can be appealed to a workers' compensation referee. Any settlement of a workers' compensation case must be in the form of a compromise and release, extinguishing liability in return for a stipulated amount, which must be approved by a workers' compensation referee. The standard form used to effect a compromise and release will not release an individual's civil claims against the employer.[37] Applicants' attorney fees also must be approved by a workers' compensation referee, and are generally 9-15% of the settlement amount. For more information, see www.dir.ca.gov/DWC.

1.9 Workers' Compensation Appeals Board (WCAB)

The WCAB is a seven-member judicial body appointed by the Governor and confirmed by the Senate. It reviews petitions for reconsideration of decisions by workers' compensation administrative law judges of the DWC and regulates the adjudication process by adopting rules of practice and procedure. A WCAB decision is reviewable only by the appellate courts.

1.10 Division of Occupational Safety and Health (DOSH)

The DOSH protects workers and the public from safety hazards by enforcing occupational and public safety laws and providing information and consultative assistance to employers, workers, and the public about workplace and public safety matters. The DOSH, through the Cal-OSHA Enforcement Unit, inspects California workplaces based on worker complaints, accident reports, and high hazard industries.

The Occupational Safety and Health Appeals Board, a three-member quasi-judicial body appointed by the Governor and confirmed by the Senate, handles appeals from private and public sector employers regarding citations issued by DOSH for alleged violations of workplace safety and health laws and regulations. For more information, see http://www.dir.ca.gov/DOSH.

2. Leave and Accommodation Statutes

2.1 Pregnancy

Under the Pregnancy Disability Leave Law (PDLL), California employers with five or more employees must grant up to "four months" (17.33 weeks) of unpaid leave per pregnancy[38] to employees disabled by pregnancy or pregnancy-related conditions,[39] regardless of whether the employer allows disability leaves generally.[40] (Note that this is a *pregnancy disability* leave, not a *maternity* leave. Employers who grant motherhood leaves without granting fatherhood leaves arguably discriminate against male employees because of their gender.) DFEH regulations state that the reinstatement must be to the exact same position (as opposed to an equivalent or comparable position), and that the employee is entitled to a written guarantee of reinstatement upon request.[41] A pregnancy-disabled employee who exhausts her four months of PDLL leave also may be entitled to additional leave under the FEHA, as a reasonable accommodation for a disability.[42]

The PDLL requires further accommodations, such as temporary transfers, for conditions related to pregnancy, childbirth, or related medical conditions.[43] A California employer may transfer an employee over her objection only if she seeks a reduced schedule or intermittent leave and a transfer would better accommodate the needs of the business.[44] California employers must maintain group health benefits during the employee's pregnancy disability leave as if she were actively working during the leave, up to a maximum of four months within a 12-month period (commencing on the date the pregnancy disability leave begins).[45] Employers must maintain health coverage for up to seven months if employees take their full PDLL leave and then their full CFRA leave for baby bonding.[46]

Employers must not interfere with or restrain the exercise or attempted exercise of PDLL rights.[47]

2.2 Lactation Accommodation

In 2010, Congress amended the FLSA to require employers to provide employees with a reasonable amount of unpaid break time in a private location (other than a bathroom) to express milk for their children of up to one year in age.[48] In so doing, Congress followed the lead of California, which since 2002 had been requiring employers to permit employees to take unpaid breaks to express milk in a private location (other than a toilet stall), in close proximity to the work area, unless this break time would "seriously disrupt the operations of the employer."[49] The California standard remains slightly more lactation-friendly than the federal standard, extending lactation-accommodation benefits to all employees, not just nonexempt employees.

The FEHA includes breastfeeding and related medical conditions within its definition of "sex" (see § 6.2), and thus forbids California employers to discriminate against those who breastfeed.

2.3 Family Care and Medical Leave

Under the California Family Rights Act (CFRA), an eligible employee of an employer with 50 or more employees within 75 miles of the employee's worksite is entitled to unpaid leave of up to 12 work weeks in a 12-month period for reason of (1) birth, adoption, or foster-care placement of a child, or (2) serious health condition of the employee or the employee's child, spouse, registered domestic partner, or parent.[50]

California employers must not interfere with an employee exercising or attempting to exercise CFRA rights.[51]

CFRA requirements sometimes exceed those of the federal Family and Medical Leave Act (FMLA), and are *in addition to* the requirements of the California PDLL. Thus, an eligible employee in California who has taken a pregnancy disability leave of up to four months may take an *additional* 12 weeks of CFRA leave to bond with her child (or for any other CFRA-qualifying reason), during which the employer must continue health insurance coverage. The CFRA entitles an employee to intermittent leave for bonding without the employer's permission, and the basic minimum duration of that leave generally is two weeks.[52] Further, under the CFRA, California employers cannot require "medical facts" (e.g., symptoms or a diagnosis) and certain other information that the FMLA would permit as part of a medical certification, and also cannot obtain a second or third medical opinion as to the serious health condition of a family member (as opposed to the employee's own medical condition, where second and third opinions are permitted).[53]

2.3.1 Employee right to rely on spokesperson while on leave?

Ordinarily, an employer can discipline an employee on leave who refuses to communicate. But a California appellate decision reversed a summary judgment for an employer that had dismissed an employee on leave for refusing to respond to repeated follow-up inquiries regarding his condition, and for insisting instead that any communication be through his wife or his workers' compensation attorney or his physician. To the employer, this was a clear case of insubordination, warranting dismissal, but the Court of Appeal found a triable issue of whether the employer itself had been reasonable in insisting on direct communication with its employee. The plaintiff's psychiatrist had advised the employee to avoid stressful situations and the employee had felt "too stressed out" to speak with his employer directly. The Court of Appeal concluded that "nothing precluded [the employer], at a minimum, from contacting [the workers' compensation] attorney,"[54] and that the record thus supported an inference that the employer had unreasonably refused to communicate with the plaintiff's representatives.

2.3.2 Liberal definition of serious health condition

The California Supreme Court has reversed a summary judgment in favor of a hospital that had dismissed a technician for absenting herself under suspicious circumstances and then defying an order to return to work.[55] She had submitted a physician's note supporting a 30-day leave for "medical reasons," which the employer disputed by sending her to a second physician, who opined that she could return to work without restrictions. The employer relied on this second opinion in firing the plaintiff. The technician sued the hospital for firing her and failing to follow CFRA procedures, arguing that the hospital's failure to seek yet a ***third*** medical opinion stopped it from challenging her serious health condition.

The California Supreme Court made two rulings. First, rejecting the plaintiff's argument that a third opinion was required, the court held that an employer can challenge an employee's assertion of a serious health condition without having to use the CFRA's dispute resolution method of obtaining a binding determination on the employee's condition from a third, jointly-chosen health care provider. This was a narrow employer victory through a 4-3 vote.

Second, by an equally narrow margin, the California Supreme Court rejected the employer's argument that the employee's ability to perform a similar job during her absence conclusively disproved her claim that she had a "serious health condition" that made her "unable to perform the functions of' a technician's position." Rather, the court thought that this fact was merely "strong evidence" for the employer to take to the jury.

2.3.3 Liberal construction of requests for CFRA leave

The California Court of Appeal revived the claim of an employee who had been discharged for excessive absenteeism.[56] The employee had suffered summary judgment because he admittedly never requested a CFRA leave and because the managers who decided to discharge him relied on his habitual absences, without knowing that he had been hospitalized. Yet the Court of Appeal reversed the summary judgment against him, holding that he arguably had requested a CFRA leave and had thus triggered employer duty to inquire into his situation when he submitted a Kaiser Permanente medical form indicating he had been in the hospital.

2.3.4 Employer response obligations clarified

CFRA regulations provide a deadline for the employer's response.[57] A Court of Appeal ruling in 2012 clarified that an employer need not affirm or deny a request within ten days, but rather must "respond to" a request within that time. It was sufficient, therefore, for an employer to address a request and seek additional information from the employee; the employer did not need to reach its final decision within the ten-day period.[58]

2.3.5 Leave granted to care for same-sex spouse

Same-sex marriages are now lawful in California.[59] An employee may take CFRA leave to care for a same-sex spouse with a serious health condition. Federal law also has recently addressed the issue of same-sex spouses. In August 2013, the federal Department of Labor revised the definition of "spouse" for purposes of taking FMLA leave. Under the FMLA, spouse is defined as "a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides, including 'common law' marriage and same-sex marriage."[60]

2.3.6 Absence of "honest belief" defense

The Court of Appeal has held that the "honest belief" defense available to an employer in many discrimination contexts does not apply to a CFRA claim. Rather, an employer denying leave in the belief that the employee is abusing leave must be factually correct in that belief: the employer could not "simply rely on an imprecisely worded and inconsistently applied company policy to terminate an employee on CFRA leave without adequately investigating and developing sufficient facts to establish the employee had actually engaged in misconduct warranting dismissal."[61]

2.4 Paid Family Leave

Employees of private California employers who take time off work to care for a seriously ill child, spouse, parent, or domestic partner or to bond with a new child are entitled to up to six weeks of Family Temporary Disability Insurance (FTDI) benefits (i.e., Paid Family Leave (PFL) benefits) during a 12 month period. An employee can claim these benefits at any time after being employed, although the employee must wait seven days before receiving benefits. The program is administered in conjunction with the state disability insurance program, with insurance payments funded by an employee payroll tax.

The PFL law does NOT create leave rights. Thus, an employee eligible for PFL benefits is not entitled to reinstatement unless the leave is otherwise protected by law (e.g., FMLA or CFRA), and employers need not provide employee benefits during the paid leave unless other statutes (e.g., family leave statutes) provide for continuation of benefits.

Effective July 1, 2014, the California Unemployment Insurance Code has expanded the definition of "family" for purposes of family temporary disability wage replacement benefits. Under the expanded definition, pay is now available for family leaves regarding not only a seriously ill child, spouse, parent, or domestic partner, but also a seriously ill grandparent, grandchild, sibling, and parent-in-law. Pay is also available for leave to bond with a minor child within one year of the birth of the child or the placement of the child in connection with foster care or adoption.[62]

2.5 Accommodation of Addicts and Illiterates

Employers of 25 or more employees must provide a "reasonable accommodation" (e.g., an unpaid leave) for employees who wish to participate in alcohol or drug rehabilitation programs or adult literacy programs,[63] and must take reasonable steps to safeguard the privacy of the employee who has enrolled in a rehabilitation program.[64]

2.6 Time Off for Court Appearances (Jury Duty, Witness Leave, etc.)

California employers must grant unpaid leave to, and must not discriminate against, employees who (i) are summoned for jury duty or for a court appearance as a witness, (ii) appear in court to seek relief as a victim of domestic violence, stalking, or sexual assault, or (iii) are victims of certain felonies or are closely related to such victims.[65] Generally a condition of leave is giving reasonable notice to the employer.

2.6.1 Jury duty

An employer may require that employees on jury duty report to work when not called to serve on a jury.[66] Although employers who provide paid jury duty typically limit it to two weeks, both federal and California law generally require, as a condition of exempt status, that exempt

employees receive a salary of a fixed amount per week regardless of the amount worked that week, so that a partial-week jury leave may amount, as a practical matter, to fully paid leave for exempt employees.

2.6.2 Victim-related court appearances

As of January 1, 2014, California employers must not discharge, discriminate, or retaliate against an employee for taking time off, after reasonable advance notice, to appear at any proceeding involving the right of a victim of any of certain crimes.[67] The new law also specifies what information is sufficient to certify the absence, including a police report, court order, and medical documentation.[68] A "victim" protected under this law includes the employee or the employee's spouse, parent, child, sibling, or guardian.[69]

2.7 Victimhood Accommodation

California has created new rights for individuals who are victims of domestic violence, sexual assault, or stalking. These individuals not only may need to miss work for victim-related judicial proceedings (see § 2.6.2), but also may have special safety and medical needs.

2.7.1 Safety accommodations

California employers must, as of January 1, 2014, engage in an interactive process and provide reasonable accommodations—absent undue hardship—for employees victimized by domestic violence, sexual assault, or stalking who has disclosed that status and who has requested a safety accommodation while at work. Reasonable accommodations may include such "safety measures" as modified schedules, changed telephone numbers, and installation of locks. The employer, in considering a reasonable accommodation, may require certification of the employee's continued victim status.[70]

2.7.2 Medical leaves

California employers with 25 or more employees must, as of January 1, 2014, permit employees who are victims of domestic violence, sexual assault, or stalking to take time off work to obtain victim-related services, such as medical attention, psychological counseling, or help in safety planning.[71]

2.8 Time Off for Good Deeds and Training for Same

California employers must allow employees to take leaves of absence to serve as volunteer firefighters, peace officers, and emergency rescue personnel. Also qualifying is volunteer service with the Civil Air Patrol.[72] Employers with 50 or more employees must also allow temporary leaves of absence to enable employees to engage in fire, law enforcement, or emergency rescue training.[73] Employees subjected to an adverse employment action for taking

time off for these reasons can seek reinstatement and recovery of lost wages and work benefits. A violation of this law may constitute a misdemeanor.[74]

2.9 Voting Leave

California employers must post, in the period preceding each statewide election, a notice that employees who lack time to vote during nonworking hours may take paid leave of up to two hours to vote.[75]

2.10 School-Parent Leave

Employers with 25 or more employees at the same location must grant unpaid leave of up to eight hours per month and up to 40 hours per school year to employees to participate "in activities of the school of any child" of the employee who is in grades K through 12.[76] The same protections apply to those wishing to participate in the activities of a licensed child day care facility.[77]

2.11 Kin Care Leave

California employers who provide sick leave (defined as accrued increments of compensated leave that the employer provides to employees during absences for medical reasons) must permit employees to use up to one-half of their annual rate sick-leave entitlement to attend to an ill child, parent, spouse, or domestic partner. Thus, for example, an employee who earns six days of sick leave per year may use up to three days of leave to care for such a significant other.

Employers who provide paid time off (PTO) may unwittingly subject themselves to additional kin care requirements, as PTO (personal time off that can be taken for any reason, including illness) can be considered a form of additional sick leave.[78]

The California Supreme Court has ruled that the kin care statute does not apply to sick leave policies that provide for an uncapped number of compensated sick days for an employee's own illness, but rather applies only to sick leave policies that provide for measurable amounts of accrued sick leave.[79]

California employers must grant kin care leave to—and must not discriminate against—an employee who attempts to use kin care leave, and must not count that leave as an absence that may lead to discipline of the employee.[80] Aggrieved employees are entitled to reinstatement and actual damages, or one day's pay, whichever is greater. Employees who prevail in a court action are entitled to attorney fees.[81]

2.12 Military Leave

The California Military and Veterans Code contains sections comparable to the language in the federal USERRA, and also provides additional employee rights, especially for public sector employees, and protects service members for state call-ups. California employers must not discharge a returning employee who was on active military duty with the National Guard, except for cause, within one year after being restored to the position. Violation of the California statute is a misdemeanor.[82]

The DOL, in interpreting the federal USERRA, defines "employer" broadly to include any person who pays salary or wages for the work performed, or who has control over employment opportunities—including someone who has been delegated the performance of employment-related responsibilities (other than functions that are purely ministerial in nature). The DOL thus opines that individuals can be subject to personal liability for USERRA violations.[83] Here, remarkably, the California version of the law is less plaintiff-friendly, for the Court of Appeal has ruled that individuals cannot be personally liable for violating California's military leave statute.[84]

2.13 Military Spousal Leave

California employers with 25 or more employees must grant up to ten days of unpaid leave to employees married to members of the active military service who themselves are on leave from a combat zone.[85] Employees who work an average of at least 20 hours per week are eligible for military spousal leave if they are spouses of a "qualified member" of the military. A "qualified member" is a member of the U.S. Armed Forces deployed to a combat zone, or a member of the National Guard or Reserves who has been deployed anywhere during a military conflict.

Employees requesting leave must notify the employer of their intention to take time off within two business days of receiving official notice that the employee's spouse will be on leave from military deployment. There is no provision allowing an employer to deny or delay the leave. Because the law establishes no cap on the aggregate amount of time off, it appears that the employee can take the full ten days off on each qualifying occasion. The statute states that spousal leave shall not prevent an employee from taking a leave that the employee "is otherwise entitled to take,"[86] suggesting that an employer cannot require an employee on military spousal leave to concurrently use other leave that the employee is entitled to take.

Employers must not retaliate or otherwise discriminate against employees requesting military spousal leave.

2.14 San Francisco Paid Sick Leave / Family Friendly Workplace

In America generally, employers enjoy the prerogative to deny pay to a worker on sick leave. Not so in California, at least not in San Francisco, which, in 2007, became the first American city to mandate paid sick leave for private employees. The San Francisco ordinance requires businesses to provide employees working in San Francisco with paid sick leave: 40 hours per year for employers with ten or fewer workers and 72 hours per year for larger employers, with a 72-hour cap. The ordinance entitles workers to an hour of paid sick leave for each 30 hours worked, beginning 90 days after hire. Sick leave hours carry over year to year, subject to the 72-hour cap. Employees may take leave not only for their own illness but also to care for a child, parent, spouse, domestic partner, or other designated person. (One consolation is that employers need not pay out unused sick leave upon termination of employment.)

Effective January 1, 2014, covered San Francisco employers must also permit employees to request a flexible or predictable working arrangement to care for a child, a covered family member with a serious health condition, or a parent over age 65. To be eligible, an employee must have worked for the employer for at least six months, regularly work at least eight hours per week, and work within the San Francisco City limits. A request by an eligible employee triggers various procedural requirements, including potentially multiple meetings and written responses. An employer may deny the request for bona fide business reasons such as cost, detrimental effect on customer needs, inability to organize work among other employees, or insufficiency of work during the periods the requesting employee proposes to work.

2.15 Paid Leave for Organ or Bone Marrow Donation

Under the Michelle Maykin Memorial Donation Protection Act, California employers must allow eligible employees to take paid leaves of absence to donate an organ or to donate bone marrow. An employee who has been employed by the employer for at least 90 days may take up to five business days of paid leave during any one-year period to donate bone marrow, and up to 30 business days of paid leave during any one-year period to donate an organ. The one-year period is measured forward from the date an employee's leave begins. An employer may require an employee to use up to five days of earned but unused sick leave or vacation or paid time off during the initial bone-marrow donation leave, and up to two weeks of earned but unused sick leave or vacation or paid time off during the initial organ-donation leave. These leaves are not a break in service for purposes of an employee's right to salary adjustments, sick leave, vacation, annual leave, or seniority, and employers must maintain and pay for group health coverage during the leaves. These leaves do not run concurrently with FMLA and CFRA leaves. Employees returning from leave generally must be reinstated to their same position or an equivalent position.[87]

3. Employee Privacy—Protected Activities

Unlike the United States Constitution, which generally applies only to governmental action, the California Constitution reaches certain aspects of private employment. Indeed, California prides itself on having in its constitution "a document of independent force and effect particularly in the area of individual liberties."[88]

The California Constitution expressly protects the individual's right to privacy.[89] One aspect of "privacy" is personal autonomy—the individual's interest in making lifestyle choices free of unwarranted interference (see § 3 herein). Another aspect is the individual's interest in being free of unwarranted intrusion (see § 4). The California Constitution and various statutes further both these interests.

3.1 Off-Duty, Off-Premises Lawful Conduct

Broadly worded provisions of the Labor Code forbid employers to discriminate against an employee or applicant for lawful off-premises conduct during nonworking hours.[90] The Labor Code gives employers only two statutory safe harbors: (1) employers may require an employee to sign a contract to avoid any conduct that "is actually in direct conflict with the essential enterprise-related interests of the employer and where breach of that contract would actually constitute a material and substantial disruption of the employer's operation."[91] and (2) employers may require a firefighter to sign a contract limiting the firefighter's "consumption of tobacco products on and off the job."[92]

Although these provisions were enacted in 1999 and 2001, it remains unclear exactly what they add to a plaintiff's rights. Even before their enactment, a court citing the California constitutional right to privacy upheld a judgment of tortious discharge against IBM in favor of a marketing manager whom IBM had fired for her romantic involvement with a manager who worked for a rival firm.[93] The cases interpreting these provisions have suggested that they are not as broad as a literal reading of them might suggest and that they merely codify existing constitutional rights, rather than adding a new basis for a claim of wrongful termination in violation of public policy. One case upheld the dismissal of a supervisor who was fired for dating his subordinate in violation of his company's anti-fraternization policy.[94] A second case upheld the dismissal of a hospice employee who was suspected of engaging in an unlawful investment scheme.[95]

3.2 Disclosure of Wages

California employers must not prohibit employees from disclosing the amount of their wages. More specifically, employers must not (1) require an employee to refrain, as a condition of employment, from disclosing the amount of the employee's wages, (2) require an employee to waive the right to disclose the amount of the employee's wages, or (3) discriminate against an

employee for disclosing the employee's wages.[96] A California appellate court has interpreted "wages" in this context broadly to include bonuses.[97]

3.3 Disclosure of Working Conditions

California employers must not forbid employees to disclose information about working conditions. More specifically, as to the employer's working conditions, an employer must not (a) require an employee to refrain from disclosing information, (b) require an employee to waive the right to disclose information, or (c) discharge, formally discipline, or otherwise discriminate against an employee for disclosing information.[98] Accordingly, an employer must not retaliate against employees for disclosing information to help a union organize or boycott an employer. The Ninth Circuit has indicated that this law may invalidate a clause in an arbitration agreement forbidding the sharing of information about the specifics of an arbitration case.[99] This law may be preempted by federal labor law to the extent that it concerns merely concerted complaints about working conditions and not health or safety complaints.[100]

3.4 Right to Designate Counsel

California employers must not discriminate against an employee for designating a representative to bargain over conditions of the employee's employment.[101] Courts have construed this provision to empower an employee to designate an attorney to bargain with respect to his or her conditions of employment, and to prohibit an employer from firing him or her for making that designation.[102] In two appellate court cases, an employer's refusal to deal with its employee's workers' compensation attorney raised a triable issue as to whether the employer had failed to comply with its duty, under the FEHA, to engage in an interactive process to see if it was possible to accommodate the employee's disability.[103]

Nonetheless, a California employer may still insist on dealing with an employee without the presence of counsel when investigating employee misconduct or assessing employee job performance.[104]

3.5 Employee Whistleblowing

3.5.1 Labor Code § 1102.5—reports to law enforcement

Under this general whistleblowing statute, California employers were forbidden to discipline an employee for disclosing information to a governmental or law enforcement agency with a good faith belief that the information was evidence of noncompliance with state or federal law.[105] In 2013, judicial interpretation and statutory amendment expanded the scope of this prohibition in numerous directions. Protected activity now includes reports (i) about violations of *local* as well as state and federal law, (ii) that involve wrongdoing of only co-worker or third-party wrongdoing,[106] (iii) that were simply part of the employee's job,[107] and (iv) that went to the employer rather than to the

government.[108] In addition, even in the absence of an actual report, an employer is liable if it takes retaliatory action because the employer "believes the employee disclosed or may disclose" relevant information.[109] And plaintiffs no longer need to exhaust administrative remedies before suing under this statute.[110]

Upon proof that the employee's protected activity was "a contributing factor in the alleged prohibited action," the employer must prove by "clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in [protected] activities."[111]

Violation of this statute makes the employer liable not only for damages but for a civil penalty of $10,000.[112]

3.5.2 Labor Code § 98.6(a)—reports to Labor Commissioner

California employers must not discriminate against an employee or applicant for filing a bona fide complaint relating to rights under the jurisdiction of the Labor Commissioner, or for testifying or preparing to testify, or for exercising any rights on behalf of himself, herself, or others.

3.5.3 Labor Code §§ 6310-6311—safety and health reports

No person may discriminate against any California employee for making any oral or written comment to government agencies with jurisdiction over employee safety or health, for causing to be instituted any proceeding, for testifying in any proceeding, or for exercising rights relating to employee safety or health. California employers must not dismiss an employee for refusing to perform work in violation of occupational health or safety standards, where the violation would create a "real or apparent hazard" to an employee.

3.5.4 Government Code § 12940(h)—FEHA complaints

No person may discriminate against any Californian for opposing a practice forbidden by the FEHA or for filing a complaint, testifying, or assisting in any FEHA proceeding.

3.5.5 Business and Profession Code § 2056—health care advocacy by physician

No person may retaliate against a California physician for advocating medically appropriate health care for the physician's patients.[113]

3.5.6 Health and Safety Code—healthcare advocacy

California health facilities cannot retaliate against employees or medical staff for complaining to the facility, to an accrediting agency, or to a governmental entity, or for participating in any investigation of the facility's quality of medical care.[114] A "rebuttable presumption" of unlawful retaliation by the facility arises if its "responsible staff" knows of an individual's protected activity and if the facility takes adverse action against the individual within 120 days of the filing of a grievance or a complaint.[115]

3.5.7 Changing personal information

Effective January 1, 2014, California employers must not discharge, retaliate, or take adverse action against an employee because the employee "updates or attempts to update his or her personal information, unless the changes are directly related to the skill set, qualifications, or knowledge required for the job."[116] Employees who are undocumented workers at the time of hire, but who later receive work permits and social security cards, can provide corrected information. Employers thus may be prohibited from taking any adverse action against the employee for providing false documentation to begin with, unless the updated information is directly related to the skill set, qualifications, or knowledge required for the job.

3.5.8 Retaliation by reporting immigration issues because of exercise of rights

Effective January 1, 2014, California employers must not report or threaten to report to a government agency the suspected citizenship or immigration status of an employee, former employee, prospective employee (or that of the individual's family members) in retaliation for the individual's exercise of rights under California laws.[117]

3.6 Refusal to Undergo Medical Treatment

The California constitutional right of autonomy can protect an employee's right to determine the course of medical treatment or lack thereof. An employee thus could sue an employer for relying on confidential medical information to require that the employee enroll in a 30-day inpatient alcohol treatment program as a condition of employment.[118]

4. Employee Privacy—Protection From Intrusions

The California Constitution expressly protects the individual's right to privacy. Unlike the United States Constitution, which generally restrains only governmental action, the California Constitution can

restrain private employers. Indeed, the California Supreme Court has called the California Constitution "a document of independent force and effect particularly in the area of individual liberties."[119]

California's constitutional privacy provision protects both aspects of privacy: the interest in being free of unwarranted interference with personal autonomy (see § 3 herein) and the interest in being free of unwarranted intrusions (see § 4). The California Constitution and various statutes further both of these interests.

4.1 Drug Testing

4.1.1 Privacy issues

Drug testing (through urinalysis and other specimen testing) implicates the California right to privacy. While drug testing of employees for reasonable suspicion is permissible in California, random testing is not, absent (1) a federal legal mandate to do so or (2) a strong case that the particular class of employees being tested would pose some imminent safety or health threat, with irremediable consequences, if allowed to work under the influence of drugs.[120]

Testing job applicants appears to accord with the guidance provided by California courts.[121] The Ninth Circuit has upheld an employer's "one-strike" rule, authorized by a collective bargaining agreement, providing that an applicant who tests positive on a pre-employment drug screen is permanently disqualified.[122]

Under a San Francisco ordinance, private employers must have reasonable grounds to test blood and urine specimens.[123]

4.1.2 Disability discrimination issues

Disability discrimination laws protect privacy to the extent that they prohibit certain examinations or questions. For peculiar California law on this point, see § 6.3.4.

4.2 Questions about Certain Arrests and Convictions

4.2.1 State law

Employers generally may inquire whether applicants have been convicted of a crime. In California it is different.[124] California employers must not inquire of applicants, employees, or *any other source* about the arrest of an applicant or employee that did not lead to a conviction, or ask about certain marijuana-related convictions more than two years old.[125] California employers also must not ask about an applicant's or employee's referral to, and participation in, any pre-trial or post-trial diversion program.[126] A 2013 amendment now prevents California employers from asking about judicially dismissed, sealed, or expunged criminal convictions.[127]

California plaintiffs' lawyers exploited this provision to seek $26 million for 135,000 unsuccessful applicants who had unlawfully been asked if they had marijuana convictions. The trial court granted summary judgment to the plaintiffs, even though none of them actually had marijuana convictions to reveal. The Court of Appeal provided some adult supervision here, reversing the judgment while observing, "Plaintiffs' strained efforts to use the marijuana reform legislation to recover millions of dollars from Starbucks gives a bizarre new dimension to the everyday expressions 'Coffee Joint' and 'Coffee Pot.' "[128]

4.2.2 San Francisco ordinance limiting inquiries into criminal history

Effective August 16, 2014, under a "Fair Chance Ordinance" (designed to help rehabilitate convicts by giving them a "fair chance" at employment), San Francisco employers of 20 or more employees must not ask job applicants about certain arrests or criminal convictions at all, and must not ask about other criminal conviction history until after a live interview or making a conditional offer of employment. Further, any criminal conviction, in order to disqualify a job candidate, must bear a "direct relationship" to the position the candidate is seeking. That is, the conviction must have a "direct and negative bearing on that person's ability to perform duties or responsibilities necessarily related to the employment position." The ordinance will also impose special notice, posting, and recordkeeping requirements on covered employers.[129]

4.3 Polygraph Tests

California employers must not require an applicant or employee to take a lie-detector test or "similar" test. Employers may *request* a person to take such a test, but only after first advising the person, *in writing* at the time of the test, that the employer cannot require the test.[130]

4.4 HIV Testing

California employers must not require HIV testing or use blood tests to determine insurability or suitability for employment.[131]

4.5 Genetic Testing

California employers must not subject applicants or employees to tests for genetic characteristics.[132]

4.6 Tape Recording and Videotaping

4.6.1 Confidential communications

It is a crime for a California employer *or employee* to surreptitiously tape record a confidential communication.[133] Violators are liable for civil penalties in amounts of up to $5,000 per violation, or three times any actual damages.[134] The recording may not be used as evidence, except to prove a violation of the statute.[135]

4.6.2 Restrooms, locker rooms, changing rooms

California employers must not use or cause to be made any video- or audio-taping of employees in a restroom, locker room, or any room that the employer has designated for changing clothes.[136]

4.6.3 Secret videotaping in open areas

The California Supreme Court has held that employees have the right to privacy, even in an open workplace, against intrusions by members of the general public.[137] In 2009, the California Supreme Court held that employees have reasonable expectations of privacy against their employer, with respect to their activities in a closed shared office.[138] The employees sued their employer upon discovering that it had installed a covert video camera in order to catch night-time intruders into the office shared by the plaintiffs, who worked only during the day. The Court of Appeal held that the plaintiffs could sue for invasion of privacy even if the camera never actually observed them, on the theory that mere intrusion into their workplace solitude was actionable. The Supreme Court reversed this odd result, but agreed with the plaintiffs that the employer had intruded upon their privacy. The Supreme Court ruled for the employer because the surveillance—being narrowly tailored in place, time, and scope, and reflecting legitimate business concerns—was not highly offensive and never caught the plaintiffs on videotape.

4.7 Medical Records

4.7.1 Civil Code § 56

California employers must establish procedures to keep employee medical records confidential (e.g., in files separate from personnel files).[139] California employers must not—unless complying with court orders, administering employee benefits, litigating medical issues the employee has put in controversy, or determining eligibility for medical leaves—use or disclose medical records unless the employee has signed a special release.[140] California employers must not discriminate against an employee who refuses to sign that release, but may take necessary action in the absence of medical information if the employee refuses to sign the release.[141] The release must meet several requirements, e.g., the language must be separate from other language, and must be in no smaller than fourteen point font. Moreover, the release must be signed only to authorize the release of medical information, be limited in time and purpose, specify who may disclose the information, and contain an advisory that the employee is entitled to a copy of the release.[142]

4.7.2 Labor Code § 3762—workers' compensation insurers

In workers' compensation proceedings, the employer's insurance carrier or a third-party administrator often receives medical information about an employee (in, for example, a deposition transcript or medical report). The Labor Code forbids disclosure of this information to the employer, except as to (1) the elements of the claim file that affect the employer's insurance premium, (2) the diagnosis of the condition for which workers' compensation is claimed or treatment is provided, and (3) information needed to modify the employee's work duties.[143]

4.8 Social Security Numbers and Other Personal Information

4.8.1 Limits on use of SSNs

No person may print an individual's social security number (SSN) on materials mailed to the individual, publicly post SSNs, print them on password cards, or require their use as a password on an Internet device. The following limited exceptions apply: (1) a mailed item may contain a SSN if inclusion of the SSN is required by law and (2) an entity that has used SSNs before July 1, 2002, may continue to do so if (a) the use is continuous, (b) the entity has provided an *annual* disclosure that the individual has the right to stop this use, and (c) the entity ceases the use within 30 days of the individual's written request.[144] Nor may a person require an individual to transmit a SSN over the Internet unless the connection is secure or the SSN is encrypted.[145]

4.8.2 Duty to protect personal information

As of 2005, California businesses owning personal information—such as SSNs, driver's license numbers, credit card members, medical information—must "maintain reasonable security procedures and practices appropriate to the nature of the information, to protect the personal information from unauthorized access, destruction, use, modification, or disclosure."[146] A business that "discloses personal information about a California resident through a contract with a nonaffiliated third party"—e.g., an employer that releases personal information when contracting with third parties for payroll, benefits administration, or background check purposes—must "require by contract that the third party implement and maintain reasonable security procedures and practices appropriate to the nature of the information, to protect the personal information from unauthorized access, destruction, use, modification, or disclosure."[147]

4.8.3 Social media password and access protections

As of January 1, 2013, California employers must not request or require employees or job applicants to divulge personal social media account information. Specifically, employers cannot ask or demand that employees or applicants (1) disclose user name

or account password access to access a personal social media account, (2) access personal social media in the employer's presence, or (3) divulge any personal social media.[148] Employers must not take any adverse action for refusing or failing to comply with such a request or demand.[149]

The term "social media" broadly encompasses all digital or electronic content, including videos, photographs, blogs, instant-text messages, email, online services or accounts, and Internet website profiles. Employers still may, however, ask employees to divulge personal social media reasonably believed to be relevant to investigating suspicions of employee misconduct or violations of law, so long as the employer uses the social media solely for that or a related investigation or proceeding.[150] And employers can still request this information for the purpose of accessing an employer-issued electronic device.[151]

4.9 Duty to Disclose Security Breaches of Computerized Personal Information

California businesses owning any computerized data including personal information must, upon breach of the security of that information, notify the affected persons "in the most expedient manner possible and without unreasonable delay."[152] Among the items considered protected information are medical information and health insurance information.[153]

4.10 Personnel Records

In a lawsuit, the personnel files of California employees often are unavailable to the party seeking them until (1) there is a notice given to the employees and (2) the employees have the opportunity to object in court to the disclosure of their files.[154]

Employee privacy rights have yielded, however, when respect for privacy rights would hinder the pursuit of a class action against an employer.[155] Courts have permitted class-action counsel alleging wage and hour violations to obtain the name, address, and telephone number of every current and former employee belonging to the allegedly aggrieved class, so long as the employee did not, after receiving notice, object in writing to contact by plaintiffs' counsel.[156] The court rejected the employer's suggestion to shield private employee information unless the employee affirmatively agreed to be contacted. The court reasoned that "no serious invasion of privacy" was involved, as what was involved was only "contact information, not medical or financial details."[157] The court supported an opt-out rather than an opt-in procedure because "there was no evidence of any actual or threatened misuse of the information"[158] and because the "prompt payment of wages due employees is a fundamental policy of this state."[159]

California courts have exalted the class-action procedure over employee privacy rights even when employees are on record as wanting to be left alone. In one case,[160] where the defendant's employees had signed forms stating that they did not want to be contacted by

plaintiffs' lawyers, the defendant argued that these forms revealed a heightened expectation of privacy that justified only opt-in discovery of the employees' private contact information. The court rejected this argument, ordering disclosure of employee addresses and telephone numbers unless the employees affirmatively opted out of the disclosure process.

And in some circumstances courts have even ordered disclosure of employee home addresses without permitting the affected individuals to object to their privacy being invaded.[161]

4.11 Consumer Credit and Investigative Consumer Reporting Agencies Acts

The federal Fair Credit Reporting Act (FCRA)[162] requires employers to give certain notices and access rights to applicants and employees on whom the employer is requesting a background check, to give these individuals a chance to correct inaccuracies in what is being reported about them. Compliance with the FCRA is complicated. Here we highlight some ways in which California's analogous statutes differ.

4.11.1 Credit reports

The California Consumer Credit Reporting Agencies Act (CCRAA)[163] governs credit-history information that a consumer credit reporting agency reports for use in evaluating an individual's fitness for employment or other permissible purposes. While resembling federal law on this subject, California law also requires employers to provide, on the form authorizing the credit report, a check-box that the individual can use to request a copy of the report, and to identify the consumer credit reporting agency providing the report.[164] If the individual has indicated a desire for a copy of the report, then the user must request that a copy be provided to the individual when the user requests its copy from the credit reporting agency. The report to the user and to the individual subject must be provided contemporaneously and at no charge.[165]

California generally prohibits using credit reports for employment decisions.[166] "Credit report" does not include verification of past employment or income that does not otherwise include credit information (such as credit scores, records or history). Credit reports are permissible as to the following eight job categories, if the applicant or employee receives written notice of which of these categories applies:

(1) managerial positions (as defined in the "executive" exemption in the Wage Orders),

(2) positions in the California Department of Justice,

(3) sworn peace officer or other law enforcement position,

(4) positions for which the information is required to be obtained or disclosed by law,

(5) positions involving regular access to bank or credit card information, social security numbers, dates of birth (for a purpose other than routine solicitation and processing of credit card applications in a retail establishment),

(6) positions where the person can enter into financial transactions on behalf of the company (includes being a named signatory on employers bank or credit card account, authorization to transfer money or enter contracts),

(7) positions involving access to proprietary or confidential information, and

(8) positions with regular access to cash totaling $10,000 or more of the employer, a customer or client during the workday.[167]

4.11.2 Investigative consumer reports

The California Investigative Consumer Reporting Agencies Act (ICRAA)[168] governs the use of reports received from investigative consumer reporting agencies on an employee's or applicant's "character, general reputation, personal characteristics, and mode of living."[169] Unlike the federal FCRA, which limits the definition of an "investigative consumer report" to information gathered from personal interviews with the subject's neighbors and associates, the California ICRAA definition extends to collection of information (other than credit information) from *any* source.

The aptly named ICRAA is an especially annoying statute, authorizing not only an action for actual and punitive damages plus attorney fees, but also the greater of actual damages or civil penalties of $10,000 per violation.[170] There is little case law interpreting whether these penalties apply to each report or each "violation" under the statute. Some defendants have challenged the constitutionality of ICRAA as applied to criminal records requested for either tenancy or employment purposes.[171]

4.11.2.1 routine background checks

California applicants and employees, unlike individuals in most of America, have a right to see the investigative consumer report even if no adverse action has occurred. The employer must provide on the authorization form a box that an individual can check to request a copy of any report that is sought for reasons other than suspicion that the subject of the investigation has engaged in wrongdoing or misconduct.[172]

The ICRAA also imposes detailed requirements. Thus, a California employer asking an employee or applicant to sign a form authorizing the employer to obtain an investigative consumer report from a reporting agency must

disclose, in a writing consisting solely of the disclosure, information such as the following:[173]

- that an investigative consumer report may be obtained (as the FCRA requires),
- that the report is being obtained for employment purposes (as the FCRA requires),
- that the report may include information on the individual's character, general reputation, personal characteristics, and mode of living (as the FCRA requires),
- the nature and scope of the investigation requested (which the FCRA requires only if the individual asks),
- the name, address, and website of the investigative consumer reporting agency that will conduct the investigation (beyond what the FCRA requires),[174]
- that the investigative consumer reporting agency will, on reasonable notice, permit the individual to inspect the agency's files for information on the individual (beyond what the FCRA requires),
- that the individual may obtain a copy of the file, by paying the actual cost of duplication (beyond what the FCRA requires), and
- that the individual may obtain a summary of the file information by telephone, with proper identification (beyond what the FCRA requires).

Moreover, there are California-specific limits on what may be reported by a background screening company. For example, under the FCRA, there is no longer any time limit affecting the search for records of criminal convictions for applicants making $70,000 or more. California is different. A California report generally must not contain reports of convictions that precede the report by more than seven years regardless of an applicant's contemplated salary.[175]

4.11.2.2 investigations into suspicions of wrongdoing

The ICRAA notice, authorization, and disclosure requirements do not apply if an investigative consumer reporting agency is used to investigate suspicions of wrongdoing or misconduct[176] (although certain adverse action requirements in the FCRA and ICRAA do apply).

4.11.2.3 employer-generated reports

While the federal FCRA applies only if the employer uses a reporting agency, the California ICRAA applies to an employer's own investigative efforts to the extent that they involve obtaining certain public records—records of arrest, indictment, conviction, civil judicial action, tax lien, or outstanding judgment.[177] If a California employer takes adverse action as a result of receiving such a public record, then the employee has a non-waivable right to receive a copy of the record.[178]

The first ICRAA appellate case, decided in 2005, involved an employer who had fired the plaintiff when he confessed that he had a felony conviction. The employer induced that confession by interrogating the plaintiff after obtaining, off the Internet, a copy of a judicial decision mentioning his felony.[179] Eight business days after the interrogation, the employer gave the plaintiff a copy of the Internet records. The plaintiff then sued for untimely disclosure, seeking the minimum $10,000 penalty for an ICRAA violation. The court made two holdings of interest: (1) the employer could not avoid ICRAA disclosure requirements by arguing that its dismissal of the plaintiff resulted from his admission to a felony conviction instead of from the employer's receipt of the Internet report; the court aggressively read the ICRAA to say that the employer must disclose a copy of the public record if an adverse action was taken under circumstances in which the record was obtained and (2) no specific deadline applies to the required disclosure; rather, the employer must furnish a copy "of any public record uncovered in a background check within a reasonable time after an investigation concludes." Here, the court held, as a matter of law, that eight business days following the plaintiff's interrogation was a reasonable time in which to furnish a copy of the relevant documents, especially since the employer's due diligence in asking the plaintiff about his criminal record served to verify that the background "information was accurate and not the result of identity theft or otherwise erroneous."

The employer must also provide a copy of all public records obtained even if no adverse action occurs, upon "completion" of the investigation, unless the individual has checked a box, on a written form, to waive the right to receive a copy of the public records.[180]

4.11.2.4 criminal history information

Litigants have disputed whether criminal history information is "character" information governed by the ICRAA or "creditworthiness" information governed by the CCRAA. A California federal district court held, in 2012, that

the ICRAA is unconstitutionally vague as applied to background reports containing criminal history information. The court, reviewing the two statutes and their legislative history, concluded that an item of information can be subject to either the ICRAA or the CCRAA, but not both. The criminal history information at issue in the case pertained to both the plaintiff's character and creditworthiness. The court held that because there was no rational basis to decide that the information should be governed by one statute versus the other, the ICRAA was unconstitutionally vague in that situation and so the court dismissed the ICRAA claim.[181]

4.12 Psychological Tests

California applicants have successfully challenged, as an unlawful invasion of privacy, psychological tests (such as the MMPI) that require them to answer questions about their religious beliefs and sexual orientation, even though the test answers were used by only the professional administrators of the test and not by the employer itself.[182]

Pre-employment psychological examinations are forbidden just as pre-employment medical examinations are (see § 6.3.2).

4.13 Fingerprinting

California employers must not fingerprint employees to provide information to a third person who could use the information against the employee.[183]

4.14 Photographing

California employers must not photograph employees to provide information to a third person who could use the information against the employee.[184] If an employee photograph is required, then the employer must pay the cost.[185]

4.15 Subcutaneous Identification Devices

Subverting the aspirations of intrusive employers (as well as concerned parents of teenagers), the California Freedom from Subcutaneous Identification Device Act (our unofficial title only) forbids any person from requiring any individual to undergo the subcutaneous implanting of an identification device.[186] An identification device is anything that transmits personal information, such as name, address, telephone number, email address, date of birth, driver's license number, social security number, etc.[187]

4.16 Email Usage

California employers can minimize employee expectations of privacy by issuing clear written policies. Some employees might expect to have privacy in their electronic communications,

even when enabled by the employer's technology,[188] but the Court of Appeal has held that an employee's communications to her attorney on her work computer, via work email, were not confidential and thus not protected by the attorney-client privilege, even though the employee had used her company-issued private password and had deleted the email messages.[189] The employee had no reasonable expectation of privacy because her employer had a written policy, which she had signed, stating that company technology resources should be used only for company business, that employees must not use company resources to send or receive personal emails, and that the company would monitor its computers for compliance with the policy.

5. Litigation Issues

5.1 Limited Alternatives to Jury Trial

5.1.1 California's hostility to arbitration of employment disputes

The Federal Arbitration Act[190] promotes the enforceability of arbitration agreements. The FAA declares that courts can invalidate contractual agreements to arbitrate only on the same grounds that would cause courts to invalidate contractual promises generally, such as the grounds of unconscionability or duress. Thus, the FAA preempts special state rules that single out arbitration agreements for disfavor. Accordingly, courts throughout America generally enforce agreements by which parties agree to arbitrate rather than litigate in court. But California has been peculiarly hostile to arbitration agreements. This anti-arbitration attitude has provoked the U.S. Supreme Court on repeated occasions to invoke the FAA to strike down California-erected obstacles to arbitration.

First, in 1984, the U.S. Supreme Court, overturning the California Supreme Court, held that franchisees suing under California's Franchise Investment Law must abide by their contractual agreement to arbitrate.[191] *Second,* in 1987, the U.S. Supreme Court held that the FAA preempts a California Labor Code section that authorizes non-union employees to sue for unpaid wages "without regard to the existence of any private agreement to arbitrate."[192] *Third,* in 2008, the U.S. Supreme Court reversed a California Court of Appeal decision that empowered the Labor Commissioner, instead of an arbitrator, to decide the validity of an arbitration agreement signed by entertainment workers suing under the California Talent Agencies Act.[193]

Fourth, in 2011, the U.S. Supreme Court in *AT&T Mobility v. Concepcion*[194] held that the FAA preempts California's *Discover Bank* rule, which invalidated class-action waivers in arbitration agreements.[195] Later that year, the U.S. Supreme Court relied on *Concepcion* to vacate a California Supreme Court decision that had found an

arbitration agreement contrary to public policy and unconscionable because it required employees to waive their right to an adjudicatory hearing (a "Berman hearing") before the Labor Commissioner.[196] The U.S. Supreme Court directed the California Supreme Court to reconsider that decision in light of *AT&T Mobility v. Concepcion.*[197]

The California Supreme Court responded to that direction by acknowledging that the FAA, as interpreted by *Concepcion*, preempts any categorical bar on Berman hearing waivers. Nonetheless, the California Supreme Court in its decision stated that unconscionability could still be found, on a case-by-case basis, and that a Berman hearing waiver may be considered a relevant factor supporting an ultimate finding of unconscionability.[198]

Another recent U.S. Supreme Court pronouncement, which California courts variously will evade or follow, is that parties who have not contracted for class arbitration may not be forced to arbitrate class claims.[199]

5.1.2 Invalidity of predispute jury waivers

In many states, employers have avoided jury trials while maintaining the procedural advantages of litigating in court by agreeing with employees and applicants to have employment disputes heard by a judge sitting without a jury. This predispute selection of a bench trial avoids the risk of unpredictable, excessive jury verdicts while also retaining the right to seek judicial appellate review. In California, however, it's different. The California Supreme Court has held that these agreements are invalid, on the ground that waiving a jury trial requires a specific statutory authorization, such as the California Arbitration Act.[200] (A concurring justice, calling California "out of step with the authority in other state and federal jurisdictions, most of which have permitted predispute jury waivers,"[201] urged the California Legislature to authorize predispute waivers of jury trial, to permit trials by the court.[202] No such statutory development appears likely.)

5.1.3 California's unconscionability doctrine, applied to limits on judicial proceedings

In America generally, employers make arbitration agreements a condition of employment. Such agreements have certain common features: they generally waive court and jury trial while reserving the employer's right to seek judicial relief for trade-secret violations; they limit discovery; they share the costs of arbitration between the parties; and they sometimes even limit the remedies available and the time in which to file a claim. California casts a peculiarly disapproving gaze on all of these provisions. The leading case is the California Supreme Court's 2000 decision in *Armendariz v. Foundation Health Psychcare Services.*[203] Under *Armendariz* and its progeny,

California courts refuse to enforce arbitration agreements if they are "unconscionable," and define unconscionability very broadly.[204]

A contract is unenforceable as unconscionable if it is unconscionable *both* procedurally and substantively. Procedural unconscionability involves oppression or surprise due to unequal bargaining power. Procedural unconscionability typically exists where the employer imposes an arbitration agreement as a condition of employment, with no realistic chance for the employee to bargain. Substantive unconscionability involves terms that the court deems harsh or unreasonably one-sided.

5.1.3.1 California's broad view of procedural unconscionability

Some employers have sought to eliminate problems with substantively unconscionable arbitration agreements by eliminating procedural unconscionability. They have sought to do this by proposing written arbitration agreements that employees can reject simply by opting out of the agreement within a reasonable time, such as 30 days, so that the resulting agreement, even if deemed substantively unconscionable, could nevertheless be enforceable because it is not procedurally unconscionable. But then came the California Supreme Court's 2007 decision in *Gentry v. Superior Court* (*Circuit City Stores, Inc.*).[205] The Supreme Court ruled that even an easily understood one-page opt-out form may be insufficient to avoid a finding of procedural unconscionability. Thus, the California Supreme Court, disagreeing with the Court of Appeal and with two Ninth Circuit cases,[206] refused to accept that Circuit City's arbitration program—which permitted employees to opt out of the program within 30 days of written notice and even advised that employees could consult an attorney about the opt-out decision—was free of procedural unconscionability. The Supreme Court reasoned that the opt-out form gave employees a "highly distorted picture of the arbitration Circuit City was offering," such that only "a legally sophisticated party" would have understood the relative advantages of judicial litigation; also, the Supreme Court speculated that employees "likely" "felt at least some pressure not to opt out of the arbitration agreement."[207] A dissenting opinion argued that there were no grounds to find that Circuit City had unfairly coerced or induced employees not to opt out of the arbitration program.[208]

Often the contracting parties expressly incorporate other documents by reference, a practice that is clearly enforceable so long as the documents are readily available. This permissible contractual practice of incorporation by reference should be appropriate in arbitration agreements as well as other agreements, as the Federal Arbitration Act would forbid any special rule that

disfavored arbitration agreements. And so it is that throughout most of America an arbitration agreement will mention rules of arbitration that a party can easily retrieve through the Internet or otherwise. But California is different. The Court of Appeal has held that an arbitration clause in a mandatory employment agreement was procedurally unconscionable because the employer had failed to provide the employee with a complete copy of the relevant arbitration rules: the rules of the American Arbitration Association.[209]

Another decision found procedural unconscionability where the employer failed to provide the employee sufficient time to review the agreement or have it reviewed by legal counsel, and failed to give the employee a copy of the signed agreement.[210]

A Ninth Circuit opinion, applying California law, found procedural unconscionability where the employer, having presented the arbitration agreement on a "take it or leave it" basis, also failed to provide the actual terms of the arbitration policy to the employee until three weeks after she had agreed to be bound by it as a condition of employment.[211]

5.1.3.2 requirement of "mutuality"

Armendariz held that any arbitration agreement imposed on an employee is substantively unconscionable if it lacks a "modicum of bilaterality." One example of unconscionability, California style, is an employer requiring the employee but not the employer to arbitrate all claims arising out of the same transactions or occurrences, absent reasonable justification for a unilateral obligation. The agreement in *Armendariz* was unconscionable because (1) the agreement forced an employee to arbitrate all claims between the parties while not subjecting the employer to the same duty, and (2) the agreement restricted full recovery of damages for employees but not the employer.

Through expansive reasoning that reflects hostility to arbitration, California courts have held that an arbitration agreement is substantively unconscionable if it permits the parties to pursue court claims that would likely be more valuable to employers than to employees.[212] (Of course, there is nothing inherently "unfair" about reserving certain claims for litigation if, as the public policy favoring arbitration holds, arbitration is an acceptable substitute for litigation. So by saying it is unfairly one-sided for the agreement to leave certain claims unaffected by the agreement to arbitrate, California courts are revealing their bias against arbitration.)

5.1.3.3 special requirements for statutory claims

Armendariz held that, as to statutory claims, a mandatory arbitration agreement must meet certain minimum requirements: (1) providing for neutral arbitrators, (2) providing for discovery sufficient for the employee to secure information needed to present the claim, (3) requiring a written decision to permit limited judicial review, (4) providing for all relief that would be available in court, and (5) requiring the employer to pay all of the costs unique to arbitration, such as the arbitrator's fees. A court may save an arbitration agreement by interpreting it as *implicitly* requiring these conditions, unless the agreement itself is expressly to the contrary.

Courts following *Armendariz* have struck down arbitration agreements as substantively unconscionable when they provide the employer with greater rights than they would have in court. One provision disfavored on this ground has been a clause providing for prevailing-party attorney fees on a FEHA claim, without limiting the defendant's right to fees to those cases where the employee's claims were "frivolous, unreasonable, without foundation, or brought in bad faith."[213] Other provisions found to be substantively unconscionable have included (1) neutrally worded arbitrator selection provisions that, as a practical matter, resulted in an arbitrator of the employer's choosing, (2) provisions that preclude the use of arbitrators from certain arbitration providers (e.g., AAA or JAMS), and (3) fee provisions that apportion arbitrator's fees equally among parties at the outset of the arbitration.[214]

Although *Armendariz* arose in the context of statutory employment discrimination claims, courts have applied its special requirements to other statutory claims as well.[215]

5.1.3.4 problems with banning arbitral representative actions

California courts have invalidated arbitration agreements to the extent that they would ban court actions to remedy a public wrong. A 2011 California appellate decision held that an arbitration agreement was unconscionable for waiving the plaintiff's right to bring a PAGA action (see § 5.11).[216] The court concluded that the FAA and the Supreme Court's decision in *Concepcion* did not apply, reasoning that PAGA is a mechanism by which the state itself can enforce state labor laws, and that a PAGA plaintiff is a state proxy or agent and so should be unaffected by a private agreement to arbitrate.[217] The California Supreme Court declined to review this decision.

But then a 2012 decision by another California appellate court recognized that the FAA, as interpreted by *Concepcion*, does apply to representative PAGA claims, and preempts any state law rule that would invalidate an otherwise valid arbitration agreement.[218] This decision explains that *Concepcion's* broad holding removes from courts the power to disregard an arbitration agreement's express terms, even those terms that waive a public right. The California Supreme Court has granted review of this decision, with a ruling expected in 2014.

5.1.3.5 problems with banning arbitral class actions

The U.S. Supreme Court has held that arbitrators rather than courts must decide whether class actions are permitted under arbitration contracts that are silent on the issue.[219] This decision implies that enforceable arbitration agreements *can* preclude arbitration of class actions. This is the case, for example, under Delaware law.[220]

The California Supreme Court once hinted that class-action waivers could be permissible in employment arbitration agreements. Its 2005 *Discover Bank* decision ruled that a bank's arbitration agreement, presented to its customers in a "bill stuffer," was unconscionable as it related to waiver of class-wide claims, and that a class action challenging credit-card late fees could proceed in court.[221] Because *Discover Bank* relied heavily on the point that consumer claims are too small to litigate individually,[222] some employers hoped that employment claims would be treated differently, as those claims are substantially larger and also entitle successful plaintiffs to recover attorney fees.

Further cause for hope for employers arose when a 2006 California appellate decision ruled that a class-action waiver in an employment case was permissible as to a plaintiff who asserted over $25,000 in damages. The court reasoned that class-action waivers would be unconscionable only where the amounts of damages for individual class members would be "predictably small."[223]

The California Supreme Court then dashed this hope in its 2007 *Gentry* decision: "We conclude that at least in some cases, the prohibition of classwide relief would undermine the vindication of the employees' unwaivable statutory rights and would pose a serious obstacle to the enforcement of the state's overtime laws. Accordingly, such class arbitration waivers should not be enforced if a trial court determines, based on the factors discussed below, that class arbitration would be a significantly more

effective way of vindicating the rights of affected employees than individual arbitration."[224]

While saying that class-action waivers would be inappropriate "at least in some cases," the *Gentry* court understated the breadth of its holding. The Supreme Court instructed trial courts to consider certain factors in evaluating the validity of a class-action waiver in an arbitration agreement. These factors, which predictably would always favor class litigation, include whether individual recoveries would be large enough to incentivize litigation,[225] whether there is a risk of retaliation to employees, whether employees lack knowledge of their legal rights, and "other real world obstacles to the vindication of class members' right to overtime pay through individual arbitration."[226] *Gentry* thus, as a practical matter, essentially eliminated an employer's ability to place effective class-action waivers in employment arbitration agreements, wherever the plaintiff offers up declarations asserting "real world obstacles" as mentioned above.[227]

Confirming this point, a post-*Gentry* appellate decision affirmed the denial of an employer's motion to compel arbitration of a wage and hour lawsuit. The court accepted boilerplate declarations filed by plaintiffs' counsel as evidence that a class action was "the only effective way" to address the alleged labor law violations because of "the relatively small sums involved" and because class actions are "necessary to deter employers like defendant from misclassifying their employees."[228]

The court also held that it was unconscionable for an arbitration agreement, imposed as a condition of employment, to provide that the arbitrator rather than the court would decide any issue of conscionability. This provision inherently favored the employer, the court reasoned, because only the employee, not the employer, would allege unconscionability.[229]

Whether the *Gentry* rule should survive the U.S. Supreme Court's decision in *Concepcion* is an open question. A California appellate decision in 2011 recognized this issue, while failing to resolve it.[230] Another California appellate decision, in 2012, recognized the tension between *Gentry* and *Concepcion*, but felt it was bound by the *Gentry* holding and thus was powerless to reach its own decision.[231] And then, in 2012, a Court of Appeal decision went further and concluded that *Gentry* remains good law: "We conclude that *Gentry* remains good law because, as required by *Concepcion*, it does not establish a categorical rule against class action waivers but, instead, sets forth several factors to be applied on a case-by-case basis to determine whether a class

action waiver precludes employees from vindicating their statutory rights."[232] Later in 2012, however, yet another California appellate decision recognized that "the *Concepcion* decision conclusively invalidates the *Gentry* test."[233] The California Supreme Court granted review of this decision, with a ruling expected in 2014.

Meanwhile, the U.S. Supreme Court has clearly signaled that the *Gentry* test invalid under federal law. A 2013 unpublished California appellate decision insisted that "*Gentry* is still good law,"[234] but then the U.S. Supreme Court vacated that ruling and remanded the case to the Court of Appeal to consider the effect of federal law.[235]

5.1.3.6 limited severability in arbitration agreements

Courts generally will save an agreement by using a "blue pencil" to sever out unenforceable provisions, leaving the rest of the agreement intact. California is different. California courts will decline to sever offensive provisions in an arbitration agreement in order to enforce the remainder of the agreement. *Armendariz* upheld the trial court's refusal to sever the offending provisions because (1) there were multiple unlawful provisions (both a limitation on damages and an "unconscionably unilateral arbitration clause") and (2) they permeated the entire agreement. Furthermore, the employer's post-dispute offer to waive the offending provisions did not save the day: "No existing rule of contract law permits a party to resuscitate a legally defective contract merely by offering to change it."[236]

5.1.3.7 hostility toward shortened statutes of limitations

In California, if an arbitration agreement requires that arbitration be initiated by a deadline, commencing a civil action by that deadline tolls the deadline until 30 days after a final court determination that the party must arbitrate instead of litigate, or 30 days after the civil action terminates, whichever date occurs first.[237]

Employers often seek to have employees agree to shorten the time in which to sue the employer. Courts interpreting California law in the employment context have been hostile to those efforts. Courts applying California law have struck down one-year limitations that employers have placed in arbitration agreements, reasoning that these limitations would unfairly preclude an employee from relying on legal theories that could extend the deadline for suing.[238] While one court upheld a six-month limit on employee claims measured from the date of the termination of employment,[239] another court

found such a provision unenforceable, where it limited an otherwise-applicable four-year statute of limitations to six months.[240]

A 2008 Court of Appeal decision upheld, against a FEHA claim, a one-year limitations period imposed by an arbitration agreement, where the period did not unreasonably restrict the plaintiff's ability to vindicate his FEHA rights, but then the California Supreme Court took that decision off the books by granting review of the case.[241] The Supreme Court's own decision, in 2010, declined to address the viability of the one-year statute of limitations.[242]

5.1.4 Judicial reluctance to find employee consent to arbitration

Just as the perceived unconscionability of an arbitration agreement can preclude its enforcement, so too can a finding that the employee never consented to the agreement in the first place. In a 2012 decision, where the employer sought to enforce an arbitration clause in its employee handbook, the court held there was no enforceable agreement because the clause appeared within a lengthy employee handbook, because the clause was not called to the plaintiff's attention, because he did not specifically agree to arbitration, because the handbook stated that it was not intended to create a contract, and because the handbook provided that it could be amended unilaterally by the employer, thereby rendering any agreement illusory.[243]

5.1.5 Qualified aversion to meaningful judicial review of arbitration awards

5.1.5.1 hostility to federal "manifest disregard of law" standard

Although the Federal Arbitration Act authorizes judicial review of arbitral awards in only very limited situations, generally involving a corrupt or misbehaving arbitrator,[244] federal courts have authorized vacating awards where the arbitrator has exhibited a "manifest disregard" for controlling law. They have done so even after the Supreme Court, in 2008, held that parties cannot contract to supplement the grounds for vacating or modifying the award provided by FAA.[245] California courts, however, have refused to recognize the "manifest disregard" standard of review. Thus, for example, an employer was denied meaningful judicial review of a wrongful termination arbitral award that granted $225,000 in emotional distress damages without evidence of severe mental injury and that imposed $1 million in punitive damages without any evidence to support such an award. The Court of Appeal refused to review these legal outrages, because California law, unlike federal law, does not permit vacating an arbitration award merely because the arbitrator manifestly disregarded the law.[246] (The result in California might

now differ, of course, if the arbitration agreement itself provides for broadened judicial review. See § 5.1.5.2.)

By contrast, if an arbitrator legally errs in favor of an employer, that could be grounds for vacating the award. The California Supreme Court ruled in 2010 that an arbitrator makes "a clear error of law," giving grounds to vacate the award, if the arbitrator made a procedural error that deprived an employee of a hearing on the merits of a statutory employment claim.[247]

5.1.5.2 negotiated review of arbitral awards

Employers have sought to hedge against run-away arbitral awards by bargaining for judicial review of arbitration awards for "clear error of law" and for "lack of substantial evidence" to sustain the award. That review would go beyond the review provided by arbitration statutes, which very narrowly limit judicial scrutiny of an arbitration award to such matters as whether the arbitrator had a personal bias or clearly exceeded the arbitrator's authority.[248] Until recently, California courts held that extra-statutory judicial review of an arbitration award is forbidden,[249] although one court upheld, as not unconscionable, a provision in an arbitration agreement that a second arbitrator can review an arbitration award in the same manner as an appellate court would review a trial court judgment.[250]

Surprisingly welcome news came in 2008, in a non-employment case, in which the California Supreme Court held that parties can contract for judicial review of legal error in arbitration awards.[251] The court reached this holding even though the United States Supreme Court had recently held that the Federal Arbitration Act does not permit the parties to expand the scope of judicial review beyond those grounds specified by the FAA.[252] Announcing a special "California rule," the California Supreme Court held that the parties may agree to have expanded judicial review of an arbitration award. The court found support for this rule in a California statutory provision for vacating an arbitration award when "[t]he arbitrators exceeded their powers."[253] The court thus enforced (as a matter of California, not federal, law) a provision in an arbitration agreement that "[t]he arbitrators shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error."

5.2 Public Policy Claims for Wrongful Employment Actions

California permits employees to seek economic, non-economic, and punitive damages from employers who have fired or demoted them in violation of public policy.

5.2.1 Broad definition of public policy

Admitting that the "term 'public policy' is inherently not subject to precise definition,"[254] the California Supreme Court has sought to put some defining boundaries around it. *First*, the public policy in question must be clearly established and substantial, and stem from a constitution, a statute, or an administrative regulation. *Second*, the policy must be established for the benefit of the public as a whole, and not just for the individual.[255] *Third,* the public policy must sufficiently describe prohibited conduct to give employers adequate notice.[256] Nonetheless, as seen below, these limits encompass a very broad variety of lawsuits.

5.2.1.1 examples of public policy supporting a lawsuit

Most Labor Code provisions presumably would support a wrongful termination claim, as the provisions typically make violations a crime (usually a misdemeanor), and thus presumably express policies that are clearly established and for the benefit of the public. The same would be true of any statutory antidiscrimination provision.

5.2.1.2 examples of absence of public policy

i. employer can insist on arbitration

A California appellate court has rejected the wrongful termination claim of an employee fired for refusing to sign an arbitration agreement. The court rejected the argument that the employer violated public policy by requiring employees to waive the right to jury trial, because the parties could, consistent with public policy, agree to waive jury trial as part of an arbitration agreement.[257]

ii. no general public policy favoring lawsuits

A California appellate court has rejected the wrongful termination claim of an employee who sued a client of the employer, as there is no general public policy (even in California) that generally protects the prosecution of a lawsuit.[258]

iii. no public policy against advising high schoolers to gain weight

A California appellate decision reversed a $1.2 million jury verdict, thereby rejecting the wrongful termination claim of a high school teacher who was allegedly fired for reporting a football coach's advice to students to use creatine. Displaying a rare exercise of Californian judicial restraint, the court noted that while there may be "sound policy reasons" to bar coaches from recommending weight-gaining substances, "any such prohibition must be enacted explicitly by the legislature, not implicitly by the courts."[259]

iv. workers' compensation remedies are exclusive

A 2012 Court of Appeal decision held that a worker allegedly fired for filing a workers' compensation claim could not sue for the tort of wrongful termination on that basis, because the Labor Code provision forbidding retaliation for such a filing also limits the remedy for that retaliation. The court reasoned that allowing a plaintiff to sue in tort for a violation of that provision would permit remedies and procedures broader than those provided by the statute itself, and thus concluded that the Labor Code provision cannot serve as the basis for a tort claim of wrongful termination in violation of public policy.[260]

5.2.2 Retaliatory discharge claims

Retaliatory discharge claims generally arise in one of four situations: the employee was fired or demoted for (1) a performing a statutory obligation (e.g., jury duty), (2) refusing to break the law (e.g., committing perjury), (3) exercising (or refusing to waive) a statutory or constitutional right or privilege, or (4) reporting in good faith an alleged violation of a statute of public importance.[261] Here are examples of California courts permitting wrongful termination claims.

5.2.2.1 performing a statutory obligation

California employees can sue for breach of public policy when they are fired or demoted for taking time off to serve as an election officer.[262]

5.2.2.2 refusing to break the law

California employees can sue for breach of public policy when they are fired or demoted for:

- refusing to engage in illegal price-fixing,[263]
- refusing to implement a fraudulent pricing scheme,[264] and
- defying an employer's instruction to commit perjury.[265]

5.2.2.3 exercising a constitutional or statutory right

California employees can sue for breach of public policy when they are fired or demoted for:

- claiming in good faith (even if mistakenly) entitlement to overtime premium pay,[266]
- refusing to submit to a random drug test, in violation of constitutional privacy provisions that apply to private as well as public employers,[267]
- refusing to enroll in an inpatient alcohol rehabilitation program,[268]
- resisting sexual harassment that violates constitutional provisions forbidding sex discrimination by private as well as public employers,[269]
- hiring a lawyer to negotiate conditions of employment,[270]
- appearing on a radio show to support political candidate in a local election and to criticize Member of Congress for supporting the candidate's opponent,[271]

- taking leave under the California Family Rights Act,[272] and
- discussing with other employees the fairness of the employer's bonus system.[273]

5.2.2.4 reporting a suspected violation of law

California employees can sue for breach of public policy when they are fired or demoted for:

- reporting an alleged violation of a health and safety statute,[274]
- reporting a death threat by a co-worker,[275]
- raising reasonable suspicions of company practices violating federal safety regulations,[276]
- investigating and reporting suspected unlawful acts,[277]
- reporting violations of federal immigration law,[278] or
- protesting an unlawful deduction from a paycheck.[279]

California law protects employees even from preemptive retaliation, where the employer takes adverse action against them in anticipation of their reporting unlawful workplace conduct.[280] One appellate decision extended this thought in favor of an employee who was suing for breach of public policy on a theory that the employer constructively discharged her because she was a potential witness in a claim for sexual harassment: "Employer retaliation against employees who are believed to be prospective complainants or witnesses for complainants undermines this legislative purpose just as effectively as retaliation after the filing of a complaint. To limit FEHA in such a way would be to condone 'an absurd result'…that is contrary to legislative intent."[281]

Related discussions appear in sections on employee whistleblowing (§ 3.5) and FEHA retaliation (§ 6.11).

5.2.3 Other wrongful discharge claims

California courts have also permitted employees to use the public policy tort to challenge employment actions that are inconsistent with public policy, without regard to whether the employee has engaged in protected activity, such as where the employee allegedly was fired:

- for reasons forbidden by an employment discrimination statute, even if the plaintiff has failed to exhaust the administrative remedies that the statute provides[282] or

- to avoid paying commissions, in violation of the Labor Code.[283]

In yet another extension of employer liability, the Court of Appeal in 2013 held that a low wage employee who quit his job could sue his former employer for constructive discharge for failing to reimburse auto expenses. The court reasoned that because the failure to reimburse expenses effectively reduced the employee's pay below the minimum wage, it arguably created an intolerable work condition justifying the employee's decision to quit.[284]

5.2.4 Wrongful actions short of termination

California has extended the public policy tort to "wrongful demotion," permitting an employee to sue for a disciplinary demotion imposed for reasons contrary to public policy.[285]

In 2012, in a semi-heroic refusal to yield to the temptation of judicial activism, the Court of Appeal declined to create a tort for a wrongful failure to renew an employment contract, reasoning that there is no "termination" of an employment ending by the terms of the employment contract.[286] This employer victory was qualified, however, in that the court also noted that the employee could pursue a statutory retaliation claim based on the same allegations (a firing in retaliation for raising workplace safety concerns), because the non-renewal, while not a "termination," could be an "adverse employment action."[287] Moreover, although the facts of this case did not raise the issue, a plaintiff in some other case might cobble up a "wrongful termination" claim if the employment contract had an automatic renewal clause or if the employer permitted the employee to work past the contractually set termination date.

5.2.5 Protection of registered sex offenders—Megan's Law

California's Megan's Law[288] calls for the Department of Justice to publicize, via an Internet website,[289] the whereabouts of sex offenders. Megan's Law is named after a seven-year-old girl who was raped and killed by a known child molester who had moved close to Megan's family without the family's knowledge. That tragedy inspired the family to lobby nationwide for legislation enabling people to know where sex offenders live, so that people may better protect themselves and their children. Many states now have a Megan's Law. The California version forbids an employer to fire an employee because of the employee's listing on the Megan's Law website, as the law authorizes use of information disclosed pursuant to the law "only to protect a person at risk" and prohibits use of the information for purposes relating to employment.[290] A person aggrieved by a "misuse" of Megan's Law information may sue for actual damages, punitive damages, and a civil penalty of up to $25,000.[291]

Employers can still use independent means, of course, such as background checks, to learn whether an applicant or employee is a convicted sex offender. Indeed, some employers, such as school districts, must not hire convicted sex offenders, [292] and need to perform due diligence to fulfill that duty.

5.3 Claims for Breach of Contracts of Continued Employment

5.3.1 Implied contracts to dismiss only for good cause

California formally recognizes the doctrine of employment at will, which gives both employee and employer the contractual right to end the employment relationship without cause or prior notice.[293] California also recognizes, however, that circumstances may create an implied contract that requires the employer to make important employment decisions only for "good cause."

5.3.1.1 the ease of plaintiff's proof

California judges routinely invite juries to find an "implied-in-fact contract" of continued employment, by which an employee can be discharged only for "good cause." The jury may infer such a contract from common incidents of employment, such as longevity, personnel policies or practices, assurances of continued employment, good performance reviews, merit raises, industry practices, and friendly pats on the back.[294]

5.3.1.2 the problem with traditional disclaimers

Because California juries can so easily infer an implied contract of continued employment, the presumption of employment at will is, as a practical matter, reversed: juries often will require "good cause" for discharge *unless* the parties have expressly provided, in writing, for employment at will. Moreover, unilateral statements by the employer to this effect are not necessarily conclusive.[295]

The only reasonably effective way for employers to ensure at-will status is to have the employee sign contract-like statements to that effect. An at-will provision in an express written agreement signed by the employee cannot be overcome by a contrary implied agreement.[296] Express employment-at-will statements should also appear everywhere the employer states a policy regarding factors the employer will consider in terminating or changing the terms of employment, and in confidentiality agreements and other agreements that the employee signs.[297]

California employers should beware of relying on certain disclaimer language that works in America generally. Employers traditionally sought to shield themselves from implied-contract claims by placing disclaimers in handbooks and job applications to the effect that "this [handbook] [application] policy is not a contract." That language can have unintended consequences for the California employer who wishes to use the handbook as a shield against claims for breach of implied contract. In one case, at-will language in a job application failed to preclude a contract claim, because the application also contained broad "no contract" language; the court reasoned that the application could not "establish a binding employment condition [i.e., at-will employment] while at the same time expressly providing that neither the application nor subsequent communications can create a binding employment condition or contract."[298] A better approach, under California law, would be to state that the employment-at-will language *is* contractual and that other language in the [handbook] [application] [policy] is not a contract of continued employment.

5.3.1.3 actions short of termination

The implied-contract action, like the public policy tort action, extends to "wrongful demotion." The California Supreme Court recognized an enforceable promise not to be demoted without good cause.[299]

5.3.1.4 procedural violations

The theory of implied contract may also challenge an employer's failure to follow promised pre-termination procedures. The California Supreme Court has held that an employee might be able to recover on the basis that he would not have been dismissed in a reduction in force had the employer followed its own RIF procedures.[300]

5.3.2 Standard for "good cause"

5.3.2.1 balancing test

The standard of "good cause" for dismissal or demotion formally permits the employer to rely on any legitimate, nontrivial reason for dismissal. Here again, though, the latitude that the law appears to give to employers may be more nominal than real. A standard California jury instruction permits juries to apply the "good cause" standard in a discretionary fashion, balancing the employee's interest in continued employment against the employer's interest

in efficiency.[301] (Which way do you suppose the balance tips when the scale is administered by a jury of the plaintiff's peers?)

5.3.2.2 "good cause" in cases of misconduct

In cases of suspected misconduct, an employer may have good cause for dismissal even if the employer's good faith belief in the existence of misconduct turns out to be factually mistaken. But a California employer that relies on a factually mistaken ground for dismissal must show that it conducted an "appropriate investigation," which typically must include private interviews of witnesses, adequate documentation, and an opportunity for the accused to address the allegations.[302]

5.4 Claims for Breach of Implied Covenant of Good Faith and Fair Dealing

Under California law, each employment contract necessarily implies a covenant of good faith and fair dealing. An employer breaches the covenant by any action, taken in bad faith, that deprives an employee of the benefit of the express terms of the contract. An employer might breach the implied covenant even where there is no breach of an express contract, such as where an employer dismisses a salesperson to avoid paying a commission on a sale that the salesperson has already completed,[303] or misleads an employee into taking a job in reliance on a reasonable assumption that he would have a chance to perform his job to the good faith satisfaction of the employer, and revokes the offer before the new hire begins work.[304]

The implied covenant of good faith and fair dealing does not impose substantive terms beyond those to which the parties actually agreed, and thus cannot transform an at-will employment contract into a contract terminable only for good cause. To the extent that a plaintiff claims a breach of the implied covenant on simply on the basis that she was fired without good cause, the claim lacks merit.[305]

5.5 Limited Effectiveness of Common Defenses and Procedural Devices

5.5.1 Workers' compensation preemption

In many states, the workers' compensation act provides the exclusive remedy for a work-related injury, and thus preempts tort claims based on that injury. California has differed, in that some cases permitted employees to pursue tort claims for intentional and even negligent infliction of emotional distress, notwithstanding the workers' compensation act, where the tort claim stems from conduct alleged to violate public policy. The reasoning in these cases was that the employer's conduct was not one of the "normal risks of employment" covered by the workers' compensation act.[306] In

recent years, however, a moderating trend of authority has limited these kinds of tort actions, recognizing that employer misconduct in connection with normal employment decisions is within the compensation bargain, even if the misconduct was arguably outrageous and intended to cause emotional harm.[307]

5.5.2 Exclusive statutory remedies—not

In many states, if a statute forbids conduct and provides a remedy for a violation, then the statutory remedy is exclusive for that conduct. California is different. For example, an employee alleging age discrimination may sue for wrongful termination under the public policy against age discrimination established by the FEHA, without complying with the FEHA's administrative requirements (that is, the employee may bring a tort claim based on the public policy expressed in an antidiscrimination statute, independent of a claim brought under the antidiscrimination statute itself).[308]

5.5.3 Summary judgment—not so fast

In America generally, and particularly in the federal system, courts use summary judgments to weed out weak lawsuits. A defendant (almost always the employer in an employment case) can file such a motion and expect it to be heard relatively quickly, usually within four or five weeks. California is different.

5.5.3.1 special pro-plaintiff notice requirement

A California party moving for summary judgment (which almost always is the defendant) must give 75 days of notice.[309] This period gives plaintiffs plenty of time to take multiple depositions and conduct additional written discovery, specifically designed to defeat the summary judgment motion, by establishing issues of material fact that must be decided by a jury. The party opposing a motion for summary judgment (almost always the plaintiff in an employment case) also can often delay the hearing still further to conduct even more discovery.

5.5.3.2 general judicial hostility toward summary judgment

Judicial hostility towards summary judgment in California employment cases arose vividly in one decision,[310] which reversed a summary judgment while devoting many pages to criticizing the defense counsel (while leaving unscathed the corresponding conduct of the plaintiff's counsel). The court took this occasion to share various prejudices against summary judgment in employment cases.

(i) Summary judgment "is being abused, especially by deep pocket defendants to overwhelm less well-funded litigants."[311]

(ii) "[C]ourts are sometimes making determinations properly reserved for the fact finder, sometimes drawing inferences in the employer's favor, sometimes requiring the employees to essentially prove their case at the summary judgment stage."[312]

(iii) "[M]any employment cases present issues of intent, and motive, and hostile working environment, issues not determinable on paper. Such cases, we caution, are rarely appropriate for disposition on summary judgment, however liberalized it be…'Its flame lit by [U.S. Supreme Court decisions encouraging the use of summary judgment motions to weed out nonmeritorious cases]...summary judgment has spread...through the underbrush of undesirable cases, taking down some healthy trees as it goes.' ...This we cannot allow."[313]

The Court of Appeal took another swipe at summary adjudication for employers in 2013, in a lawsuit by a female construction worker who claimed she had complained to supervisors about inaccessible or unsanitary portable toilets.[314] The trial court granted summary adjudication to the employer on her punitive damages claim, because, as a matter of law, no managing agent of the employer had engaged in or ratified any oppressive, malicious, or fraudulent conduct. The Court of Appeal reversed, concluding that the declaration filed in support of summary adjudication did not state "sufficient *evidence,*"[315] This holding came even though the declarant clearly enumerated his job duties, which involved "interfacing with stakeholders on the Project, contract administration, operations and personnel oversight, and making sure the Project was completed according to the contract."[316] The court supposed that "a trier of fact could reasonably infer [that this manager] exercised substantial authority and discretion regarding a broad range of issues involving the Project, including compliance with [the employer's] policies and the hiring, supervision, and laying off of Project employees."[317]

5.5.4 Plaintiff's income tax returns privileged from discovery

In America generally, a plaintiff suing a former employer for wrongful termination must produce income tax returns, which contain information directly relevant to claims of lost income. California is different. California courts have held that individuals have a privilege to withhold income tax returns in response to discovery requests.[318]

5.5.5 Limits to statutes of limitations

Under federal law, an employee challenging a wrongful dismissal generally must sue within a period of time that begins with the *notice* of the employee's termination of employment. The notice may precede the actual termination of employment by weeks or months.[319] California law is different. For a California plaintiff, the time to sue for wrongful termination does not start to run until the actual termination of employment.[320] The same lenient standard favors a plaintiff suing on a breach of contract: a 2010 decision by the Court of Appeal held that an employee's claim against an employer for breaching its promise to permit "senior" employees to continue employment under relaxed sales quotas did not accrue when the employer announced it would no longer honor the promise, but rather accrued only later, when the employer first counseled an employee for failing to meet sales quotas contrary to the relaxed quotas.[321]

And California courts also follow a version of the continuing violation doctrine, permitting suit on unlawful actions occurring outside the limitations period if a course of conduct, continuing into the limitations period, consists of acts "sufficiently similar in kind," occurring with "sufficient frequency," even if the employee already knew of facts to sustain a claim at a time outside the limitations period.[322]

5.5.6 Statute of Frauds not a defense

Plaintiffs suing for breach of a contract of continued employment, requiring good cause for dismissal, often rely on alleged oral promises made many years ago, by managers no longer with the employer. The Statute of Frauds, found in virtually every state,[323] provides that a contract must be in writing to be enforceable, if by its terms the contract is not to be performed within one year from its inception. Someone taking a common sense approach to this issue might think that an oral contract of continued employment, contemplating performance for a period of more than one year, is subject to the Statute of Frauds. Not so in California. The California Supreme Court has held that the Statute of Frauds defense is unavailable because an oral employment contract *could possibly* be completed within one year, in that, within one year, the employee could quit or die or the employer could fire the employee for good cause.[324] The Supreme Court's reasoning thus relied on the possibility of a first-year *failure* of performance of an oral employment contract, even though the statutory language itself addresses only actual performance of the contract.

5.5.7 Federal labor preemption generally not a defense

California employers sometimes argue that a state law claim is preempted by Section 301 of the Labor Management Relations Act and thus must proceed, if at all, only under a collective bargaining agreement. But this defense fails when the claim arises,

as it typically does, under independent state law and does not require interpretation of the CBA.[325]

5.5.8 Limits on cross-complaints

One weapon in an employment defendant's arsenal is a cross-complaint against the plaintiff for his or her own actionable conduct. California limits the effectiveness of such a cross-complaint, however, by authorizing a specialized motion—an "anti-SLAPP" motion—which permits a plaintiff to argue that the cross-complaint should be stricken on the ground that it is simply a litigation tactic.[326]

When a female employee sued both her employer and her co-worker for sexual harassment, the co-worker defendant cross-complained against her for defamation and intentional infliction of emotional distress ("IIED"), based on her allegations to the police, to a nurse, and to an HR manager. When the plaintiff then filed an anti-SLAPP motion, the court dismissed the cross-complaint and required the co-worker to pay the plaintiff's attorney fees. The Court of Appeal affirmed, because the anti-SLAPP statute protected the plaintiff's allegations in that they were made in connection with matters under review by an official proceeding or body, and because the co-worker could not demonstrate a likelihood that he would prevail on the merits of his defamation and IIED claims.[327]

5.6 Defamation Claims

5.6.1 Self compelled publication

Ordinarily, a defamation claim requires proof that the defendant published the defamatory statement to third parties. California is different. It joins a few other jurisdictions in recognizing the doctrine of "self compelled publication." Suppose that an employee, caught with hands in the till, is fired by the boss, who privately reminds the employee that theft is a dismissible offense. Suppose further that the employee is not really a thief, but was just borrowing the money. Suppose now that the fired employee, seeking a new job, feels compelled to tell prospective employers that theft was the reason given for dismissal by the prior employer. Peculiarly in California, these facts may create liability for defamation, even though the former employer never told anyone (other than the fired employee) about the theft, if the plaintiff was compelled under the circumstances to publish the defamatory statement. The doctrine of "self compelled publication" has obvious implications for exit interviews. Employers have tried to avoid liability under this theory by following a strict policy against giving out any information about former employees except for the dates of employment.[328]

5.6.2 References by former employers

California expressly recognizes a privilege for a former employer to say whether it would rehire a current or former employee.[329] The statutory language is so vague, however, that it is conceivable that an employer still could be liable for defamation if it was motivated by ill will to state that a former employee would not eligible for rehire.

Some employers disclose information on former employees based on written authorizations signed by those former employees. But California law does not recognize a waiver of liability as to future intentional acts, so that an employer allegedly providing false information can still be sued for intentional defamation, notwithstanding the former employee's written authorization.[330]

5.7 Misrepresentation Claims

5.7.1 Employer liability for fraudulent inducement

Labor Code Section 970 authorizes double damages for an employee who has been induced to change from one place to another by false promises regarding employment.

Many states refuse to use the doctrine of promissory estoppel to aid an employee who leaves a job to accept an at-will job that never materializes. California is different. Even if the plaintiff has left an at-will employment, the inducing California employer can be liable under theories of promissory estoppel[331] or promissory fraud[332] for the income the plaintiff has lost by leaving the former employer in reliance on the defendant's false pre-hire promises. A California court held that a plaintiff who was hired by an at-will employer with false promises of compensation, and who was fired six months later for complaining about the broken promises, could recover the compensation that he would have earned with his former employer, which would have re-hired him but for its strict no-rehire policy.[333]

5.7.2 Employer liability for too-generous references: negligent referral

A California employer that gives a reference praising a former employee, while failing to report facts showing the employee's dangerous tendencies, may be liable for intentional or negligent misrepresentation. A school district that praised a former employee for his ability to work with children, while failing to report his misconduct with children, was subject to a misrepresentation suit by a child whom the employee molested in his new employment.[334]

5.7.3 Employer liability for blackballing

Labor Code Section 1050 makes an employer liable for treble damages for misrepresentations to prevent a former employee from obtaining new employment.

5.8 Employer Liability for Employee Torts

5.8.1 Negligent retention

An employer is liable for injuries to a third party caused by an employee with known propensities to cause such harm.[335]

5.8.2 Good Samaritan protection

Like many states, California has Good Samaritan statutes, designed to encourage people to assist victims of dire emergencies. That is because the common law, while imposing no duty on a person to come to a victim's aid, does require due care of a person who chooses to administer aid. To encourage helping behavior by people who would be inclined to act as Good Samaritans but for this common law rule, the California Legislature enacted a statute that gave immunity from liability to "any person…who renders emergency care at the scene of an emergency."[336] The California Supreme Court, acting in its historical tradition of expanding liability at every opportunity, held in a 4-3 decision, in 2008, that this protection was limited to those who provided "emergency *medical* care."[337] In reading "medical" into the statute, the court reversed a summary judgment in favor of a defendant who had removed her friend from a wrecked automobile immediately following an accident, inadvertently aggravating the friend's spinal injuries in the process.

The dissenting opinion pointed out that the majority's rewriting of the Good Samaritan statute—immunizing only *medical* assistance—would legally jeopardize all rescue and transportation efforts, so that a person would be at legal risk while pulling a victim from a burning building and would be legally protected only while administering CPR to the victim on the sidewalk. The dissent doubted that the California Legislature intended "results so illogical, and so at odds with the clear statutory language." The dissent was right: the Legislature responded by amending the statute to include both "medical" and "non-medical" emergency care.[338]

5.8.3 Intentional torts

The traditional rule is that an employee's actions are within the scope of employment—and thus binding on the employer—only if they are motivated, in whole or part, by a desire to serve the employer's interest. Deviating from this rule, California courts have expanded employer liability by reasoning that an employee's willful, malicious, and

even criminal torts can fall within the scope of employment. In California, the employer is vicariously liable for an employee's conduct—even if that conduct is not authorized or ratified—if the employment predictably creates the risk that employees will commit torts of the type for which liability is sought. The Court of Appeal applied this expansive notion of tort liability in holding that an auto-supply store could be liable to a customer who had been assaulted by the store's employee. The employee had hit the customer in the head with a metal pipe when the customer criticized the employee for giving an inadequate response to a question about the price of motor oil. The Court of Appeal concluded that this physical eruption, stemming from a customer interaction, could be a predictable risk of retail employment.[339]

5.8.4 Unintentional torts

Under the traditional "going and coming" rule, employers are not liable for torts that their employees commit on their way to and from work, because commuting employees are not acting within the scope of their employment. But California courts have created a "required vehicle" exception to the going-and-coming rule, reasoning that an employer derives an incidental benefit from its employee's use of a vehicle where that use is an express or implied condition of employment.

A 2013 California appellate decision reversed a summary judgment for the employer of an employee who had hit someone with her car on her way home from work, even though the accident occurred while the employee was deviating from her normal route home to obtain some frozen yogurt and to attend a yoga class. The court broadly reasoned, "Because the employer required the employee to use her personal vehicle to travel to and from the office and make other work-related trips during the day, the employee was acting within the scope of her employment when she was commuting to and from work."[340] And "the planned stops [for yoga and yogurt] were not so unusual or startling that it would be unfair to include the resulting loss among the other costs of the employer's business."[341]

5.9 Employment Discrimination Litigation

California forbids all the kinds of employment discrimination forbidden by federal statutes, plus quite a few more (see § 6.2).

5.9.1 No caps on damages

Under federal law—Title VII, ADA, and the ADEA—monetary remedies for employment discrimination are subject to certain limits, such as caps on compensatory and punitive damages for Title VII lawsuits and the absence of emotional distress remedies for ADEA lawsuits. Further, some states, such as Washington, do not recognize claims for

punitive damages. California is different. A plaintiff who prevails in any kind of California employment tort suit is entitled to recover the full panoply of tort damages, including uncapped economic damages and non-economic damages, and punitive damages, as well as costs, and in a discrimination suit is entitled to recover not only reasonable attorney fees but also expert witness fees.[342] And under California law, unlike federal law, fee awards can often dwarf damage awards (see § 5.12.5).

5.9.2 Additional claims for physical violence

California employees discriminated against with acts of violence and intimidation have a private right of action in addition to the rights they already have under ordinary antidiscrimination statutes.[343]

5.9.3 Far greater scope of liability for employment discrimination

In many ways California's anti-discrimination provisions have a greater breadth, provide more remedies, and are easier for plaintiffs to pursue than are the corresponding provisions under federal law (see § 6.1).

5.10 Wage and Hour Claims

5.10.1 One-sided attorney fees provisions

For claims seeking unpaid minimum wage or overtime premium pay,California favors plaintiffs with a one-way fee-shifting provision that entitles only the prevailing *employee* to recover attorney fees.[344] For claims seeking other forms of unpaid wages, a prevailing employee remains entitled to attorney fees, while the prevailing employer is so entitled only if the employee sued in bad faith.[345]

Before 2014, Section 218.5 of the Labor Code neutrally provided for prevailing-party attorney fees as to claims that did not involve minimum wages or overtime premium wages. Employers invoked this even-handed statute when they defeated claims seeking pay for missed meal and rest breaks. Employers could say that those claims were claims for "wages" because the California Supreme Court, in a 2007 decision, had held that meal and rest pay was a "wage," not a "penalty."[346]

In 2012, however, the California Supreme Court deprived employers of this leverage. The high court determined that claims for meal and rest pay are not claims for "wages" after all, but rather are claims for violation of the employer's obligation to provide meal and rest breaks.[347] The Supreme Court implied that if the claims had involved wages instead of penalties, an award of attorneys' fees to the prevailing employer would have been appropriate.

The attention thus focused on Section 218.5 prompted the Legislature, in 2013, to amend the statute to tilt the playing field still further in favor of plaintiffs.[348] Effective January 1, 2014, while Section 218.5 continues to entitle employees to attorney fees when they win claims for unpaid wages, the statute entitles prevailing employers to attorney fees only if the court finds that the employee brought the lawsuit in bad faith.[349] Meanwhile, as to actions for unpaid minimum or overtime premium wages, it remains the case that only the successful employee, and never the successful employer, is eligible to recover attorney fees.[350]

The Court of Appeal has denied an employer prevailing-party attorney fees in cases where the wages claimed were for split-shift premium pay (considered to be a claim for minimum wages), but has allowed them for claims involving reporting time pay (considered to be a claim for unpaid wages at the employee's regular rate).[351]

5.10.2 The wage and hour class action explosion

The number of class action lawsuits alleging violations of the California Labor Code has risen dramatically. While plaintiffs annually filed only five to ten of these suits before 1999, they filed 40 in 1999, over 60 in 2000, over 100 in 2001, and over 175 in 2002, with the rate of filing continuing to escalate so that virtually each day now sees new filings of California Labor Code class actions.

The following factors make class actions particularly attractive to plaintiffs in California.

- California wage and hour law differs from federal law in important ways, such that an employee who is exempt from federal overtime pay requirements often is not exempt under California law.
- California procedural rules facilitate class actions for violation of wage and hour obligations. Federal wage and hour claims, under the FLSA, require an "opt-in" procedure, meaning that collective actions proceed to the extent that employees want to join the suit. Courts have held, however, that California procedural law does not permit opt-in class actions,[352] meaning that employees will belong to the class unless they affirmatively opt out. One 2006 Court of Appeal decision has permitted plaintiffs to have the best of both worlds by alleging FLSA violations while proceeding with an opt-out-only theory of class certification by characterizing the FLSA violations as violations of the California Unfair Competition Law.[353] And the Ninth Circuit has similarly approved a plaintiff's tactic of using the UCL as a vehicle to assert a FLSA claim, without being bound by the FLSA's procedural safeguards such as the requirement that employees must affirmatively opt into the case in order to participate in it.[354]

- California case law recognizes that plaintiffs' lawyers have a constitutional right to communicate with potential class members, and requires employers to cooperate in a procedure to enable those lawyers to obtain the names and addresses of potential class members, notwithstanding privacy issues.[355]
- Virtually every Labor Code claim entitles the prevailing plaintiff to attorney fees.[356]
- California has permitted wage and hour claims to proceed under its Unfair Competition Law (discussed immediately below), which has an extraordinarily long (four-year) statute of limitations.

5.10.3 Unfair competition claims

5.10.3.1 The Unfair Competition Law (UCL)

California's vaguely worded UCL permits lawsuits for any "unlawful, unfair or fraudulent business practice."[357] Wage and hour plaintiffs often add a UCL claim to obtain a four-year statute of limitations instead of the three-year statute that applies to Labor Code claims generally.

The UCL authorizes only limited remedies: it does not permit damage awards or a remedy of nonrestitutionary disgorgement (e.g., return of profits that an employer has realized through Labor Code violations).[358] Nor does the UCL authorize recovery of penalties due for untimely payment of termination wages.[359]

The UCL does authorize injunctive relief and any order "necessary to restore to any person in interest any money or property which may have been acquired by means of such unfair competition." The California Supreme Court thus held that an action seeking restitution for unpaid overtime wages could proceed as a representative action under the UCL, and that the four-year statute of limitations applied even though the underlying wage claim was governed by a three-year statute.[360]

Plaintiffs have used the UCL to circumvent a defendant employer's right to jury trial. The Court of Appeal has upheld a trial court's decision to have a wage and hour claim tried to the court, without a jury, over the defendant's objection, on the basis that the UCL claim encompassed the traditional wage and hour claims and that the UCL claim is one for equitable relief, for which no jury trial is available. The Supreme Court decided to review this decision (on other grounds), making it unfit to cite as precedential authority.[361]

Historically, a UCL action also permitted the plaintiff to seek restitution on a class-wide basis without satisfying the usual requirements of class certification.[362] This rule was amended by Proposition 64, discussed below, to require a UCL plaintiff who seeks class-wide relief to meet class certification standards.

5.10.3.2 Proposition 64

Proposition 64, enacted by a vote of the People of California in November 2004, reformed the UCL by requiring that a private UCL plaintiff must have suffered an "injury in fact" and have lost "money or property" as a result of the challenged business practice, and by requiring that UCL plaintiffs suing on behalf of others must satisfy the requirements for a class action claim.[363] The California Supreme Court has held that Proposition 64 applies to pending cases, but would permit non-injured plaintiffs bringing UCL claims to find someone truly injured to replace them as a plaintiff in order to continue the lawsuit.[364]

5.10.4 Class certification

Plaintiffs asserting wage and hour violations gain enormous leverage over employers by getting their lawsuits certified as class actions, as that development greatly magnifies the employer's potential exposure to monetary liability. A plaintiff seeking class certification from the court must identify a sufficiently numerous class that has a well-defined community of interest, which embodies three factors: (1) predominant common questions of law or fact, (2) class representatives with claims typical of the class, and (3) class representatives who can adequately represent the class.[365]

California courts show extraordinary deference to the plaintiffs' pleaded allegations. One appellate decision overruled a trial court that had dismissed class allegations on demurrer, stating: "In this action, as in the vast majority of wage and hour disputes, class suitability should not be determined on demurrer."[366]

Thus, to defeat class certification, employers often must bear the enormous expense of filing or defeating a motion based on extensive evidence regarding the suitability of the claim for class treatment.

5.10.4.1 judicial endorsement of wage and hour class actions

The California Supreme Court, in the 2004 *Sav-On Drug Stores, Inc.* case, issued a decision favoring class certification of a wage and hour case involving whether the employer had properly classified certain managers as

exempt.[367] *Sav-On* emphasizes that if one reasonably *might* conclude from the record that common issues predominate over individualized ones, then a trial court's certification order should not be disturbed on appeal.[368] *Sav-On* states that decisions regarding predominance are for the trial court to determine, and the trial court's decisions should not be lightly overturned.[369]

While *Sav-On* does not mandate certification in exempt/nonexempt classification cases, the opinion has a pro-certification tone, stating that class actions are "encouraged" in the wage and hour context.[370] Furthermore, the court suggested that if an employer categorically reclassified all the subject employees as nonexempt without changing their duties, that could fairly be taken as an admission that the position had been misclassified all along.[371] The court also suggested that class treatment could be supported by the employer's failure to audit the performance of its exempt employees to see if particular employees truly were functioning in an exempt capacity.[372]

Sav-On identifies several issues that plaintiffs could establish through common proof.

- Whether the employer deliberately misclassified nonexempt employees as exempt.
- Whether the employer implicitly conceded the employees in question were nonexempt when it reclassified them all from exempt to nonexempt.
- Whether any given task within the limited universe of tasks that managers performed qualifies as exempt or nonexempt.
- Whether a manager following the employer's reasonable expectation for performing the job would spend most working time on exempt duties.[373]

The California Supreme Court concluded that a trial court could rationally conclude that those common issues predominated over individualized issues concerning how managers actually spent their time. Dismissing concerns that these cases could prove unmanageable, the Supreme Court noted that the trial court had broad discretion as to how to handle individualized issues once the class issues were resolved. The Supreme Court gave minimal guidance as to how to carry out those proceedings, but it encouraged trial courts to be "procedurally innovative" in fashioning procedures to resolve remaining individualized issues efficiently.[374]

The California Supreme Court affirmed these general class certification principles in *Brinker*, a 2012 case, by holding that a trial court considering certification need not decide issues that affect an element of the certification standard, if they are unnecessary to the ultimate certification decision.[375]

After *Brinker*, several California appellate decisions extended this pro-certification rationale even further, ruling that certification should turn on whether a plaintiff's theory is susceptible to common proof, and minimizing the individualized inquiries necessary to determine which putative class members, if any, actually experienced a violation of their rights under the Labor Code.[376]

Meanwhile, California appellate decisions going the other way (in the employer's favor) either have not been published or have suffered the indignity of being depublished by the California Supreme Court.[377]

The most important of the appellate decisions now on Supreme Court review (and thus depublished) is *Duran v. U.S. Bank National Ass'n*,[378] which reversed a $15 million judgment for a class of bank officers who claimed that they had been misclassified as exempt. The trial court permitted them to use "statistical sampling" to prove both class-wide liability and damages. The Court of Appeal reasoned that this Trial by Formula approach violated due process in numerous ways: "we have never advocated that the expediency afforded by class action litigation should take precedence over a defendant's right to substantive and procedural due process.".

Although *Duran* promised to end an era in which California plaintiffs could use junk science and skirt due process, all in the name of class action expediency, the California Supreme Court halted this development in its tracks by granting review of the *Duran* decision. The high court is expected to rule in the case by mid-2014.

5.10.4.2 broad pre-certification class discovery

In a further assist to class action lawyers, the Court of Appeal had held that the original plaintiff need not even belong to the asserted class to have standing to obtain pre-certification discovery.[379] At issue was an order permitting pre-certification discovery to identify class members who might become substitute plaintiffs in place of the original plaintiffs.[380] The Court of Appeal concluded that the trial court did not err in concluding that the rights of absent class members outweighed the potential for abuse of the class action procedure.[381]

5.11 Bounty-Hunting Claims for Violations of the Labor Code

5.11.1 The PAGA legislation

While federal and state governments create civil penalties for certain violations of employment statutes, these penalties typically are enforced by public officials, who exercise prosecutorial discretion in deciding whether to pursue penalties.

California is different. The Labor Code Private Attorneys General Act of 2004 (PAGA)[382] created two significant problems for California employers. *First,* as of 2004, new civil penalties apply to violation of all Labor Code provisions "except those for which a civil penalty is specifically provided." (See § 7.11.)[383] *Second,* "aggrieved employees"[384] may sue, in lieu of the Labor Commissioner, for the civil penalty, with the plaintiff and other aggrieved employees to collect 25% of the penalties (the remainder going to the state).[385] The prevailing plaintiff also can recover costs and attorney fees.[386] Recovery of civil penalties is not available, however, if the LWDA or its agencies or employees already have cited the same facts and theories to seek penalties.[387]

The California Supreme Court enhanced the power of PAGA still further in 2009, when it held that an individual can sue under PAGA without having to satisfy the requirements of a class action, on the rationale that "an action to recover civil penalties 'is fundamentally a law enforcement action designed to protect the public and not to benefit private parties.'"[388]

In line with this reasoning, the California Court of Appeal has held that an individual's right to proceed in court to enforce PAGA rights may not be waived in an arbitration agreement.[389]

5.11.2 The PAGA amendments

Reform legislation, enacted in August 2004, mitigated some of the harsher aspects of the PAGA, and empowered the DLSE to promulgate regulations to implement the statute. The principal reform measures were as follows.

5.11.2.1 DLSE exhaustion requirement

Employees challenging certain Labor Code violations must, before suing, give written notice to the DLSE of the specific violation, to enable the DLSE to investigate and cite the employer for the violation, in which case a private lawsuit cannot proceed. If the DLSE does not timely act, then the employee may sue.[390] For a small number of alleged violations, the employer has an opportunity to cure the violation within 33 days of the employee's notice.[391]

A PAGA claim is deficient if the notice to the DLSE failed to provide sufficient "facts and theories" for the alleged Labor Code violation.[392]

Some courts have diminished the significance of the PAGA exhaustion requirement by holding that plaintiffs may pursue certain Labor Code penalties without first contacting the DLSE. These are "statutory penalties" that employees could collect directly, pre-PAGA (e.g., waiting-time penalties, pay for meal-break and rest-break violations). These courts would apply the exhaustion requirement only as to "civil penalties," defined as those penalties that only the Labor Commissioner could collect absent an employee's PAGA action. Courts thus have held that while employees must exhaust DLSE remedies as to any claim for "civil penalties," employees need not contact the DLSE before suing for "statutory penalties."[393]

Further diminishing the practical significance of the exhaustion requirement was a 2008 case in which the Court of Appeal held that PAGA claims added in an amended complaint relate back to the original complaint, if the claims rest on the same misconduct and the same injury.[394]

5.11.2.2 judicial discretion to reduce penalties

A court may exercise discretion to reduce the amount of civil penalties if they otherwise would be "unjust, arbitrary and oppressive, or confiscatory."[395] Courts have approved PAGA settlements involving payments to the LWDA of less than 0.1% of a common settlement fund.[396] Some courts have awarded nearly $3 million in civil penalties in connection with default judgments.[397]

5.11.2.3 court approval of settlements

The court must approve any settlement of a PAGA lawsuit.[398]

5.11.2.4 anti-retaliation provision

California employers must not retaliate against any employee for bringing a PAGA claim.[399]

5.11.2.5 exemption for notice, posting, and filing violations

Employees cannot maintain PAGA lawsuits for petty violations such as failures to post notices or file notices, although this new exemption does not cover "mandatory payroll or workplace injury reporting."[400]

5.11.2.6 repeal of job-application provision

Employers no longer must (as was once required by former Labor Code Section 431) file a copy of their job application forms with the DLSE.

5.11.3 Further PAGA peculiarities

5.11.3.1 aggrieved via violation of Wage Order working conditions

Courts have permitted aggrieved employees to pursue PAGA claims not only for violations of provisions appearing expressly within the Labor Code, but also for violations of provisions appearing only in the Wage Orders. These courts have concluded that Labor Code Section 1198 incorporates the Wage Order provisions by reference.[401] Accordingly, PAGA claims may assert violations of applicable Wage Orders, including violations of "suitable seating" requirements (see § 7.1.13.). The Wage Orders include regulations on various other working conditions, such as suitable temperature.

5.11.3.2 recovering wages as civil penalties

Although the California Supreme Court has announced that a PAGA "action to recover civil penalties is fundamentally a law enforcement action designed to protect the public and not to benefit private parties,"[402] a Court of Appeal has concluded that PAGA plaintiffs may obtain "underpaid wages" as part of the civil penalty.[403]

5.12 "The Life Unlitigated is Not Worth Living"

This Californicated paraphrase of the wisdom of Socrates is not exactly public policy in California, but sometimes it sure seems that way.

5.12.1 Encouragement of multiple claims

California judges practically encourage plaintiffs' attorneys to assert all claims possible. The California Supreme Court has stated, "A responsible attorney handling an employment discrimination case must plead a variety of statutory, tort and contract causes of action in order to fully protect the interests of his or her client."[404] Plaintiff's attorneys can thus feel obliged to bring many claims, lest clients second-guess their judgment by citing the wisdom of the California high court. And in one case, in which the plaintiffs' attorneys had won a class action judgment against an employer in the amount of $90 million, the Court of Appeal permitted disgruntled class members to sue these highly successful plaintiffs' attorneys for malpractice, on the ground that they had failed to bring yet an additional claim for still more money.[405]

5.12.2 No guarantee that plaintiffs need ever pay costs

In America generally, frivolous litigation faces some deterrent because a plaintiff who loses a lawsuit must pay not only the plaintiff's own litigation costs but also the defendant's litigation costs (as well as the defendant's attorney fees, in very rare circumstances). Yet California is different. It creates no guarantees that the plaintiff who files a bad lawsuit will ever have to pay anything. As to the prevailing defendant's costs, at least one California appellate court has held that the plaintiff is liable for costs only if the plaintiff has the ability to pay.[406]

And California permits a plaintiff to sue while secure in the knowledge that even the losing plaintiff's own costs will be paid by someone else. Various states historically have recognized causes of action (e.g., champerty, maintenance) that can put a party at risk for financing litigation. State bar rules in other states have limited the ability of lawyers to engage in that financing. Not so in California. California does not discourage financing litigation and its state bar rules do not restrict a lawyer from agreeing to advance expenses of a client and even waiving the right to repayment if the client fails to obtain any recovery. Thus, in a 2006 Formal Opinion, the Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association, citing the California Rules of Professional Conduct, ruled that it is permissible for a law firm to cover a client's litigation costs if the client loses and the prevailing party wins a judgment for its costs.[407]

And a member of a California-certified plaintiff class need not worry about potential liability for costs in deciding whether to opt out of the class: absent class members cannot be held liable for the defendant's costs if the defendant wins the lawsuit.[408]

5.12.3 Court-enhanced attorney fees by use of multipliers

Under federal statutes authorizing an award of attorney fees to the prevailing party, the award is simply the product of (a) the hours reasonably expended on the winning effort times (b) the reasonable rate for those hours. There is no after-the-fact multiplier or enhancement to augment the plaintiff's reward for pursuing a risky case.[409] A California appellate court once agreed with this result, opining that an attorney-fee enhancement would "at best serve no purpose and at worst encourage pursuit of unmeritorious claims."[410] But the California Supreme Court disagreed, holding that trial courts can grant an enhanced attorney-fee award to compensate plaintiff's attorneys for the risk that they assume in taking a case on a contingent fee basis.[411]

In a 2008 PAGA case,[412] the Court of Appeal held that the trial court could grant an enhanced fee award to class-action plaintiffs' counsel who took a case that raised significant complex legal issues of first impression.

5.12.4 Attorney fees awarded even if plaintiff doesn't win

Sometimes plaintiffs seek prevailing-party attorney fees even though all they arguably accomplished was simply a voluntary change in the defendant's course of conduct. The United States Supreme Court has rejected this "catalyst" theory of recovery of attorney fees.[413] California is different. The California Supreme Court has endorsed the recovery of attorney fees for a plaintiff if the defendant changes its behavior substantially because of, and in the manner sought by, the plaintiff's lawsuit.[414] The court thus permitted the plaintiffs—who never won their lawsuit—to recover not only (1) attorney fees for litigating the underlying lawsuit, but also (2) a multiplier on those fees, (3) attorney fees for litigating their entitlement to attorney fees, and (4) a multiplier on the fees for litigating entitlement to fees.[415] This development led the dissenting justice to note forlornly: "The majority today goes farther than this court has ever gone before—indeed, so far as I can tell, further than any other court has ever gone—in permitting plaintiffs to win large attorney fee awards. … Lest California truly become a mecca for plaintiffs and plaintiffs' attorneys throughout the country, we need to be at least somewhat in step with the rest of the country."[416]

5.12.5 Attorney-fee awards can dwarf actual recoveries

In federal cases, the amount of attorney fees awarded to a plaintiff generally must be in reasonable proportion to the success that the plaintiff has attained.[417] Yet a California discrimination plaintiff who obtained a $30,500 jury award for compensatory damages won an additional $1.1 million in attorney fees.[418] The California Supreme Court corrected a similar situation in 2010. A plaintiff winning an $11,500 FEHA verdict had sought $871,000 in attorney fees. The trial court denied the fee request because the recovery was so modest that the case could have been brought in a court of limited jurisdiction (with recoveries limited to $25,000). When the Court of Appeal reversed, holding that it was an abuse of discretion to deny attorney fees in a FEHA case solely because the amount of the damages award was modest,[419] the California Supreme Court reversed the Court of Appeal and upheld the trial court, concluding that the trial court could deny attorney fees on the basis of the plaintiff's minimal success and the grossly inflated fee request.[420]

Yet California courts continue to countenance grossly disproportionate fee awards. In a 2013 case, the Ninth Circuit applied California law to uphold an award of $700,000 in attorney fees to a plaintiff where the jury, while rejecting most of her claims, had awarded her just $30,000 in damages.[421]

5.12.6 California Judicial Council jury instructions often wrongly favor plaintiffs

The California Judicial Council has commissioned standard jury instructions, such as the California Civil Jury Instructions (CACI), that misstate the law to the plaintiff's advantage. Courts have corrected some of these mistakes, by rejecting standard jury instructions that have:

- permitted retaliation plaintiffs to prevail simply because their protesting activity was a motivating reason for their discipline, even in the absence of retaliatory intent,[422] and
- permitted discrimination plaintiffs to prevail where, notwithstanding the presence of some discriminatory motive, the plaintiff would have experienced the same adverse employment action even in the absence of discrimination.[423]

5.13 Special Protections for Unauthorized Workers

5.13.1 Plaintiff protection

In America generally, the unauthorized work status of plaintiffs can limit their litigation remedies. The U.S. Supreme Court has held that undocumented workers cannot recover back pay for a wrongful termination, because awarding back pay would conflict with federal immigration policy.[424] In California, it's different. California legislation—codified in the Labor Code, the Civil Code, and the Government Code—makes the immigration status of a plaintiff irrelevant to any liability and remedies available under California law, except to the extent that the reinstatement remedy is prohibited by federal law.[425] Moreover, in a proceeding to enforce California law, it is unlawful even to inquire into a person's immigration status, absent clear and convincing evidence that the inquiry is necessary to comply with federal law.[426]

Employers have argued that federal immigration law (IRCA) preempts this California legislation, but California courts have held otherwise. A trial court held that IRCA preempted the claims of undocumented workers suing for unpaid wages under California's prevailing-wage law, because the plaintiffs, under federal law, could not work lawfully in the United States. But the Court of Appeal reversed, concluding "there is no actual conflict between the IRCA and the prevailing-wage law as the state law is not an obstacle to the accomplishment and execution of the full purposes and objectives of the IRCA."[427] The Court of Appeal reasoned that enforcement of the prevailing wage law "removes a major incentive to hiring undocumented workers."[428] And as to the point that allowing wage suits by unauthorized workers would encourage illegal immigration, the Court of Appeal simply doubted "that many illegal aliens come to this country to gain the protection of our labor laws. Rather it is the hope of getting a job—at any wage—that prompts most illegal aliens to cross our borders."[429]

Another California court has held that an unauthorized alien who was injured on the job is entitled to workers' compensation, notwithstanding the employer's argument that federal immigration law preempts state labor law protections for undocumented workers.[430]

The Ninth Circuit has upheld a $1.1 million dollar jury verdict for an Italian store manager whose Beverly Hills employer dismissed him when his visa expired.[431] The plaintiff claimed that his dismissal breached a contractual promise to dismiss him only for good cause. The employer contended that it had good cause because, under IRCA, an employer cannot "continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment."[432] While agreeing that compliance with IRCA would be good cause to dismiss, the Ninth Circuit upheld employer liability on the basis that the employer, instead of immediately dismissing the plaintiff, could have granted his request to go on temporary, unpaid leave for a "reasonable period" in order to restore his authorization to work in the United States.[433]

In 2011, in a rare employer-friendly opinion, the Court of Appeal held that an undocumented worker who fraudulently claims legal work status cannot recover back pay for a wrongful termination or a failure to hire, because the employer could assert the defenses of after-acquired evidence and unclean hands.[434] The Court of Appeal explained that undocumented workers were still entitled to all the protections available under employment law, and distinguished the plaintiff's claims from those brought by undocumented workers suffering discriminatory conduct during employment, such as workplace harassment. The plaintiff here had provided no evidence that the employer knowingly hired undocumented workers and then failed to discharge them when their status was discovered. Instead, the employer had a settled policy of refusing to hire applicants who submitted false Social Security numbers.

But this modest employer victory was short-lived, for the California Supreme Court then granted review of the decision.[435] In February 2013 the Supreme Court invited supplemental briefing as to whether IRCA preempts the California provisions that enable undocumented workers to obtain compensatory remedies, including back pay.[436]

5.13.2 General protection for unauthorized workers

The California Legislature has limited an employer's ability to deal with employees who have provided false information to secure their jobs. As of January 1, 2014, California employers must not take "any adverse action against an employee because the employee updates or attempts to update his or her personal information, unless the changes are directly related to the skill set, qualifications or knowledge required for the job."[437] It thus appears that an employee who provides an "updated" SSN cannot be discharged for having previously provided different information.

Also effective January 1, 2014, a California employer engages in an "adverse action" if it reports or threatens to report to the government the suspected citizenship or immigration status of an employee, former employee, or prospective employee because that person has exercised a right under the Labor Code or other laws.[438]

5.14 Disregard for Employer's Obligation to Withhold Taxes Due on Damages Judgment

In America generally, an employer who pays money to settle a claim or satisfy a judgment can, and must, withhold income taxes and payroll taxes to the extent that the money represents lost income (back pay and front pay), because to that extent the payment, for purposes of the Internal Revenue Code, is wages. So it was that when United Air Lines suffered a judgment in a California wrongful termination case, United withheld taxes from its payment of the judgment. Yet the California Court Appeal held that United must pay the plaintiff the full amount of the judgment (and thus take its chances with the IRS) because the court, in an under-analyzed opinion that the IRS itself surely disagrees with, concluded that "the damages award was not 'wages' from which United was obliged to withhold taxes."[439]

5.15 Employer's Attorney-Client Privilege

In America generally, an employer can secure a confidential written opinion from an outside law firm and have the firm interview the employer's employees to learn facts needed to prepare the opinion, all without the fear that later, in litigation, the employer's legal adversaries can discover what facts the law firm relied upon in rendering its legal advice. That principle applies in California, too, but only because the California Supreme Court granted extraordinary relief to correct the errors of two levels of lower courts. In one wage and hour class action challenging the classification of managers as exempt from overtime pay, the Court of Appeal ruled that it would not disturb a trial-court order that the defendant must turn over to a discovery referee an opinion letter that the defendant had secured from a law firm, for the purpose of having the referee redact out and reveal to the plaintiffs the "facts" that the law firm had relied upon in rendering its legal advice. The California Supreme Court eventually issued a ringing endorsement of the attorney-client privilege, recognizing that confidential attorney-client communications are protected from discovery in their entirety, regardless of whether the facts contained therein are otherwise discoverable, and that courts cannot compel parties to submit documents to in camera review to determine whether the communication is privileged.[440]

5.16 Limits to Protection for Attorney Work Product

Employers defending lawsuits often have their attorneys interview witnesses to investigate the plaintiff's claims. The plaintiff's counsel then asks the defendant employer, during pre-trial discovery, to serve up on silver platter the fruits of the defense counsel's investigation. In a 2012 case, the California Supreme Court addressed the degree of protection that courts should give to work product that an attorney creates while obtaining evidence from

witnesses.[441] The defense counsel argued that the identity of attorney-selected interviewees was necessarily work product (and thus could be withheld from the plaintiff). The Supreme Court rejected this argument, holding that the identities of attorney-selected witnesses must be disclosed unless that would "reveal the attorney's tactics, impressions or evaluation of the case, or would result in opposing counsel taking undue advantage of the attorney's industry or efforts."[442] In another ruling, more favorable to defendants, the Supreme Court—acknowledging that a witness statement obtained through an attorney-directed interview deserves "at least qualified work product production"—held that the party seeking the statement must show that withholding it would be unjust, and also held that the statement potentially could also be subject to an absolute work product protection, if the statement "reflects an attorney's impressions, conclusions, opinions, or legal research or theories."[443]

6. Employment Discrimination Legislation and Litigation

6.1 Comparing California Antidiscrimination Law with Federal Statutes

Some of differences between California law and federal law on various aspects of employment discrimination law appear below. In each instance, California law is more onerous for employers.

Issue	California statutes	Federal statutes
How many employees must an employer have to be covered?	Five, as to discrimination generally, and just one, as to harassment.[444]	15, as to race, color, religion, disability, gender, national origin, and 20, as to age.
Are independent contractors protected?	Yes, as to harassment (see § 6.5).	No.
Are there caps on punitive and compensatory damages?	No (see § 5.9.1).	Yes, under Title VII, in amounts varying from $50,000 to $300,000, depending on employer's size.
Can plaintiffs be awarded multipliers on attorney fee awards?	Yes (see § 5.12.3).	No.
Is there individual liability for harassment by a supervisor or co-worker?	Yes (see § 6.5).	No.

Issue	California statutes	Federal statutes
Is it specifically unlawful to "aid, abet, incite, compel, or coerce" discrimination?	Yes (see § 6.5).	No.
Is the employer automatically liable for a hostile environment created by a supervisor?	Yes (see § 6.5).	Yes, but only if employer fails to show the affirmative defense described below.
Can an employer avoid liability for harassment by supervisors by showing it took reasonable steps to prevent and correct harassment and the plaintiff unreasonably failed to follow those steps?	No. An employer merely can limit damages, if the employer proves (1) it took reasonable steps to prevent and correct harassment, (2) plaintiff unreasonably failed to the steps provided, and (3) reasonable use of steps would have prevented at least some of the harm suffered (see § 6.5).	Yes. An employer can avoid liability by showing (1) it took reasonable steps to prevent and correct harassment and (2) plaintiff unreasonably failed to avail herself of the steps provided.
What is the deadline for filing an administrative complaint?	One year.[445]	300 days.
What is the deadline for suing after getting a right-to-sue letter?	One year.[446]	90 days.
What is a protected disability?	An impairment *or* condition that simply limits a major life activity, including one that prevents performance of any job, *without regard* to whether corrective devices or measures mitigate the impact of the impairment (see § 6.3.1).	An impairment that *substantially* limits a major life activity, considering whether, in the case of visual impairments, corrective lenses that would mitigate that limitation.
Are only qualified individuals entitled to reasonable accommodations?	No.[447]	Yes.[448]
What statuses are protected?	Many statuses beyond those protected by federal law (see § 6.2).	Principally race, color, religion, gender, national origin, age, and disability.

Issue	California statutes	Federal statutes
Must a plaintiff overtly oppose an employer's action to engage in activity protected from retaliation?	No, a plaintiff need not opine as to unlawfulness, so long as her conduct permits the employer to infer that she thinks the employer's order is discriminatory (see § 6.5).	Yes, though Title VII does protect an employee who speaks out about discrimination during an employer's investigation into another employee's complaint of discrimination.[449]
Is the deadline for filing an administrative claim of discrimination tolled during the employee's pursuit of an internal grievance?	Yes.[450]	No.
Can an employer, in responding to a request for religious accommodation, consider segregating the employee to reconcile the employee's religious dress or grooming practice with the employer's personal-appearance policy?	No.[451]	Yes.
Can an employer avoid a religious accommodation simply by showing that it would impose a cost that is more than de minimis?	No.[452]	Yes.
To prevail under a statute prohibiting discrimination "because of" a protected status, must the plaintiff prove that the status was a "but for" cause of the adverse action, or can the plaintiff prevail merely by showing that the status was a "substantial motivating factor"?	Proof of a "substantial motivating factor" is enough, although the employer can avoid damages and reinstatement by pleading and proving a "same decision" defense.[453]	Proof of merely a motivating factor, where the employer would have taken the same action in the absence of that factor, does not warrant a finding of employer liability.[454]

6.2 Additional Protected Bases

California law forbids employers of five or more employees to discriminate against employees and applicants on the usual bases (race, color, religion, sex, national origin, age, and disability, and also opposition or participation activity), and also expressly protects many additional statuses:

- any **perception** by the employer that an individual has any of the protected characteristics,[455]
- political affiliation,[456]
- marital status,[457]
- sexual orientation,[458]
- gender, gender identity and gender expression,[459]
- pregnancy, childbirth, and medical conditions related to pregnancy or childbirth,[460]
- breastfeeding or medical conditions related to breastfeeding,[461]
- religious dress and grooming practices,[462]
- medical condition (any impairment related to cancer and genetic characteristics),[463]
- genetic information,[464]
- military and veteran status,[465]
- testing positive for HIV,[466]
- victims of certain crimes taking time off to testify,[467] and
- various kinds of whistleblowing or claim-filing such as;
    - disclosing information in the reasonable belief that the information disclosed evidences a violation of law,[468]
    - reporting safety violations,[469]
    - claiming unpaid wages or other violations under the jurisdiction of the California Labor Commissioner,[470] and
    - filing workers' compensation claims or suffering workplace injuries.[471]

6.3 Special Rules for Disability Discrimination

6.3.1 Somewhat broader definition of disability

The California definition of disability is broader than the federal definition, even after the federal ADA Amendments Act of 2008 dramatically expanded the federal definition of disability. California authorizes many different types of health care providers to

certify a disability, such as physicians, surgeons, marriage and family therapists, acupuncturists, as well as "dentists, clinical psychologists, optometrists, chiropractors, nurse practitioners, nurse midwives, clinical social workers, and physician assistants."[472]

6.3.1.1 federal definition of "disability"

Under the federal ADA, "disability" means an impairment that "substantially limits" a major life activity.[473] The ADA amendments repudiated Supreme Court rulings that had narrowed the scope of what was considered a protected disability. Even under the new expanded federal definition, however, not all impairments are necessarily disabilities. For example, specifically excluded from the federal definition of disability are visual impairments that can be corrected by eyeglasses or contact lenses.[474]

6.3.1.2 California definition of "disability"

Remaining somewhat apart from federal law, California law defines physical or mental disability very broadly, to include any condition that merely "limits" a major life activity, in the minimal sense that the condition makes achievement of the major life activity "difficult."[475] The California definition of disability:

- makes certain conditions—autism spectrum, bipolar disorder, clinical depression, diabetes, epilepsy, heart disease, HIV/AIDS, hepatitis, multiple sclerosis, obsessive compulsive disorder, palsy, post-traumatic stress disorder, schizophrenia, and seizure disorder—disabilities by definition,[476]
- covers not only impairments, but conditions,[477]
- considers the limitation on a major life activity without regard to any mitigating measures such as eyeglasses, medications, assistive learning devices, or reasonable accommodations,
- considers "major life activity" to include sleeping, thinking, and interacting with others,[478] and
- considers "major life activity" to include *any* job, with the result that an individual with a condition preventing the performance of a particular job has a disability even if that individual can perform hundreds of thousands of other jobs.

California also protects an employee's association with persons who have disabilities. In 2013 the Court of Appeal decided that a plaintiff could sue for association-based disability and wrongful termination when he was fired after informing his employer he

would be donating a kidney to his sister, who had what the court considered a disability (kidney failure).[479]

6.3.2 Disability-related inquiries

Like federal law, California law prohibits pre-employment disability-related inquiries and medical testing. Thus, California employers must not ask applicants about any physical disability, mental disability, or medical condition, or about the severity of a physical disability, mental disability, or medical condition. Nor can California employers seek information to confirm a medical condition.[480] Notwithstanding these prohibitions, employers may ask about the ability of applicants to perform job-related functions, may respond to applicant requests for reasonable accommodation,[481] and may require a form of employment entrance medical examination.[482] Here again, however, California is different.

6.3.2.1 ban on "psychological" examination

While federal law forbids only all *medical* examinations occurring before a job offer,[483] California forbids pre-employment medical examinations *and psychological* examinations.[484]

6.3.2.2 ban on broad-ranging employment entrance examination

California generally observes a federal law exception from the ban on pre-employment examinations, which permits employers to require an "employment entrance examination" of all employees entering the same job classification, so long as the exam occurs after the employment offer and before employment starts. But California is different. While federal law permits any medical inquiry in connection with this employment entrance examination, California requires that all aspects of the examination itself be "job-related and consistent with business necessity."[485] This requirement means that inquiries by the employer or the employer's physician may trigger liability even if the employer does not rely on the information obtained.

6.3.2.3 limits on nature of the disability inquiries or exams

California law forbids employers to require medical or psychological examinations or make inquiries regarding the nature or severity of a disability except where the inquiry is job-related and consistent with business necessity.[486] The FEHC, in a 2010 decision, opined that an employer may not require employees requesting accommodations to produce complete medical records to substantiate limitations stemming from a disability, as those

records are likely to contain information that is unrelated to the disability and need for accommodation, and therefore is not job-related nor required by business necessity.[487]

6.3.3 Does employer or employee have the burden of proof regarding qualifications?

Under federal law, a disability plaintiff must prove that he or she is a qualified individual. The language of the California statute arguably suggests something different: it broadly prohibits discrimination because of a physical or mental disability[488] and then specially exempts those situations "where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger his or her health or safety or the health or safety of others even with reasonable accommodations."[489] One California appellate decision read this statutory language to mean that the plaintiff's lack of qualifications is an affirmative defense, to be proved by the defendant employer, meaning that the plaintiff's ability to perform essential duties would be a matter for the defendant to disprove as part of an affirmative defense rather than a matter for the plaintiff to prove in the case in chief.[490]

In 2007, the California Supreme Court reversed this decision.[491] Citing statutory language, legislative intent, and well-settled law, the high court concluded that the FEHA, like the ADA, requires the plaintiff to prove that he or she can perform the essential functions of the job, with or without reasonable accommodation. While the Supreme Court thus kept California within the national fold, it did so only barely, by a 4–3 vote. The three dissenting justices argued that the high court should have deferred to the administrative agency charged with interpreting the FEHA, which for many years had treated the inability to perform as an affirmative defense, rather than as part of the plaintiff's case in chief.[492]

6.3.4 Drug testing

California's Compassionate Use Act of 1996 (aka Proposition 215) legalized, for purposes of California law, the medical use of marijuana pursuant to a physician's prescription.[493] The Act does not address whether California employers must accommodate an applicant or employee whose physician has prescribed marijuana to treat a potentially disabling condition such as cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, or migraine.[494] The California Legislature provided a partial answer to this question in 2003, by providing that the Compassionate Use Act does not "require any accommodation of any medical use of marijuana *on the property or premises* of any place of employment or *during the hours* of employment."[495]

This language arguably implies that an employer must accommodate an individual's use of medical marijuana *beyond* working hours and *off* the employer's premises. Yet, in good news to employers, the California Supreme Court in 2008 held, five to two, that denial of employment because of an individual's off-duty, off-premises use of marijuana did not violate the FEHA or any public policy established by California's constitutional right to privacy.[496] The plaintiff, an engineer, flunked a drug test because he tested positive for the main chemical found in marijuana. He provided a physician's note recommending that he use marijuana to help alleviate his chronic back pain. When he nevertheless was fired for flunking the drug test, he sued the employer for discriminating against him because of his disability and for failing to reasonably accommodate his disability by permitting him to use marijuana in accordance with the Compassionate Use Act. The Supreme Court rejected these claims, holding that the Act merely decriminalizes medicinal marijuana use under California state law and simply does not speak to employment law.

The two dissenting justices accused the majority of "conspicuously lacking…compassion" and putting Californians with marijuana-alleviated symptoms to a "cruel choice" between a medically prescribed treatment and a job.[497] The dissenters argued that the FEHA itself required accommodation where, as here, the employer's objection was to off-duty conduct that did not affect the employee's performance of essential job functions. The dissenters conceded, however, that the Compassionate Use Act could not establish a truly fundamental public policy, given the contrary federal law.

DFEH disability regulations make clear that California employers need not accommodate the use of medical marijuana in the workplace and can enforce their drug use policies when employees test positive for marijuana.[498] Any disciplinary focus must be on the violation of policy, however, and not on any underlying disability that the marijuana use may implicate.

6.3.5 The interactive process and reasonable accommodation

In America generally, employers *should* follow an interactive process to ensure that they meet their duty to provide reasonable accommodation to an employee with a known disability who needs an accommodation to perform essential functions of a job. Failure to engage in that process is a problem *if* there was an available reasonable accommodation that the employer would have considered had the process been followed.

It is different in California. Here employers, in certain circumstances, *must* follow the interactive process even if it turns out that no reasonable accommodation existed, and must initiate the interactive process when the employer learns about the employee's

disability and potential need for accommodation—from a direct source, from observation or from a third party.[499] Indeed, California makes it unlawful *in itself* for an employer to fail to engage in a "timely, good faith, interactive process…to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known…disability."[500] Thus, the Court of Appeal has upheld a jury verdict against an employer for failing to engage in the interactive process, even though the jury also found that there had been no failure to provide a reasonable accommodation. Acknowledging that federal law (the ADA) would provide no remedy for a bad faith failure to consider accommodations when in fact no reasonable accommodation was available, the court emphasized that California is different: "FEHA allows an independent cause of action for employees whose employers fail to engage in the interactive process."[501]

The California duty to accommodate can require an employer, when aware that a disabled employee can no longer perform the regular job, to explore several options. *First*, employers must canvass vacant positions to see if there is one to offer to the employee.[502] *Second*, employers must determine whether a leave of absence would be a reasonable accommodation. There is no specific time limit for how long a leave must be. Applicable regulations state that employees must show that the leave likely would been effective in allowing the employee to return to work at the end of the leave, with or without further accommodations.[503] A 2013 California appellate decision found that FEHA's reasonable-accommodation requirements may require an employer to provide leave for a pregnancy-disabled employee for a period beyond the four-month maximum leave required under the PDLL.[504]

California's disability discrimination regulations specify certain possible reasonable accommodations, such as telecommuting, and reserved parking spaces.[505] Employers may also need to allow "assistive animals" in the workplace—both for the visually and hearing impaired and for those who need emotional support.[506]

California regulations do acknowledge, however, that the duty to accommodate does *not* require an employer to make a light-duty position permanent or to lower its quality standards.[507]

6.4 Special Rules for Age Discrimination

6.4.1 Salary might not be an age-neutral criterion

In America generally, an employer reducing its workforce to cut costs may select employees for dismissal on the basis of their high salary, even though a higher salary correlates with experience, which in turn correlates with age. California is different. The FEHA declares that "the use of salary as the basis for differentiating between

employees when terminating employment may be found to constitute age discrimination if use of that criterion adversely impacts older workers as a group."[508]

6.4.2 Adverse impact theory

Until 2005 there was debate over whether federal ADEA claimants could recover on a theory that an employer policy had an adverse impact on individuals over age 40. The U.S. Supreme Court has now validated that theory of liability in age cases (just as it has in Title VII cases alleging discrimination on the basis of race, color, religion, and sex), but the Court also has recognized that employers can defend an ADEA adverse-impact claim by showing that the challenged policy was based on reasonable factors other than age.[509] California, meanwhile, has declared that "the disparate impact theory of proof may be used in claims of age discrimination,"[510] without making any provision for the "reasonable factors" defense.

6.5 Special Rules for Discriminatory Workplace Harassment

Federal law on an employer's duty to prevent and correct harassment consists principally of the simple ban on discrimination in Title VII, as interpreted by the 1980 Equal Employment Opportunity Commission (EEOC) Guidelines (29 C.F.R. § 1604.11), EEOC policy guidances, and judicial decisions. Generally, application of the FEHA follows Title VII, because the two statutes have the same basic purposes.[511] California differs, however, in that its statutory language specifically addresses harassment.

6.5.1 Special aspects of California harassment law

California law on workplace harassment exceeds the scope of federal law in many important respects. California harassment law, unlike federal law:

- governs employers of one or more (not 15) employees,[512]
- protects from harassment additional statuses (e.g., marital status and sexual orientation),[513]
- protects independent contractors as well as employees and applicants,[514]
- imposes personal liability on individual perpetrators, including both supervisors and co-workers,[515]
- makes employers automatically liable for harassment by a supervisor, with no recourse to an affirmative defense, except for a defense that affects the amount of damages only,[516]
- has a definition of "supervisor" that is broader than the definition followed under Title VII,[517]

- forbids "any person" to "aid, abet, incite, compel, or coerce" harassment,[518]
- makes employers liable for perpetrating or permitting sexual favoritism that is "sufficiently widespread" to convey the "message" that management views women as "sexual playthings" or that the way to get ahead is to sleep with the boss, regardless of whether the sexual conduct was unwelcome and regardless of whether the plaintiff herself ever received a sexual advance,[519]
- requires all employers "to take all reasonable steps necessary to prevent harassment from occurring,"[520] and to distribute to all employees a detailed fact sheet on sexual harassment,[521] and
- requires larger employers to train supervisors on the prevention of sexual harassment.[522]

The FEHA does not define harassment, but administrative regulations cite examples of harassment, such as "verbal, physical, and visual harassment, as well as unwanted sexual advances."[523]

6.5.2 Difficulties in distinguishing harassment from management activity

Because individuals can be sued for harassment, and because employers can be liable for harassment by supervisors even if the employer was unaware of the harassment and could not have prevented it, California plaintiffs will try to characterize management actions as "harassment" whenever they can. So it was in *Roby v. McKesson Corp.*,[524] where a plaintiff suffering from panic attacks and suing for disability harassment under the FEHA claimed that she was "harassed" when her supervisor gave her bad job assignments, ignored her at staff meetings, unfairly reprimanded her, left her off a personal gift list, made her document all telephone calls, and counseled her about her body odor. The jury awarded over $1 million in damages for "harassment." The Court of Appeal reversed this part of the judgment, explaining that "most of the alleged harassment here was conduct that fell within the scope of [the supervisor's] business and management duties. … While these acts might, if motivated by bias, be the basis for a finding of employer *discrimination*, they cannot be deemed 'harassment' within the meaning of the FEHA."[525]

The California Supreme Court took review of the case, however, and reinstated the harassment verdict, on a rationale that official employment actions can provide evidentiary support for a claim of unlawful workplace harassment.[526] In doing so, the court somewhat undermined the effect of its earlier decision, in *Reno v. Baird*,[527] that individuals are not personally liable for making official employment decisions on behalf of the employer.

6.5.3 Duty to prevent and correct harassment

6.5.3.1 statutory language

i. general duty

California employers must "take all reasonable steps necessary to prevent … harassment from occurring,"[528] and must take "immediate and appropriate corrective action" where harassment occurs.[529]

ii. DFEH fact sheet

California employers must give each employee an official DFEH fact sheet or equivalent information to inform the employee regarding:

- the illegality of sexual harassment,
- the definition of unlawful sexual harassment,
- examples of sexual harassment,
- the employer's internal complaint process,
- the legal remedies available through government agencies,
- directions on how to contact the agents, and
- the protection against retaliation for opposing harassment or filing a complaint or participating in an investigation or proceeding.[530]

iii. supervisory training

Effective 2006, California employers with 50 or more employees must provide sexual harassment training and education to each supervisory employee once every two years, and must train new supervisors within six months.[531] The training—two hours of "classroom or other effective interactive training" conducted by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination, and retaliation—must include:

- information and practical guidance regarding federal and California law on;
    - the prohibition against sexual harassment,
    - the prevention of sexual harassment,
    - the correction of sexual harassment in the workplace,

- the remedies available to victims of sexual harassment; and
- practical examples "aimed at instructing supervisors" in the prevention of harassment, discrimination, and retaliation.

Although no penalty attaches to an employer's failure to conduct this mandatory training, that failure surely would be cited by a plaintiff's attorney to argue that the employer has breached its statutory duty to take all reasonable steps to prevent workplace harassment. Moreover, in investigating FEHA administrative complaints of discrimination, the DFEH routinely requires proof that a respondent employer has completed the mandated training.

The FEHC has issued Sexual Harassment Training and Education Regulations[532] that interpret the California training statute as follows.

- Not only full-time employees but part-time and temporary employees and independent contractors count toward the 50-employee threshold.[533]
- Employers are covered if they do any business in California, even though most or nearly all employees work outside California.[534]
- Only supervisors located in California need be trained.[535]
- The required interactive training may be in the form of classroom training, webinar training, or other e-learning, so long as the program will take the participant no less than two hours to complete.[536] Electronic training meets the requirement of interactivity only if questions from participants are answered within two business days.[537]
- The instruction must include questions and skill-building activities to assess learning, and "numerous hypothetical scenarios about harassment, each with one or more discussion questions so that supervisors remain engaged in the training."[538]

6.5.3.2 judicial language on the employer duty to investigate

The California Court of Appeal has stated, "FEHA goes even further than the federal statute by *requiring* that supervisors 'take immediate and appropriate corrective action' when harassment is brought to their attention."[539] The Court of Appeal quoted this legislative note to Government Code Section 12940 (not part of the Code but part of its legislative history.)

> "It is the existing policy of the State of California, as declared by the Legislature, that procedures be established by which allegations of

prohibited harassment and discrimination may be filed, timely and efficiently investigated, and fairly adjudicated, and that agencies and employers be required to establish affirmative programs which include prompt and remedial internal procedures and monitoring so that worksites will be maintained free from prohibited harassment and discrimination by their agents, administrators, and supervisors as well as by their nonsupervisors and clientele."[540]

The Court of Appeal thus held that a supervisor could reasonably believe that he was engaging in a statutorily required (and thus protected) activity when he protested harassing conduct, even though the conduct was not severe or pervasive enough to be actionable.[541]

6.5.3.3 actions for failure to prevent discrimination or harassment

A California employee has no remedy if an employer fails to take all reasonable steps to prevent discrimination and harassment from occurring, unless actionable harassment or discrimination actually occurred.[542] But the employer risks prosecution by the DFEH for a violation of 12940(k), even in the absence of any actionable harassment or retaliation.[543]

6.5.4 Personal liability for perpetrators

6.5.4.1 supervisors harassing

In America generally, workplace harassment leads to statutory liability for the employer, not to personal liability for the individual perpetrator, although he may be subject to liability under common law torts such as battery, false imprisonment, and infliction of emotional distress. California is different.

The FEHA imposes personal liability on individual supervisors who perpetrate harassment.[544]

6.5.4.2 co-workers harassing

A few states do, like California, make harassing supervisors personally liable under the state antidiscrimination statute. And California goes still further. The FEHA makes even a non-supervisory co-worker personally liable for acts of harassment.[545]

6.5.5 Employer liability for supervisor's harassment

6.5.5.1 vicarious employer liability

Where a hostile environment is created by a "supervisor" (someone with substantial independent authority over a subordinate's employment status), California imposes automatic liability on the employer (i.e., liability without regard to notice or fault).[546] Federal law gives employers an affirmative defense (the *"Ellerth/Faragher"* defense) in this kind of case, permitting the employer to avoid liability if (1) it took reasonable steps to prevent and correct harassment and (2) the plaintiff unreasonably failed to take advantage of those steps.[547] California is different. The California Supreme Court has refused to recognize the *Ellerth/Faragher* defense in a harassment case brought under the FEHA.[548]

In place of the federal *Ellerth/Faragher* defense, California recognizes a limited avoidable-consequences defense, which permits employers to reduce damages (but not avoid liability) if the employer proves that (1) it took reasonable steps to prevent and correct harassment, (2) the plaintiff unreasonably failed to use measures the employer provided, and (3) the plaintiff's reasonable use of those measure would have prevented some or all of the harm.[549]

6.5.5.1 broad definition of "supervisor"

The U.S. Supreme Court has interpreted the analogous federal law (Title VII) to call for a narrow definition of "supervisor," encompassing only those management-level employees who "are empowered" to take "tangible employment actions" against lower-level employees.[550] The California statutory language, by contrast, defines "supervisor" broadly, to include those employees who have the authority to discipline or direct other employees.[551]

6.5.6 Protection of independent contractors

In America generally, employment discrimination laws protect employees and applicants (and, in the case of retaliation, former employees). Non-employees thus generally lack the protection of employment discrimination statutes. California is different. In California an independent contractor, as much as an employee, is protected from discriminatory workplace harassment.[552]

6.5.7 Sexual assault statute

There is a separate statutory claim for sexual battery.[553] There are also separate statutory claims for discriminatory acts of violence and intimidation.[554]

6.5.8 Stalking

There is a separate statutory claim for stalking.[555]

6.5.9 Sexual harassment in business, service, and professional relationships

A special provision prohibits sexual harassment in these non-employment relationships.[556]

6.5.10 Special privacy protections for plaintiffs

California courts have prevented defendants in harassment litigation from inquiring into a plaintiff's victimization by prior sexual assaults,[557] marital difficulties,[558] and sexual conduct with persons other than those for whose behavior the plaintiff seeks to hold the defendant liable.[559]

6.5.11 Sexual favoritism

For purposes of federal law, the U.S. Supreme Court has explained that the "critical issue" in a sexual harassment case is "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed," and that harassment laws are not intended to create a "civility code."[560] Federal law thus contemplates actionable sexual harassment as involving unwelcome conduct directed at the victim on the basis of the victim's gender; mere objections to welcome conduct involving others would not occasion a sexual harassment suit. But in California it's different.

In *Miller v. Department of Corrections*,[561] the California Supreme Court recognized a claim for sexual harassment even though the plaintiffs had never experienced disparate treatment on the basis of their gender. The court permitted two women to sue under the FEHA on the basis that their boss had created a sexually hostile work environment for them by giving unwarranted favoritism to his female lovers. Neither plaintiff claimed that she had been treated worse than men in the workplace or that she had been treated badly because she was a woman. Neither woman received an unwelcome sexual advance and no man had directed any hostile conduct at her. Rather, the women were "sexually harassed" only in the sense that each was offended by seeing other women obtain preferential treatment through sexual cooperation with the boss. Nonetheless, the court held that employer liability could exist on the theory that sexual favoritism within a workplace can be "sufficiently widespread" to convey the "message" that management views women as "sexual playthings" or that the way to get ahead is to sleep with the boss.[562]

The *Miller* court erroneously stated that it was following federal legal authority in the form of a 1990 EEOC policy guidance. Actually, the guidance is not federal authority but rather is the EEOC's litigation position, adopted without the benefit of the notice-and-comment process required by administrative rule-making. The California Supreme Court nonetheless quoted, with evident approval, the EEOC's argument for greater employer liability: "If favoritism based upon the granting of sexual favors is widespread in a workplace, both male and female colleagues who do not welcome this conduct can establish a hostile work environment…regardless of whether any objectionable conduct is directed at them and regardless of whether those who were granted favorable treatment willingly bestowed the sexual favors. In these circumstances, a message is implicitly conveyed that the managers view women as 'sexual playthings,' thereby creating an atmosphere that is demeaning to women."[563] The *Miller* court thus reasoned "that even in the absence of coercive behavior, certain conduct creates a work atmosphere so demeaning to women that it constitutes an actionable hostile work environment."[564]

6.5.12 Sexual desire not necessary

The California Legislature has amended the FEHA to clarify that sexual harassment is prohibited without regard to the harasser's sexual desire.[565] The amendment overturned an appellate court decision that "created confusion" by holding that a plaintiff in a same-sex harassment case must prove that the harasser harbored a sexual desire for him.[566] Thus, severe or pervasive sexually offensive conduct can create a hostile work environment, so long as the conduct is based on the victim's gender, regardless of whether the harasser had any sexual interest in the victim.

6.6 English-only Work Rules

In America generally, employers may require that employees speak only English in the workplace, unless that requirement discriminates on the basis of national origin by having an unjustified adverse impact. California is different. The FEHA, without requiring any proof of an adverse impact, makes it an unlawful employment practice for an employer to adopt or enforce a policy that prohibits the use of any language in the workplace unless the employer gives notice of the policy to employees and justifies it by showing a "business necessity." "Business necessity" exists only if the policy serves an "overriding legitimate business purpose" and is needed for the safe and efficient operation of the business, and there is no available alternative.[567]

6.7 Equal Pay

The Labor Code forbids any California employer from paying an unequal wage for equal work on the basis of sex and makes the employer liable for double damages to an employee who

suffers such discrimination.[568] There also is criminal liability for employers and individuals who violate this law.[569]

6.8 Pant Suits

In America generally, grooming and dress codes that differentiate between men and women are not unlawful as sex discrimination, as these employer requirements do not affect employment opportunities. California is different. The FEHA makes it an unlawful employment practice for an employer to refuse to permit an employee to wear pants on account of the employee's gender. Thus, California employers can ban pants for all employees, but must not ban pants for men only or for women only. Exceptions exist for requiring employees "in a particular occupation to wear a uniform" and for requiring an employee to wear a costume while portraying a specific character or playing a dramatic role.[570]

6.9 Gender, Gender Identity, and Gender Expression

California's prohibition against sex discrimination includes discrimination on the basis of "gender," a term that means not only biological sex but also "gender identity and gender expression."[571] "Gender expression" includes "gender related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth."[572]

The statutory language aims to protect persons whose vocal pitch, facial hair, personality, hairstyle, mannerisms, clothing, or demeanor is associated with a particular gender. The statute would forbid employment discrimination, for example, on the basis that a male employee appeared effeminate or on the basis that a female employee appeared masculine. Nonetheless, employers may continue to impose "reasonable workplace appearance, grooming, and dress standards not precluded by other provisions of state or federal law, provided that an employer shall allow an employee to appear or dress consistently with the employee's gender identity."[573]

6.10 Religious Accommodation

While the California definition of "religion," for purposes of the FEHA, may be narrower than its federal counterpart,[574] the scope of the California duty to accommodate religious practices is clearly broader than the corresponding federal duty.

6.10.1 Express coverage of specified religious practices

Federal law protects religious workplace expression only in general terms. California differs, by expressly defining "religion" to encompass "all aspects of religious belief, observance, and practice, including religious dress and grooming practices." "Dress practice" includes "the wearing or carrying of religious clothing, head or face coverings, jewelry, artifacts, and any other item that is part of the observance" of an individual's religious creed. "Grooming practice"

includes “all forms of head, facial, and body hair that are part of the observance” of the individual’s religious creed.[575]

6.10.2 Disallowance of segregation as a religious accommodation

Judicial interpretations of federal law have permitted employees to accommodate religious objections to the employer’s personal appearance standards by having the religiously objecting employee work in a secluded area of the workplace. California categorically rejects that approach, providing: “An accommodation of an individual’s religious dress practice or religious grooming practice is not reasonable if the accommodation requires segregation of the individual from other employees or the public.” [576]

6.10.3 Adoption of high standard for undue hardship

Federal law permits employers to refuse to provide a religious accommodation for an employee if the accommodation would work an “undue hardship,” which the U.S. Supreme Court has defined to mean something more than a *de minimis* cost.[577]

California is different. Lawyers once debated whether California courts should follow analogous federal law or should instead follow the FEHC interpretative regulations, which, without recognizing any *de minimis* standard, defined “undue hardship” simply in terms of such factors as the size of the establishment, the size of budgets, the overall size of the employer, the nature and cost of the accommodation, and the availability of reasonable alternatives.[578] That debate became moot after legislation enacted, effective January 1, 2013, made California’s approach clearly different from (and more onerous on employers than) the federal approach in this area of the law.

California now clearly requires employers that complain of a burdensome proposed accommodation to prove undue hardship under the same tough standard that applies in cases of disability accommodations.[579] From a practical perspective, the interactive process that employers have used to address disability accommodations should also guide considerations of religious accommodations.

California provides a vague exemption from its religious accommodation requirements where the employee’s proposed accommodation “would result in a violation” of any “law prohibiting discrimination or protecting civil rights.”[580]

6.11 Special Rules for Retaliation

Under both federal and California law, employers may be liable for retaliating against an employee for engaging in protected activity, even where the conduct the employee is opposing turns out not to be unlawful.[581] But California diverges from federal law in several key respects.

6.11.1 Broad definition of protected activity

Under federal law, a plaintiff alleging retaliation must show that she engaged in protected activity, which means that she participated in a discrimination charge or lawsuit or at least overtly opposed what she reasonably thought was unlawful discrimination.[582] California is different. Here the employee's opposition need not be overt. A plaintiff disagreeing with an employer directive she believes to be discriminatory need not express that belief; all she must prove is that the employer knew she thought the directive was discriminatory. Thus, the California Supreme Court has permitted a female manager to proceed on a retaliation claim in which her "opposition" activity was simply resisting a male manager's order to fire a female cosmetics sales clerk for not being pretty enough.[583] By the Supreme Court's view, the plaintiff had engaged in protected activity even though she did not report or protest the offensive order to fire the sales clerk, but simply advised that she needed more "justification." It was enough that she reasonably believed that the order to fire the clerk was discriminatory and that the employer, "in light of all the circumstances," was aware of that belief.

California courts do seem to recognize that the plaintiff's oppositional activity must have been in good faith; the law does not protect the making of knowingly false charges.[584] Nor does the FEHA protect either lying or withholding information during an employer's internal investigation of a discrimination claim.[585]

6.11.2 Broad definition of adverse employment action

The California Supreme Court acknowledges that an adverse employment action "must materially affect the terms, conditions, or privileges of employment to be actionable" under the FEHA,[586] but broadly defines adverse employment action to include "the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career." The Supreme Court has thus permitted a retaliation plaintiff to establish an adverse employment action by citing a wide variety of intermediate personnel management decisions, such as (1) unwarranted negative performance evaluations, (2) a refusal to allow her to respond to allegedly unwarranted criticism, (3) unwarranted criticism voiced by a manager in the presence of the plaintiff's associates, (4) a "humiliating" public reprobation by a manager, and (5) a manager's solicitation of negative feedback from the plaintiff's staff.[587] By this approach, the "totality of the circumstances" could show an adverse employment action against the plaintiff even if she never suffered a formal job detriment.

6.11.3 Broad application of the continuing violation doctrine

Under federal law, the continuing violation doctrine, properly understood, applies only to harassment cases and does not apply to discrete personnel management decisions.[588] But California is different. The California Supreme Court, criticizing federal law, has rejected an employer's contention that certain retaliatory acts preceding the limitations period were time-barred. The Supreme Court concluded that limiting employees to evidence of discrete acts within the limitations period would undermine the goals of encouraging informal resolution of disputes and avoiding prematurely filed lawsuits. Under the Supreme Court's broad view of the continuing violation doctrine, an employer can be liable for acts that preceded the limitations period if they are sufficiently linked to unlawful acts that occurred within that period. And under this approach, the statute of limitations begins to run only when the continuing course of conduct comes to an end (such as by the employer's cessation or by the employee's resignation), or when the employee is on notice that further efforts to end the unlawful conduct will be in vain.[589]

6.11.4 Personal liability for retaliation

For many years, California courts departed from analogous federal law to impose personal liability on individual supervisors who retaliated against employees for opposing harassment or other unlawful discrimination.[590] A California supervisor considering an employment decision on behalf of the employer that could be characterized as retaliatory thus had to consider the prospect of personal liability. It was highly doubtful that the Legislature ever intended to create such a conflict of interest for the individual supervisor. Magnifying the aberrant nature of this doctrine of personal liability for retaliatory employment decisions was the judicial recognition that supervisors are *not* personally liable for employment decisions that turn out to be discriminatory or against public policy.[591] A hypothetical absurd result of the California doctrine was that a single wrongful dismissal could result in no personal liability for the decision maker with respect to claims for sex and race discrimination and a claim for wrongful discharge, but personal liability for the individual decision maker with respect to a claim for retaliation.

California courts nonetheless insisted on this absurd result by relying on a literal reading of a statutory provision.[592] Finally, in 2008, the California Supreme Court ended the nonsense (albeit only by a close vote of 4-3) by ruling that while employers may be held liable for discrimination and retaliation actions, nonemployer individuals cannot be held personally liable for retaliation, just as they cannot be held personally liable for discriminatory actions.[593]

6.11.5 Broader class of plaintiffs

Ordinarily only employees and job applicants can bring retaliation claims, against their employer or prospective employer. Thus it was that a trial court granted summary judgment against a physician partner who claimed that her medical group removed her as a regional director because she had opposed sexual harassment of female employees. The Court of Appeal, however, reversed, concluding that it would further the purpose of the FEHA—to eliminate employment discrimination—to allow a retaliation claim by the doctor, a non-employee, against the physician group, an employer, where the alleged retaliation was in response to her reporting employment discrimination. [594]

6.11.6 Lower causation standard

Under federal Title VII, a retaliation plaintiff must prove that the "protected activity was a but-for cause of the alleged adverse action by the employer." In other words, the plaintiff must prove that the adverse action would not have occurred but for the employer's retaliatory motive.[595] But California is different. Under the FEHA, plaintiffs need only show that an unlawful retaliatory intent was a "substantial motivating factor" in the employer's adverse action.[596]

6.12 Special Rules for No-nepotism Policies

Employers in America generally may forbid the hiring of anyone who is a relative of any existing employee. This policy does not discriminate against anyone on a protected basis. But California is different, because it prohibits discrimination based on marital status and interprets that prohibition in a peculiar way. The DFEH maintains that an employer cannot base an employment decision on whether an individual's spouse is employed by the employer unless (1) there are "business reasons of supervision, safety, security or morale" to "refuse to place one spouse under the direct supervision of the other spouse," or (2) "the work involves potential conflicts of interest or other hazards greater for married couples than for other persons," such that "business reasons of supervision, security or morale" warrant a refusal to have both spouses in "the same department, division or facility."[597]

6.13 Difficulty in Obtaining Defendant's Attorney Fee Awards

Under the federal law that most states follow, a discrimination plaintiff who loses a claim is liable for the defendant's attorney fees if the action was frivolous, unreasonable, or without foundation, even if not maintained in subjective bad faith.[598] Applying this standard, California courts have denied attorney fees to prevailing defendants in FEHA cases, even when the plaintiff has rejected the defendant's more favorable offer of judgment.[599]

Even California defendants who can show that a plaintiff's FEHA claim was frivolous may face still further obstacles to the recovery of attorney fees. *First*, one California appellate court held that awarding attorney fees to a prevailing defendant was an abuse of discretion absent proof regarding the plaintiff's ability to pay for them: "The trial court should also make findings as to the plaintiff's ability to pay attorney fees, and how large the award should be in light of the plaintiff's financial situation."[600] *Second*, in a FEHA decision that affirmed summary judgment for the two defendants—the plaintiff's employer and her supervisor—the Court of Appeal affirmed the trial court's decision to award only $1.00 in attorney fees to the prevailing individual defendant, even though the suit against her was "frivolous and vexatious."[601] The Court of Appeal upheld the decision to give only a nominal fee award, because any fee award would benefit the corporate employer, which had paid for the individual's defense, and because the suit against the employer itself, while lacking merit, was not frivolous.

6.14 No Meaningful Duty to Exhaust Administrative Remedies

A federal employment discrimination plaintiff must, before suing, exhaust administrative remedies by filing a personally verified charge with the EEOC, which can investigate and conciliate and possibly avoid litigation.

California, meanwhile, has systematically removed exhaustion requirements to the point that they have become a mere ministerial formality. *First*, a California employment discrimination complainant can bypass any administrative process simply by filing a form with the DFEH to "elect court action" and obtain an immediate right to sue. *Second*, the California complainant need not even sign the administrative paperwork; it may be signed by the complainant's attorney.[602] *Third*, the attorney need not even bother with a physical signature; the signature can be electronic.[603] And although the attorney is supposed to give notice of the administrative complaint to the employer, a failure to do so will not bar a lawsuit.[604]

California also favors complainants when it comes to late administrative filings. Federal law excuses a late administrative filing only under special circumstances, such as where the employer has misled an employee or concealed facts the employee needed to assert rights; there is no tolling of the filing deadline simply because the employee has pursued an internal grievance.[605] California is different. The California Supreme Court has held that the deadline for filing an administrative complaint of discrimination under the FEHA is tolled while the claimant voluntarily pursues an internal administrative remedy with the employer.[606]

6.15 Use of Unfair Competition Law to Sue for Discrimination

In America generally, laws designed to prevent unfair competition and antitrust violations are not a basis for employees to sue employers. California is different. One appellate court has held that the California Unfair Competition Law (which has a four-year statute of limitations)

enabled an employee to sue for age discrimination, the reasoning being that an employer who practices such discrimination has obtained an unfair competitive advantage.[607]

6.16 Disregard of Federal Evidentiary Doctrines

6.16.1 Rejection of the "stray remarks" rule

In America generally, courts rule as a matter of law (either on summary judgment or in a motion for judgment as a matter of law) against discrimination plaintiffs who rely on "stray remarks"—remarks made remote in time or otherwise disconnected from the challenged employment decision, remarks not made by anyone who made or influenced the decision, or remarks not directed to the plaintiff.[608] In 2007, however, a Court of Appeal decision, in reversing a summary judgment in an age discrimination case, broadly repudiated the "so-called 'stray remarks' rule" on the basis that it impermissibly permits trial judges to weigh evidence in ruling on motions for summary judgment.[609] The court concluded that the plaintiff should have been able to thwart summary judgment with his assertions that co-workers (who had no apparent connection with the challenged employment decision) had called him "slow," "fuzzy," "sluggish," and "lethargic." In 2010, the California Supreme Court affirmed this reasoning.[610]

6.16.2 Rejection of the "same actor rule"

In America generally, courts have followed the "same actor rule": Where the same actor has both hired and fired the same discrimination plaintiff, within a short period of time, an inference arises that there was no discriminatory motive in the firing.[611] California courts also have followed this rule, in line with the general principle that interpretations of the FEHA should follow interpretations of Title VII where the two statutes share the same basic purpose.[612] Yet in 2008 a Court of Appeal decision, upholding a jury verdict of race and gender discrimination, disputed the existence of any "same actor rule": "Evidence that the same actor conferred an employment benefit on an employee before discharging that employee is simply evidence and should be treated like any other piece of proof…Placing it in a special category as a 'rule' or 'presumption' or stating it creates a 'strong inference' attaches undue influence to same actor evidence and threatens to undermine the right to a jury trial by improperly easing the burden on employers in summary judgment and postverdict motions."[613] Although the Supreme Court agreed to review the case, the parties then settled the matter, leaving the status of the "same actor rule" in doubt.

6.16.3 Requiring admissibility of “me too” evidence

Discrimination plaintiffs often seek to introduce evidence that other employees—who are not themselves plaintiffs—also suffered discrimination at the hands of the defendant employer. Federal and state courts generally treat “me too” evidence on a case-by-case basis, weighing the evidence’s probative value against its potential to create undue prejudice, confusion, or waste of time. The United States Supreme Court, in 2008, confirmed that there is no per se rule requiring trial courts either to admit or to exclude such “me too” evidence. But California is different. In 2011, a Court of Appeal decision overruled a trial court’s exclusion of “me too” evidence. The trial court had held that the evidence, to be admissible, must have occurred in the plaintiff’s presence, during her employment.[614] The Court of Appeal held, as a matter of law, that the evidence—regarding the defendant’s sexual harassment toward nonparty female employees—had to be admitted, to show the defendant’s discriminatory mental state. Without conducting the balancing test that courts throughout America generally use, the Court of Appeal determined that the “me too” evidence was necessarily admissible to prove the defendant employer’s intent, even if the conduct had not occurred in the plaintiff’s presence and was unknown to her during her employment.[615]

7. Wage and Hour Laws

Federal wage and hour law stems from a 1938 statute, the Fair Labor Standards Act (FLSA), as amended, which is enforced by the Wage Hour Division of the U.S. Department of Labor. California has its own more extensive regulation of wages and working conditions, which reflects the influence of several sources: the IWC wage orders, the Labor Code, judicial decisions, and DLSE interpretations.

The FLSA does not preempt state law. Accordingly, an employer who is subject to both federal and California wage and hour law must comply with whichever form of regulation is the more onerous.[616] And the more onerous version is almost always the California version. Thus the California Supreme Court has repeatedly stressed the "recognized principle that state law may provide employees greater protection than the FLSA."[617]

For example, California wage and hour law, unlike federal law:

- requires employers to provide payment of wages upon termination of employment, reporting-for-duty pay, daily overtime pay, payment for uniforms and equipment, various payroll deductions, and suitable seats and restroom facilities (see § 7.1),
- requires that the minimum wage or contracted wage be paid for each hour of work (see § 7.1.4),

- forbids use of the fluctuating-workweek method for computing the regular rate for salaried nonexempt workers (see § 7.1.6),
- requires payment for a nonexempt employee's travel time even if it occurs beyond normal working hours (see § 7.3.1),
- disallows tip credits (see § 7.9),
- treats earned vacation pay as a form of deferred wage (see § 7.8), and
- imposes civil penalties for violations of wage and hour statutes, and requires the payment of one hour of pay for denied meal or rest breaks (see § 7.11).

Moreover, California often eschews the guidance that federal labor law provides. The DLSE is notorious for making such statements as, "we cannot use the analysis employed by the federal courts in establishing the obligations of California employers under the unique provisions of the California Industrial Welfare Commission wage orders."[618]

7.1 Requirements Imposed by IWC Wage Orders

7.1.1 Overview of wage orders

California has 17 "wage orders," promulgated by the IWC to cover 12 broadly described industries and five occupations. The wage orders address monetary compensation and working conditions, covering such items as minimum wage, reporting-time pay, overtime premium pay, certain payroll deductions, employer-required uniforms and equipment, meal periods, and rest breaks. These requirements affect all employees who are not exempted. The wage orders impose further requirements, as to both exempt and nonexempt employees, with respect to such matters as change rooms and resting facilities, seats, temperature, and elevators. Many of the rules are identical from one wage order to the next. Every employer subject to a wage order must post the order in a conspicuous place seen by employees during work hours. For a copy of the wage orders, see www.dir.ca.gov/iwc/WageOrderIndustries.htm. Printed versions of the industry wage orders, for workplace posting, can ordered from http://www.dir.ca.gov/wp.asp.

7.1.2 Summary of major wage order provisions

§ 3 Hours and Days of Work: Employers must pay daily overtime, weekly overtime, seventh-day overtime, double time for daily hours more than 12, double time for daily hours more than eight on the seventh consecutive workday; must observe alternative workweek rules, including maintaining regular hourly rate, accommodating employee's religious observances and conflicting schedules, and refraining from coercing employees to vote for or against proposed alternative workweek; and must honor an employee's right not to work more than 72 hours per week.

§ 4 Minimum Wages: California employers must pay the minimum wage, which has been $8.00 since January 1, 2008. The federal minimum wage, meanwhile, rose in July 2009 from $6.55 to $7.25, where it has remained ever since.

§ 5 Reporting Time Pay: Employers must pay reporting time pay.

§ 6 Licenses for Disabled Workers: Certain sub-minimum wages apply for licensed disabled workers.

§ 7 Records: Employers must keep records of each employee's full name, home address, occupation, social security number ("SSN"), birthdate (if under 18), time records, meal periods, split shift intervals, total daily hours worked, wages paid and other compensation furnished each payroll period, total works worked each payroll period, applicable rates of pay, etc.; employers must furnish paycheck stub itemizing all deductions, dates of period for which employee paid, name of employee or employee's SSN, name of employer, etc.; employers must make all required records available for inspection by employee on reasonable request; employers must provide clocks in "all major work areas or within reasonable distance thereto."

§ 8 Cash Shortage and Breakage: Employers must not deduct from wages for any cash shortage, breakage, or loss of equipment that was not caused by a dishonest or willful act or by gross negligence.

§ 9 Uniforms and Equipment: Employers must provide and maintain any required employee uniform, a uniform being "apparel and accessories of distinctive design or color." Employers must provide and maintain any required tools or equipment, except for hand tools and equipment customarily required by the craft that are used by employees who earn at least twice the minimum wage. While employers may require reasonable deposits for employer-provided uniforms and equipment and written agreements for deductions for loss of unreturned items, employers must not deduct for "normal wear and tear."

§ 10 Meals and Lodging: Employers can get certain credit against minimum wage for employer-provided meals and lodging, and charge certain rent for required living at employer-provided lodging.

§ 11 Meal Periods: Employers may not work an employee for a period of more than five hours without a 30-minute off-duty meal period, and must provide "suitable place" for employees to eat if they are to eat on the premises. Exceptions: mutual consent waivers if work period does not exceed six hours, and permissible "on duty" meal periods by mutual written agreement if the nature of work prevents relief from all duty.

§ 12 Rest Periods: Employers must authorize and permit 10-minute rest periods (which still count as working time) near the middle of each work period of four hours "or major fraction thereof." Exception: Employers need not authorize rest period where daily work time < three and one-half hours.

§ 13 Change Rooms and Resting Facilities: Employers must provide suitable places to safekeep outer clothing during working hours and work clothing during nonworking hours, and must provide (separate from toilet rooms) clean space to change clothing "in reasonable privacy and comfort" and suitable facilities to rest during work hours.

§ 14 Seats: Employers must provide "suitable seats" when the nature of the work "reasonably permits" and must provide seats for resting if the work requires standing.

§ 15 Temperature: Employers must maintain temperature for "reasonable comfort" "in each work area," remove "excessive heat or humidity" created by work, and maintain toilet, resting, and change rooms at or above 68 degrees.

§ 16 Elevators: Employers must provide adequate elevators or escalators when employees work four or more floors above ground level.

§ 17 Exemptions: The DLSE can, on a showing of "undue hardship" to the employer and no material effect on employees, waive the requirements of §§ 7, 12, 13, 14, 15, 16.

§ 18 Filing Reports: Referring to employer duties imposed by Labor Code Section 1174(a).

§ 19 Inspection: Referring to employer duties imposed by Labor Code Section 1174.

§ 20 Penalties: Describing same penalties described in Labor Code Section 558, referring to Section 1197.1 penalties, and citing without explanation Section 1199 (which provides for misdemeanor penalties).

§ 22 Posting of Order: Employers must keep the wage order posted in area where it may be easily read during the workday. Where that is not practical, employers must make a copy of the order available on request.

7.1.3 Civil penalties for wage order violations

Failure to comply with wage orders triggers a civil penalty of $50 for each underpaid employee for each pay period of underpayment for any initial violation, and $100 for each underpaid employee for each pay period of underpayment for each further

violation.[619] Special penalties apply to violations of the meal period and rest break sections of the wage orders.[620]

7.1.4 Minimum wages

7.1.4.1 state-wide minimum wage

California, like more than a dozen other states, imposes a higher minimum wage than does federal law. This minimum, appearing in Section 4 of most of the wage orders, has been $8.00 since 2008 and will rise to $9.00 in July 2014 and to $10.00 on January 1, 2016. The federal minimum wage, by contrast, last increased in July 2009, when it rose from $6.55 to only $7.25. Efforts in Congress to raise it further have thus far been unsuccessful.

California heaps especially large burdens on the employer that fails to pay minimum wage. *First*, the underpaid employee is entitled to liquidated damages in an amount equal to the amount of the unpaid wages plus interest thereon,[621] unless the employer shows that it, in good faith, had reasonable grounds to believe its actions did not violate the minimum wage.[622] *Second*, the Labor Code imposes civil penalties of $100 per employee per pay period for a first, intentional, violation, and $250 per employee per pay period for repeated violations, on "[a]ny employer or other person acting either individually or as an officer, agent, or employee of another person" who fails to pay the minimum wage.[623] *Third*, the Labor Code imposes criminal penalties on "[e]very employer or other person acting either individually or as an officer, agent, or employee of another person" who "causes to be paid to any employee a wage less than the minimum fixed by" a wage order.[624]

7.1.4.2 The peculiar "pay separately for each hour" doctrine

In America generally, employers satisfy the requirement to pay the minimum wage by paying an average hourly wage that meets or exceeds the minimum wage, even if particular hours of work within a work week are not separately compensated. California is different.

The California peculiarity in this respect emerged in 2005, with an appellate decision reasoning that because Labor Code provisions reveal "a clear legislative intent to protect the minimum wage rights of California employees to a great extent than federally," California employers must provide "full payment of wages for all hours worked."[625]

California courts have now extended this "pay separately for every hour worked" concept to piece-rate workers. A 2013 California appellate decision held that employers must separately pay employees the minimum wage for each hour worked, including waiting time and other time during which the employee cannot earn piece rate compensation. Under this interpretation of California minimum wage law, an employer cannot average the piece-rate earnings over the total hours worked, even if the employer guarantees that employees will earn the equivalent of minimum wage for all hours worked.[626]

Meanwhile, a federal court in California has applied California's peculiar "pay separately for every hour worked" principle to commission workers.[627]

The "pay separately for every hour worked" doctrine has even extended, in the context of piece-rate work, to require an employer to pay separately for rest breaks, on the rationale that rest breaks are counted as hours worked and are paid as such for workers on the clock, but are not separately paid for in the piece-rate context (see § 7.3.2).

7.1.4.2 local "living wage" ordinances

Over a dozen California localities have imposed a minimum "living wage" or an otherwise higher minimum wage for the employees of employers who have contracted with the local government.[628] Some of these ordinances can apply beyond the city limits. A Court of Appeal affirmed the application of the Hayward, California city ordinance to employees who lived or worked outside the city limits. The ordinance's failure to specify how it would apply in situations where contractors performed work outside of the municipality did not render it unconstitutionally vague. The court also permitted employees, as intended third-party beneficiaries of their employer's contract with the city, to sue to enforce their employer's contractual promise to comply with the living wage ordinance.[629]

San Francisco has a minimum wage ordinance, applying without regard to government-contractor status, requiring an annually adjusted minimum wage that, effective January 1, 2014, is $10.74.[630]

7.1.5 Reporting time pay and split shift pay

Reporting time. Nonexempt employees sometimes report to work to find less than a scheduled day's work to perform. When that happens, the employer must pay for at least one-half the scheduled work (with the pay to be no less than two hours nor more than four hours).[631] Nonexempt employees also sometimes report to work a second

time within the same workday to find less than two hours of work to perform on the second reporting. When that happens, the employer must pay two hours "at the employees' regular rate of pay, which shall not be less than the minimum wage."[632]

The Court of Appeal addressed reporting pay in 2011, rejecting a plaintiff's claim that, with respect to the 45-second termination meeting he was summoned to attend, he should have received four hours of pay instead of the two hours of pay that he did receive. The court reasoned that on the day in question the plaintiff was scheduled for a meeting of unspecified length and so was not entitled to anything more than the two-hour minimum.[633]

Another Court of Appeal decision, in 2012, added more clarity on how California employers are to pay nonexempt employees for meetings scheduled on their regular day off. The court explained that because reporting-time pay is due only when the employee gets less than one-half the scheduled shift, an employer can schedule short meetings and pay only for the length of the meeting. The example the court gave was a meeting scheduled for one and one-half hours, but lasting only one hour. In that case, no reporting-pay would be due, the court said, because the employer furnished work for more than one-half the scheduled time.[634]

Split shifts. Some nonexempt employees have a work schedule interrupted by nonpaid, nonworking hours (other than meal breaks), with a designated beginning and quitting time. California employer must pay split-shift employees "one hour's pay at the minimum wage…in addition to the minimum wage for that workday."[635]

The commonsensical interpretation of this provision is that split-shift employees, if they get paid more than the minimum wage, are entitled to any difference between what they actually earned and what they would have earned had they received the minimum wage for their entire shift plus an extra hour.[636] The Court of Appeal has adopted this interpretation, rejecting the plaintiff's argument that a split-shift employee is automatically entitled to an extra hour of wages paid at the rate of the minimum wage.[637]

7.1.6 Overtime premium pay

In America generally, employers must pay their nonexempt employees at an overtime premium rate (1.5 times the regular hourly rate) only to the extent that the employees work over 40 hours per week. California is different. Most wage orders provide that nonexempt employees also get *daily* overtime—premium pay for work over eight hours a day, and for the first eight hours of work on a seventh consecutive workday.[638] There is also a premium pay rate of *double* the regular rate for work performed over 12 hours

a day and over eight hours on the seventh consecutive workday. These special premiums apply even though the working time does not exceed 40 hours a week.

A 2011 decision recognized that California employers could mitigate some of the harshness of these requirements by negotiating a mutual wage agreement to pay employees a fixed salary that covers all hours worked, including overtime,[639] but in 2012 the California Legislature eliminated this option, forbidding employers to use explicit mutual wage agreements.[640]

7.1.6.1 the "fixed" (not "fluctuating") workweek method to compute overtime for salaried nonexempt employees

For nonexempt employees paid a weekly salary, a question arises as to how to calculate their overtime premium pay. Federal law uses the "fluctuating workweek" method, which recognizes the economic reality that the weekly salary is compensation for all hours worked that week, so that only the overtime "premium" is due for overtime hours. California is different. California uses the "fixed workweek" method, which irrebuttably presumes that the weekly salary is paid only for a 40-hour workweek.[641] Under this method, both overtime premium *and* base salary are due for all hours worked over 40 in a week. As shown below, the "fixed workweek" method results in greater liability where employers have misclassified salaried nonexempt employees as exempt.

Under the federal "fluctuating workweek" method, the regular rate for a given week for a nonexempt salaried employee is the weekly salary divided by the total number of hours worked that week. Consider an employee paid $800 per week who works 50 hours one week: the regular rate for that week would be $16 per hour ($800 divided by 50), and the overtime premium rate would be $24. The amount of premium pay due for that week would be ten hours of overtime times $8 per hour, or $80, because for the ten overtime hours the employee has already been paid the regular rate of $16, and would be entitled to only an additional $8 per hour (0.5 times the regular rate).

In California the regular rate would be higher. For the same nonexempt salaried employee, working the same hours, the regular rate would be $800 divided by only 40 hours (not the 50 hours actually worked).[642] The regular rate would thus be $20, making the premium rate $30. In addition, because the fixed workweek method presumes that a salary covers only the first 40 hours of work, the employee would be entitled to extra pay in the amount of 10 hours multiplied by the entire premium rate of $30, not just the extra $10 per hour.

The federal and California methods thus diverge at two junctures: (1) the way they calculate the *regular* rate of pay, and (2) the way they calculate the amount due. As to the regular rate, the federal fluctuating workweek method divides weekly salary by all hours worked in a week, while the California fixed workweek method divides weekly salary by 40 hours. As to *the amount due*, the federal fluctuating workweek divides weekly salary over all hours worked (so that there is a base pay credit against the overtime premium), while the fixed method divides it over only 40 hours (so that the full overtime premium is owed).

Thus, the employee who has $80 of weekly premium pay elsewhere in America could have $300 in California ($30 per hour times 10 hours of overtime). To illustrate:

	Calculation of Regular Rate					Calculation of Amount		
	Weekly Salary	**Weekly Hours**	**Regular Rate**	**Premium Rate**	**OT Hrs.**	**OT Pay**	**(OT Paid)**	**Net OT Due**
Fluctuating Workweek Method	$800.00	50	$16.00	$24.00	10	$240.00	($160.00)	$80.00
Fixed Workweek Method	$800.00	50	$20.00	$30.00	10	$300.00	($0.00)	$300.00

7.1.6.2 alternative workweeks

To accommodate employers and employees who want flexible hours, certain California wage orders permit “four-day workweek” arrangements, whereby nonexempt employees can work four 10-hour days without creating liability for daily overtime. These arrangements require specified secret-ballot election procedures, to be held within readily identifiable work units (such as a division, department, job classification, shift, or facility). The results of the election must be reported within 30 days to:

Division of Labor Statistics and Research
Attn: Alternative Workweek Election Results
Department of Industrial Relations

P.O. Box 420603
San Francisco, CA 94142-0603

Also permissible, subject to the foregoing procedures, is an alternative workweek including 12-hour workdays in which employees work ten hours at regular pay and the extra hours at overtime pay.[643]

7.1.7 Deductions for cash or merchandise shortages or damages

Section 8 of most of the wage orders reads: "No employer shall make any deduction from the wage or require any reimbursement from an employee for any cash shortage, breakage, or loss of equipment, unless it can be shown that the shortage, breakage, or loss is caused by a dishonest or willful act, or by the gross negligence of the employee."

7.1.7.1 wage order upheld by California Supreme Court

In *Kerr's Catering Service v. Department of Industrial Relations*,[644] the California Supreme Court decided that the IWC could issue a wage order that precluded an employer from making deductions that would make employees financially responsible for business losses that did not result from the employees' gross negligence or willful misconduct. The employees at issue sold food from lunch trucks. They earned minimum wage plus a commission based on the amount of sales, with the commission reduced by any cash shortages. The court upheld the wage order on the rationale that the concept of protecting employees from wage deductions already existed in various Labor Code provisions: Section 221 forbids an employer to collect back from an employee wages already paid, and Sections 400-410 limit employers' rights to seek cash bonds from employees.

7.1.7.2 application to exempt employees

The DLSE has opined that the Labor Code itself, rather than just Section 8 of the wage orders, bars the deductions expressly barred by Section 8. That DLSE interpretation would mean that the anti-deduction rules protect *exempt* employees as well as the *nonexempt* employees protected by the wage orders.[645] The general concept discovered in *Kerr's Catering Services*—that California employers must not make employees insurers for general business losses—has been extended to other contexts, making certain commission and bonus plans suspect under California law (see §§ 7.6, 7.7).

7.1.8 Payment for uniforms

California employers who require employees to wear uniforms must pay for the uniforms and their maintenance.[646] A uniform is any distinctively designed or colored wearing apparel or accessory, although items of unspecified design that are usual and generally usable in the occupation (e.g., white shirts, dark pants, black shoes and belts) are not considered to be part of a uniform.[647] In one case, a retailer settled a DLSE enforcement action in which the DLSE contended that a dress code requiring the wearing of a blue shirt and tan or khaki pants constituted a uniform requirement.[648]

Section 9(C) states that employer-provided uniforms must be returned by the employee upon completion of the job. The employer may require a reasonable deposit as security for the return. With prior written authorization by the employee, the employer may deduct from the employee's last check the cost of the uniforms, but must not deduct for normal wear and tear.

7.1.9 Payment for tools or equipment

Section 9(B) of most of the wage orders provides that employers who require tools or equipment to perform a job must provide and maintain them, although employees who are paid at least twice the minimum wage may be required to provide and maintain hand tools and equipment customarily required in their trade or craft. Section 9(C) provides that, as with uniforms, employers may require a reasonable deposit and may, with prior written authorization, make deductions for items not returned by employees.

7.1.10 Meal periods

Section 11 of most wage orders states: "No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than thirty (30) minutes." An off-duty meal period may be unpaid, but unless the employee is relieved of all duty during the 30-minute meal period, the entire period counts as time worked.

Labor Code Sections 226.7 and 512 also address meal periods. Section 226.7 forbids an employer to require an employee to work during any meal or rest period that is mandated by an IWC order.[649] Section 512 requires that employees "provid[e]" 30-minute meal periods for employees working more than five hours (one meal period) or working more than ten hours (two meal periods).[650] (As to the meaning of "provide," a word that does not appear in the wage orders, see § 7.1.10.5.)

Section 11 applies only to nonexempt workers. A literal interpretation of Section 512, however, would extend the meal-period entitlement to *all* employees, exempt as well as nonexempt. The DLSE has noted this point in opining that exempt employees as

well as nonexempt employees are entitled to meal periods,[651] even though they would not be entitled to the extra hour of pay (see § 7.1.12) that is owed to a nonexempt employee who is denied a required meal period. No appellate court has yet adopted the DLSE's interpretation.

7.1.10.1 record-keeping requirement

Section 7 of the wage orders requires that the employer keep accurate information with respect to each required meal period.[652]

7.1.10.2 on-duty meal periods

On-duty meal periods are permitted only if (1) the nature of the work prevents the employee from being relieved of all duty during the meal period, (2) the employer and employee have agreed in writing to the on-duty meal period, and (3) the agreement states that the employee may revoke the agreement, in writing, at any time.[653] The DLSE has opined that the nature of the work permits on-duty meal periods only in very limited circumstances, such as where the employer's operations make it virtually impossible to provide the employee with an off-duty meal period.[654]

7.1.10.3 waiver of meal periods

Employers must not condition permission to work on waiver of a meal period.

i. waiver of first meal period

If the employee works no more than six hours in a day, then the duty to provide a meal period may be waived by "mutual consent" of employer and employee.[655] The consent can be written or oral.

ii. waiver of second meal period

An employee who works more than ten hours in a day, and who is thus entitled to two 30-minute meal periods, may choose to waive *one* of the two meal periods, but not both, and the waiver must be in a writing signed by both employer and employee and is available only for a shift in which the employee works twelve or fewer hours.[656]

7.1.10.4 timing of meal periods

In an opinion letter now withdrawn, the DLSE once stated a "rolling five-hour rule"—that the ban on employing a person for more than five hours without a

meal period meant that an employee working eight hours a day must be given a meal period no earlier than three hours into the workday and no later than five hours into the workday. An appellate decision, *Brinker Restaurant Corp. v. Superior Court,* recognized that the DLSE opinion letter was wrong, and held that employers need not time meal periods to ensure that one occurs every five hours. The California Supreme Court then removed that assurance for employers in 2008 by deciding to review the *Brinker* case.[657]

Finally, in 2012, the supreme court in *Brinker* ruled that an employer timely provides meal breaks so long as the first meal period comes no later than the fifth hour of work (for work shifts exceeding five hours) and that the second meal period (for work shifts exceeding ten hours) comes no later than the tenth hour of work.[658] This rule can still be onerous for employers, however, because employers can incur premium-pay obligations for meal break violations when employees receive their meal breaks, but receive them only after working more than five hours into the work shift.

7.1.10.5 meaning of "provide"

California employers must not employ an employee for a work period exceeding five hours "without providing the employee with a meal period of not less than 30 minutes."[659] In this context, what does "provide" mean? One California appellate court stated that employers must ensure that employees actually take their meal breaks,[660] as did the DLSE.[661] The California Supreme Court finally addressed this issue, in 2012. The court held that California employers must "provide" a meal period only in the sense that they must relieve the employees of duty; the employer need not police the break or otherwise ensure that the employee refrain from working during the break. If the employer knows or should know that the employee in fact is working during the meal period, then the employer' obligation is to pay straight time, not the one hour of premium pay that would be due for a meal break violation.[662]

7.1.10.6 meal periods on premises

Under federal law, employers need not pay employees for time spent during any "bona fide" meal period—a period in which the employee is completely relieved of duty for the purpose of eating.[663] The employer need not permit the employee to leave the premises during a meal period, if the employee is otherwise completely freed from duties during the period.[664] California is different. California courts have followed a DLSE interpretation that employees who must remain on the employer's premises during meal periods

have not been freed from duty, and thus must be paid for that time even if the employees were free to use the on-premises time in whatever way they saw fit.[665] In 2012, the California Supreme Court generally endorsed the DLSE's interpretation.[666] This interpretation is problematic for hospitals and oil refineries and other employers whose employees traditionally stay on the premises during meals.

7.1.11 Rest breaks

California employers must "authorize and permit" nonexempt employees to take certain rest breaks.[667]

7.1.11.1 amount and timing of rest breaks

Employees are entitled to ten minutes of "net rest time" for every four hours worked or "major fraction thereof," with the rest period to be available near the middle of the work period, insofar as is practicable.[668] Under DLSE interpretations, employers must authorize and permit a first break if the daily work time is at least three and one-half hours and a second break if the work time has extended beyond six hours.[669] The California Supreme Court, in 2012, endorsed this interpretation, and added the point that a third break must be authorized for work in excess of ten hours and not more than fourteen.[670]

7.1.11.2 meaning of authorize and permit

An employer can be liable for denying rest breaks if the employer has encouraged employees to skip rest breaks by failing to notify employees of the availability of breaks, where the employer is aware that employees were not taking breaks.[671]

7.1.11.3 record keeping

Employers need not record authorized rest breaks.[672]

7.1.11.4 calculation of rest break time

The DLSE has opined that the employee must be permitted to take the ten minutes of rest time in an uninterrupted block (i.e., one ten-minute break, not two five-minute breaks)[673] and that the "net rest time" language prohibits an employer from counting as rest time any time that the employee must take to move from one work position to another, or to a rest area.[674]

7.1.11.5 toilet breaks excluded

DLSE policy forbids an employer to count any separate use of toilet facilities as a rest break.

7.1.11.6 rest breaks counted as hours worked

Rest time must be counted as working time.

7.1.11.7 rest areas required

Employers must provide a rest area, separate from toilet rooms, where the employee may choose to take the rest break.[675]

7.1.12 Recovery periods

Effective January 1, 2014, California employers must afford employees a "recovery period," to "prevent heat illness."[676] Employers must not require employees to work during a recovery period that is "mandated pursuant 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 or Occupational Safety and Health."[677]

7.1.13 The "one additional hour of pay"

A California employer that "fails to provide an employee a meal or rest or recovery period in accordance with a state law" must "pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest or recovery period is not provided."[678] In 2011 the California Court of Appeal held that an employer that fails to provide both a meal period and a rest period must pay up to two premium hourly payments per work day.[679]

A new subdivision, effective January 1, 2014, provides that the foregoing does not apply to an employee who is exempt from meal or rest or recovery period requirements "pursuant to other state laws."[680]

7.1.13.1 pay is characterized as a "wage"

The extra hour of pay—a fixed amount due regardless of how long work intrudes into the meal or rest break—resembles a penalty in that the payment does not correspond to the amount of break time denied. As discussed below, "penalty" is the characterization that employer-defendants have preferred. And in fact 22 of the 24 Court of Appeal justices who considered the issue

agreed with the employers' view that the extra hour of pay is indeed a penalty,[681] as did the DLSE in a Precedent Decision.[682]

In 2007, however, the California Supreme Court, in *Murphy v. Kenneth Cole Productions*, erased all of that pro-employer authority by ruling, unanimously, that the extra hour of pay is what the plaintiffs have always said it is: a "premium wage."[683] The *Murphy* court justified its result with repeated references to the California rule that "statutes governing conditions of employment are to be construed broadly in favor of protecting employees."[684]

7.1.13.2 consequences of California Supreme Court's decision

Murphy's decision to characterize the extra hour of pay as a wage, instead of a penalty, creates these negative consequences for employers.

- The statute of limitations for a wage claim is three years (for violation of a statutory obligation to pay wages), or even four years (for a claim brought under the Unfair Competition Law, see § 5.10.3), instead of the one-year statute for a penalty claim.
- Tax withholding and employer taxes are required on a payment of wages.
- Attorney fees are recoverable for a wage claim.[685]
- Prejudgment interest is recoverable on a wage claim.[686]
- There are penalties for failing to pay wages on termination of employment.[687]
- Restitution for unpaid wages would be available under the California Unfair Competition Law,[688] with its four-year statute of limitations.
- Additional civil penalties might apply under the PAGA (the bounty-hunter statute (see § 5.11)).

7.1.13.3 further potential ramifications of the "wage" characterization

Is the extra hour of pay owed for meal-period and rest-break violations something that employers must include within the regular rate for purposes of computing overtime pay? We think not, as the premium wage paid for overtime work is itself not an item to include within the regular rate. The DLSE seems to agree.[689]

Is the extra hour of pay something that employers must record in the required wage-itemization statement (see § 16.3)? One might think not, as the extra

hour of pay is not truly wages "earned" and does not represent "hours worked," and thus logically does not fall within a category of the items that the wage statement must include. Yet recall that, in California, logic and reason can yield to the imperative that "statutes governing conditions of employment are to be construed broadly in favor of protecting employees."[690] Accordingly, it would be prudent to record the extra hour of pay in the wage itemization statement, probably in a clearly labeled separate category (as the statement must be "accurate").

7.1.14 Suitable seats

Most California wage orders require employers to provide employees "with suitable seats when the nature of the work reasonably permits the use of seats."[691] The wage order does not authorize any monetary remedy, but the Labor Code forbids employment of employees under conditions prohibited by a wage order[692] and enables employees experiencing Labor Code violations to seek PAGA penalties of $100 or $200 per employee, per pay period (see § 7.11). Plaintiffs' lawyers have invoked this obscure seating rule in class actions against retailers and hotels and other employers whose employees often must work while standing.

Until 2009, no published decision had addressed a seating claim. In 2005, in *Hamilton v. San Francisco Hilton*,[693] a trial court rejected the seating claim of a guest service agent who challenged a hotel's requirement to stand at the front desk. The court granted the hotel summary judgment because (1) standing and continual mobility throughout the front office area were essential functions of the job and (2) seated employees could not safely use a computer, fit their knees and legs in the workspace, or open a cash drawer. Further, the hotel could reasonably decide that guest service agents should stand to serve guests—a business judgment about image and brand that a court should not "second guess."

In 2009, however, a federal district judge in San Francisco breathed new life into seating claims, ruling that a store cashier could pursue such a claim.[694] And then, in 2010, two California appellate courts both recognized the viability of seating claims.[695] In 2013, the Ninth Circuit further enlivened seating claims by holding that employees need not request a seat to trigger their employer's duty to provide one.[696]

But other aspects of the employer's duty to provide a seat remain unsettled. In December 2013, the Ninth Circuit, hearing consolidated appeals, referred to the California Supreme Court these issues of first impression.[697]

1. Does the phrase "nature of the work" refer to an individual task performed during the workday, or does "nature of the work" require a holistic look at the entire range of

duties? And if the holistic approach applies, then should courts consider the entire range of duties if the employee spends more than one-half of the time on tasks that reasonably allow the use of a seat?

2. In deciding whether the nature of the work "reasonably permits" the use of a seat, should courts consider the employer's business judgment, the physical layout of the workplace, and the employee's physical characteristics?

3. Must the employee prove what a "suitable seat" would be?

The California Supreme Court has discretionary authority to decide whether to decide these questions.[698] The referral from the Ninth Circuit is still pending.

The threat of seating claims could require California employers to re-evaluate every job that requires standing to see if the nature of the work reasonably permits the use of seats. The evaluation might involve an ergonomic study to determine the feasibility of adding seats, and a study to see if there is seating in a nearby break room for employees to use when it would not interfere with their job. This development also highlights the importance of describing any standing requirement in the relevant job description.

7.2 Exemptions from the Wage Orders

Section 1(A) of most of the wage orders states that Sections 3 through 12 of the wage orders do *not* apply to employees covered by the administrative, professional, or executive exemptions. Section 1(C) indicates that the same is true for outside salespeople. The California administrative, professional, and executive exemptions resemble the corresponding federal exemptions, but it is generally harder under California law than under federal law for an employer to establish that an employee is exempt.

7.2.1 Salary requirement

Under both federal and state law, an employee must be salaried to qualify as an administrative, professional, or executive employee. Thus, with some specific exceptions (e.g., computer professionals, physicians), all hourly paid employees are nonexempt, regardless of their duties.

7.2.1.1 minimum salary

The salary paid to an exempt employee must meet a certain numerical minimum. Under federal law, an employee meets the salary-basis requirement so long as the employee's weekly salary is at least $455. California is different. To qualify as salaried exempt, a California employee

must earn a salary that is at least twice the monthly minimum wage for full-time (40 hours per week) employment.[699] The minimum weekly salary for an exempt California employee is now $640 (equivalent to an annual salary of $33,280. With California's rising minimum wage, the minimum weekly salary for an exempt California employee as of July 2014 will be $720 (equivalent to an annual salary of $37,440).

7.2.1.2 vacation deductions for partial-day personal absences?

In interpreting the salary requirement, federal regulators have permitted employers some flexibility in charging an employee's PTO bank for partial-day absences from work. California arguably is different on a theory that vacation or PTO time is "vested" and thus is pay that cannot be deducted for partial-day absences without destroying the salary basis. Although the DLSE long espoused this theory, a 2005 decision by the California Court of Appeal held that California employers, like employers elsewhere, may require the use of accrued vacation for partial-day absences of four hours or more.[700] In 2009 the DLSE followed suit, opining that deductions from accrued sick-leave and vacation balances generally do not destroy an employee's salary basis.[701]

7.2.2 The "white collar" exemptions

7.2.2.1 executive exemption

A California exempt executive must (1) be primarily engaged in managing a department or subdivision of it, (2) supervise at least two other individuals, (3) have the authority to hire or fire other employees, or effectively recommend the same, (4) customarily and regularly exercise discretion and independent judgment in the performance of job duties (i.e., have the authority to make an independent choice free from immediate supervision with respect to matters of significance), and (5) be "primarily engaged" in exempt duties.[702]

Executive activities may include interviewing, selecting and training employees, setting and adjusting pay rates and work hours, directing the work of subordinates, evaluating employees' efficiency and productivity, resolving complaints, disciplining employees, planning the work, determining techniques to use, deciding types of material, supplies and machinery to use, purchasing same, and engaging in work directly and closely related to those activities, or properly viewed as a means to carry them out.

Nonexempt tasks include performing the same kind of work as subordinates, performing production or service work that is not part of the supervisory

function, making sales or replenishing stock, performing routine clerical duties, checking or inspecting goods in a production operation, and performing maintenance work.

But what about multi-tasking? Federal law, in determining whether an employee is executive exempt, recognizes that concurrent performance of exempt and nonexempt work does *not* disqualify an employee from the executive exemption. For example, federal regulations interpreting the FLSA state: "An assistant manager can supervise employees and serve customers at the same time without losing the exemption."[703] California is different. A 2013 California appellate decision holds that an activity must be categorized as either exempt or nonexempt, based on the employee's purpose for engaging in such activity.[704]

7.2.2.2 professional exemption

A California exempt professional must (1) be licensed or certified by California and primarily engaged in law, medicine, optometry, architecture, engineering, teaching, or accounting, or be primarily engaged in an occupation commonly recognized as a learned or artistic profession requiring knowledge of an advanced type customarily acquired by prolonged academic study, or be engaged in original and creative work dependent primarily on invention, imagination, or artistic talent, or be engaged in work that is predominantly intellectual and varied in character, and (2) customarily and regularly exercise discretion and independent judgment in the performance of those activities.[705]

7.2.2.3 administrative exemption

A California exempt administrative employee must be primarily engaged in (1) customarily and regularly exercising discretion and independent judgment[706] in the performance of intellectual work (office or non-manual work of substantial importance directly related to management policies or the general business operation of the employer or its customers; not production or sales work), or (2) directly assisting an exempt executive or administrator, with only general supervision, or work along specialized or technical lines requiring special training, experience, or knowledge; or execute special assignments.[707] Exempt administrative employee activities include servicing the business by, for example, advising management on policy determinations, planning, negotiating, representing the company, purchasing, and business research, and also by engaging in work that is directly and closely related to those activities, or properly viewed as a means of carrying them out.

In *Bell v. Farmers Ins. Exchange*,[708] a California appellate court considering whether insurance claims adjusters were administrative employees construed the wage orders to add a "role" test to the traditional "duties" test: the court would not even reach the issue of whether the job satisfies the duties test unless the employee serves in an "administrative capacity."[709] The court distinguished administrative work from "production" work, the latter being work needed to create whatever product or service the business sells, as opposed to administrative work necessary to support the production.[710] The *Bell* court held that work of insurance claims adjusters was inherently production work, rendering them ineligible for the administrative exemption.[711]

But the FLSA regulations provide that an administratively exempt employee can provide administrative support to the employer *or the employer's customers*.[712] Thus, the *Bell* court concedes "that the administrative / production worker dichotomy is a somewhat gross distinction that may not be dispositive in many cases...For example, some businesses, such as management consulting firms, may provide services that clearly pertain to business administration, even though they are activities that the businesses exist to produce and market."[713]

Bell places California law at odds with analogous federal law. Federal decisions have refused to apply *Bell*'s reasoning in FLSA insurance adjuster cases,[714] and the 2004 amendments to FLSA regulations clarify that insurance adjusters can be covered by the administrative exemption "whether they work for an insurance company or another type of company."[715] Several federal decisions have concluded that insurance adjusters are not entitled to overtime under the FLSA.[716] A further indication that *Bell* had limited effect was a 2007 Ninth Circuit decision,[717] which held that insurance adjusters, as a rule, qualify for the administrative exemption, and which criticized *Bell* for its overbroad construction of the meaning of "production work."[718]

California peculiarity reasserted itself, however, in 2007, when the Court of Appeal decided *Harris v. Superior Court (Liberty Mutual)*.[719] Despite the opportunity to move away from *Bell* and towards the federal view of the administrative exemption, *Harris* went the other way, taking an even narrower view than *Bell* concerning what jobs qualify as "administrative." The Court of Appeal concluded that "only work performed at the level of *policy or general operations* [emphasis in original] can qualify as 'directly related to management policies or general business operations'," and that "work that merely carries out the particular, day-to-day operations of the business is production, not administrative, work."[720] *Harris* thus departed significantly from

traditional analysis of the administrative exemption, rejecting many federal decisions that interpret the administrative / production dichotomy much differently.[721]

A strong dissent in *Harris* challenged the majority's conclusions. The California Supreme Court granted review of *Harris* in 2007, and finally issued its decision in 2011.[722]

The Supreme Court unanimously reversed the Court of Appeal and remanded for further proceedings.[723] The Supreme Court distinguished *Bell* as involving a stipulation that the plaintiffs' work there was "routine and unimportant" and as relying on the 1998 version of a wage order, which has been superseded by a 2001 that incorporates relevant aspects of federal regulations. The Supreme Court explained that modern-day, post-industrial, service-oriented businesses may not follow the administrative/production worker dichotomy, and that courts should not strain to apply the dichotomy where it does not fit. Thus, while the dichotomy might still have use as an analytical tool, the Court of Appeal here erred in applying the administrative / production worker dichotomy as a dispositive test.

7.2.3 The quantitative requirement for "white collar" exemptions

In America generally, to qualify for a "white collar" exemption, an employee must, as a "primary duty," perform exempt tasks and, in doing so, regularly and customarily exercise discretion and independent judgment. In interpreting "primary duty,"[724] the U.S. Department of Labor does not treat the amount of time spent as the sole test. The DOL recognizes that an employee might be an exempt executive without spending over 50% of working time in managerial duties.[725]

California is different. In an analogous situation involving the exemption for outside salespeople,[726] the California Supreme Court ruled that the test for exempt versus nonexempt duties is a "purely quantitative approach," gauging whether "more than one-half" of an employee's time is spent on exempt duties. In so holding, the California court declined to follow the DOL's regulation that "reclassifies intrinsically nonexempt sales work as exempt based on the fact that it is incidental to sales."[727]

7.2.4 Sole-charge exemption

Federal law formerly provided for a "sole-charge exception" for executives at separate establishments, which allowed employers to treat the manager of an establishment as exempt irrespective of the primary duty test, so long as there were at least two full-time

employees or their equivalents under the manager's supervision at the location.[728] California has never recognized this exception.

7.2.5 Computer professionals

California exempts from overtime pay requirements computer professionals who are primarily engaged (1) in work that is intellectual or creative requiring the exercise of discretion and independent judgment and (2) in duties that consist of (a) applying systems analysis techniques and procedures (e.g., determining hardware, software, or system functional specifications), or (b) designing, developing, documenting, analyzing, creating, testing, or modifying computer systems or programs, or (c) documenting, testing, creating, or modifying the design of software or hardware, or (d) duties associated with being highly skilled in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering.

An employer seeking to establish the computer professional exemption must meet all of the foregoing requirements plus a compensation requirement. By a 2007 amendment, an employer met that requirement, effective January 1, 2008, by paying $36 an hour or the annualized full-time salary equivalent. That rate is subject to annual increases in accordance with the California Consumer Price Index for Urban Wage Earners and Clerical Workers.[729] Effective January 1, 2014, the relevant hourly rate is $40.38, and the minimum annual salary is $84,130.53.

7.2.6 Specified medical employees

Registered nurses (s) qualify for the professional exemption under federal law. California is different, prohibiting a professional exemption for RNs engaged in the practice of nursing, i.e., engaged primarily in patient care. California permits an exemption only for "advanced practice nurses," such as certified nurse midwives, certified nurse anesthetists, and certified nurse practitioners.[730] The distinction between RNs and advanced practice nurses (APNs) is that the latter undergo months or years of specialized education and training, must be state licensed, and perform duties that otherwise only physicians could perform.

7.2.7 Outside salespersons

Under federal law, an employee qualifies as overtime exempt as an outside salesperson by regularly engaging outside the workplace in selling services or the use of facilities if the nonsales activities do not exceed 20% of the time worked.[731] Sales activity includes work incidental to or in conjunction with outside sales, including incidental deliveries and collections. The time devoted to various duties is important,

but not necessarily controlling. A routeman who calls on customers and takes orders for products delivered from stock, and who receives compensation commensurate with a volume of products sold, is employed for the purpose of making sales.[732] Thus, the federal exemption focuses on the employee's "primary function," not on how much work time is spent selling, and the 20 percent cap on nonexempt (i.e., nonsales) work does not apply to nonsales activities that are "incidental" to outside sales, including deliveries.

California is different. While California has a statutory overtime exemption for outside salespeople,[733] its wage orders define the term narrowly, as an adult "who customary 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 of contracts for products, services or use of facilities."[734] This definition does not mention the primary function for which the person is employed and focuses, quantitatively, on whether "more than half the working time" is devoted to "selling...or obtaining orders or contracts." Moreover, the California definition does not reclassify intrinsically nonsales work as exempt based on the fact that it is incidental to sales.

In a 1999 decision, the California Supreme Court held that the California exemption for outside salespersons—by not tracking the language of the federal exemption and by using its own definition of "outside salespersons"—intends to depart from federal law, to "provide, at least in some cases, greater protection for employees."[735] At issue before the court was whether a routeman delivering bottled water was exempt from overtime as an outside salesperson. While remanding the case for further proceedings, the court strongly implied that the plaintiff would not be exempt under California law even if he was exempt under federal law.

7.3 Hours Worked

The "hours worked" concept is central to both federal and California law. California law, however, can require employers to compensate employees when federal law does not.

The federal definition of hours worked is whether the time is spent predominantly for the employer's benefit, as opposed to the employee's. By contrast, the California definition of "hours worked" is "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so."[736]

Further, while federal law does not require employers to live by contracts to pay wages exceeding the minimum wage, California's statutory wage and hour law arguably requires that employers pay employers no less than the wages required by statute **or** contract.[737]

As of 2012, California employers must not prohibit employees from maintaining a personal record of the hours they have worked or the piece-rate units they have earned.[738]

Employers typically count hours within given workweeks, which employers are free to set as they wish. A workweek beginning at midnight on Sunday is common. Hours worked within that week would count for weekly overtime, and hours worked from midnight to the following midnight would count in those few states (such as California) where employer must pay daily overtime. An employer following this accounting should not have its workweek method challenged. But California is different. The Court of Appeal has held that employees who worked 14-day shifts from Tuesday to Tuesday on boats could recover seventh day overtime compensation on both the seventh and 14th days of each consecutive 14-day work period, even though the employer's designated workweek began on Monday at 12:01 a.m. and ended on Sunday at midnight.[739]

Both federal law and state law (as interpreted by the DLSE) permit employers to compute employee work time by using a rounding method, "provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked."[740] A California trial court, however, held that rounding was unlawful and granted summary judgment to the plaintiffs, on a rationale that California law did not authorize paying on the basis of anything other than strict time reporting. The Court of Appeal, in a 2012 decision, corrected this mistake, holding that California law should follow federal law in this instance.[741] The California Supreme Court, meanwhile, has yet to address whether rounding is permissible.

7.3.1 Travel time

7.3.1.1 commuting

Under the FLSA, as amended by the Portal-to-Portal Act, employers need not pay for the time an employee spends traveling to and from work, so long as the travel itself is not integral to the work performed. California is different: travel time is compensable if the employee is subject to the control of the employer, even if the employee is not working. Under this doctrine, even commuting time in California is compensable if the employer requires its employees to travel to work on its buses.[742] A 2010 decision by the Ninth Circuit highlighted the difference between federal and California law, with the court holding that where employees were required to use company vehicles for commuting purposes, the commute was not compensable under the federal Employment Commuter Flexibility Act, but was compensable under California law, which requires that employees be compensated for all time during which they are subject to the employer's control.[743]

7.3.1.2 overnight travel

Under federal law, hours worked do not include non-working travel time spent outside of the normal working hours. California is different, treating as hours worked any compulsory travel time, because it is time subject to the control of the employer, regardless of whether the employee is actually working during that time.[744]

7.3.2 Non-productive time of piece-rate and commissioned employees

The FLSA permits employers to pay employees a piece or commission rate *without* specially compensating the employees for their non-productive working time, so long as their *average* hourly wage exceeds the minimum wage. California is different. The DLSE interprets California law to require that workers be compensated, at or above the minimum wage, for all hours spent on non-productive activities required by the employer.[745] As discussed separately above (see § 7.1.4), courts have endorsed this California-specific approach.[746]

A 2013 California appellate decision stretched the envelope even further, holding that drivers who were paid on the basis of mileage and at certain hourly rates for certain tasks, must be paid separately for their rest breaks: "a piece-rate compensation formula that does not compensate separately for rest periods does not comply with California minimum wage law."[747]

7.3.3 On-call time

Federal law applies two predominant factors in assessing whether an "on call" employee is entitled to compensation: (1) the degree to which the employee is free to engage in personal activities and (2) the agreements between the parties.[748] California law differs. The California DLSE deems irrelevant any agreement between the parties as to whether on-call time is compensable. In California, the essential test for compensability is simply whether the employer imposed restrictions on the on-call employee's ability to serve personal purposes so as to render the employee subject to the employer's control. Employers can minimize the impact of on-call compensability by paying for on-call time at some wage (e.g., the minimum wage) that is lower than the normal wage.

A 2011 California appellate decision held, with respect to ship-board employees who worked 14 consecutive shifts of 12-hour days (followed by 14 days off), and who were otherwise on call, were entitled to compensation for *all* their on-call hours, because of the requirement that they sleep aboard ship and remain within no more than 45 minutes of the ship at all times. The court rejected federal authority that would consider

agreements between the parties governing the compensability of on-call work, because California law depends on the employer's control, without regard to agreements.[749]

A sensible 2013 California appellate decision then held that if an employee is on a 24-hour or more shift, an employer can deduct up to eight hours as uncompensable sleep time, so long as the sleep is uninterrupted, the employer provides the on-call employee a comfortable place to sleep, and the employee has agreed in writing that this period would be not be compensated. But then the California Supreme Court took this decision up for review,[750] leaving the validity of this deduction in doubt.

7.3.4 Security procedures

In some recent cases plaintiffs' lawyers have argued that California retailers must compensate nonexempt employees for time spent in undergoing inspections as they leave the store. In America generally, claims of this sort might fail under the de minimis doctrine, which recognizes that short and sporadic time that an employee spends off the clock is not compensable.[751] California, however, may be less deferential to this doctrine. One federal district court, in San Francisco, certified a class of retail workers who sought pay for the time they spent cooperating in routine bag checks upon departing the store.[752] The case settled for $5 million.

7.4 Payroll Deductions

7.4.1 Labor Code prohibition

California employers generally must not deduct from employee paychecks except as authorized by law or with the employee's written consent.[753]

7.4.2 Judicial interpretations

California courts have discovered a general principle that employers must themselves incur all the costs incurred in the normal operation of their businesses, and must not use employees to act as "insurers" against losses that result from ordinary employee carelessness or simple negligence or that result from matters beyond the employees' control. In *Kerr's Catering Service v. Department of Industrial Relations*,[754] the California Supreme Court upheld an IWC wage order provision that barred an employer from deducting the cost of cash shortages from its employees' earned commissions unless the employer could show that the cash shortage resulted from the employees' gross negligence or willful misconduct. California courts have drawn from those limited circumstances a broad principle prohibiting other kinds of wage deductions for business losses caused by factors beyond the employee's control or by simple employee negligence.[755] The DLSE also has taken this position.[756]

7.4.3 Debt repayment (employee loans)

Any payroll deduction used to satisfy a debt that the employee owes the employer is valid only if approved in writing by the employee. Any deduction of a "balloon" payment from a final paycheck is unlawful unless it is authorized in writing at the time of termination.[757]

7.4.4 Recovery of wage overpayments

One California appellate court decision has even held that an employer must not make payroll deductions in order to recoup mistakenly made overpayments of salary. The court reasoned that any such deduction would violate attachment and garnishment statutes.[758]

The DLSE has opined that an employer making regular, predictable, and expected overpayments (such as where the employer pays a set amount on the assumption that employees have worked a given number of hours, without yet checking on the exact number of hours worked) can recover those overpayments through deductions in the next paycheck, but only if the employer has prior written authorization to make those deductions and only if the employee still receives, after the deductions, not less than the minimum wage. Further, even with that authorization, according to the DLSE, there can be no deduction from the final paycheck.[759]

7.4.5 Cost of medical examinations

California employers must not deduct from a paycheck the cost of a medical examination for the employee.[760]

7.4.6 Tips

California employers must not deduct tips or gratuities from wages. For discussion of this and other peculiar rules on tips, see § 7.9.

7.5 Wage Payment Statutes[761]

7.5.1 Payment during employment

Labor Code Sections 204, 204b, and 205 set forth detailed requirements for establishing regular paydays. Section 207 requires that employers post a notice identifying when and where wages are paid. Nonexempt employees must be paid at least semimonthly and must be paid no later than seven days after the close of the pay period.[762] A failure to pay wages due in a pay period incurs penalties of $100 or $200 per employee per pay period plus 25% of the unpaid wage.[763]

The Court of Appeal has held that this worker-protection legislation permits all employees, including a business executive making over $180,000 under a written employment agreement, to sue for wages under the Labor Code and thereby be entitled to invoke the attorney-fee provision applying to a successful wage claim.[764]

7.5.2 Method and place of payment

The payment of wages must be in a form redeemable in cash on demand, without discount, at an established place of business within California.[765]

Labor Code Sections 208 and 209 require that an employer pay final wages due at the place of employment (when the employee is fired) or the employer's offices (when the employee quits), and to make the final paychecks of striking workers available on the next regular payday.

7.5.2.1 payment by direct deposit

Employers generally may satisfy their obligation to pay wages by making direct deposits to the employee's account in a California bank, with the employee's voluntary written authorization.[766] By prior California law, the employee's authorization of direct deposit was "deemed terminated" if the employee was fired or quit. By a 2005 amendment, however, the employer now may make the final payment of wages by direct deposit.[767]

7.5.2.2 payment by debit card

The DLSE has opined that California employers can meet their duty to pay wages in cash or by negotiable instruments through the means of an electronic debit card, so long as the employee has agreed in writing to this method of payment and so long as the employee can use the card without fee for the first transaction in each pay period, to permit immediate free access to the entirety of the wages.[768]

7.5.3 Payment upon termination of employment

7.5.3.1 timing of payment

Many states permit employers to pay final wages in the regular payroll cycle. California is different. A discharged employee in California must be paid in full on the day of discharge.[769] An employee who quits must be paid not later than 72 hours of the notice of resignation, or earlier, at the time of quitting, if the employee has given at least 72 hours of notice.[770]

i. when is the day of discharge?

Because of the severe waiting-time penalties imposed (see below), it is important for an employer to establish clearly the day of discharge. The day of discharge is not necessarily the last day on which work is performed. In cases of suspected employee misconduct, many California employers suspend an employee without pay pending further investigation or deliberation on the decision whether to discharge the employee. This approach enables an employer to have the final paycheck ready on the day of discharge. If, however, the employer reaches its final decision to discharge, and releases the employee from employment, before the day the employer delivers the final paycheck, the employer is risking waiting-time penalties.

ii. when are temporary employees discharged?

A "temporary employee" might be called to work for a fixed-term assignment, and then wait a few days before taking the next assignment. Is there a "discharge"—requiring immediate payment of all earned wages—every time a temporary assignment ends? In a case involving an individual hired for a one-day modeling job and then not promptly paid for her services, the California Court of Appeal relied on the plain meaning of the statutory term "discharge" to hold that an employee whose temporary assignment simply runs its course has not been "discharged" and, therefore, cannot recover waiting-time penalties for lack of an immediate payment; rather, final payment can occur at some mutually agreed time or other reasonable time.[771] The California Supreme Court then swept this pro-employer ruling off the books and held that the employer's obligation to pay all earned wages upon termination of employment is not limited to a situation where an employee is released from an ongoing employment relationship, but also applies upon completion of the specific job assignment or time duration for which the employee was hired.[772]

The California Legislature then provided some complications with 2008 legislation that addresses timely payment of temporary service employees. This law generally permits weekly payments for these employees, "regardless of when the assignment ends," subject to certain exceptions pertaining to daily work assignments, labor disputes, and other special situations.[773]

7.5.3.2 waiting time penalties

Willful failure to pay wages due upon termination can result in a "waiting time" penalty equal to the employee's daily rate of pay for up to 30 working days.[774] The employer's good faith belief that no wages are owed is a defense to waiting-time penalties,[775] but ignorance of the law is insufficient to avoid waiting time penalties.[776]

Although the waiting time penalty provision likely was meant to apply only to a failure to make timely payment for work done during a final pay period, the DLSE has applied the penalty in circumstances where the final paycheck fails to address unpaid wages that have been earned at any time during the employment.

Absent some constitutional challenge, the amount of waiting time penalty imposed on a California employer does not depend on the amount of the underpayment. Thus, an employer who has underpaid an employee by a grand total of $1, and who does not discover the underpayment until more than 30 working days after the employee has quit, could owe the employee waiting time penalties, measured by 30 working days, or six weeks, of wages.

To make matters worse for employers, the statute of limitations for claiming waiting time penalties is three years, not the one-year limitations period generally applying to penalty claims. One Court of Appeal held that a claim just for penalties (where the employer had paid the underlying wages due) should be subject to the one-year statute of limitations,[777] but the California Supreme Court, in 2010, held that a three-year period applies.

Softening the blow somewhat, the same California Supreme Court decision held that waiting time penalties are not recoverable as restitution under California's Unfair Competition Law,[778] in that those penalties "would not restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest."[779] Accordingly, plaintiffs may not simply tack on a UCL claim to extend the statute of limitations period to four years for waiting time penalties.

7.5.3.3 payment of vacation pay upon termination

The wages that the employer must pay a departing employee include all accrued, unused vacation pay. Vacation pay due at the time of termination must be calculated at the final rate of pay on the basis of daily accrual, even if

accrual of vacation pay ordinarily has been calculated on an annual, monthly, or weekly basis.[780] (See § 7.8.)

7.6 Payment of Commissions

A commission is compensation paid based on a percentage of the price of the products or services that an employee has sold. Employees who earn more than 1.5 times the minimum wage and whose total compensation consists mostly of commissions are exempt from overtime premium pay requirements under California wage orders.[781] Nonexempt employees on commission must receive, through a draw against commissions or otherwise, at least the minimum wage for each pay period.

7.6.1 What payments qualify as commissions?

The DLSE defines commissions narrowly, as pay based on a percentage of the sale, and argues that pay based on the number of units is really a piece rate, not a commission rate.[782] But the Court of Appeal has rejected this narrow interpretation in the context of a pay plan for car salespersons. [783] At issue was a Labor Code provision stating that commissions for employees of licensed vehicle dealers consist of "compensation paid to any person for services rendered in the sale of such employer's property or services and based proportionately upon the amount or value thereof."[784] The Court of Appeal concluded that fixed payments of $150 for each car sold or leased qualified as payments that would count towards determining whether a car salesperson made most of her pay from commissions and thus qualified as exempt from overtime-pay requirements. The court reasoned that a uniform payment for each vehicle sold was "proportionate—a one-to-one proportion. The compensation will rise and fall in direct proportion to the number of vehicles sold."[785]

A California appellate decision has also recognized that payments reflecting a percentage of the adjusted gross profit on the sale of a product or service can qualify as commissions. The employees at issue placed candidates with client companies and, once the candidate was successfully placed, received a percentage of the adjusted gross profit from the placement, as determined by a formula that included the employer's costs and expenses. The Court of Appeal, rejecting the plaintiff's argument that this formula was too "complex" to qualify as a commission, reasoned that the payments "were sufficiently related to the price of services sold to constitute commissions for purposes of the commissioned employees exemption."[786]

7.6.2 When are commissions earned?

Commissions earned within a pay period must be paid for that pay period, and commissions generally are earned upon the completion of a sale.[787] Nonetheless, the

DLSE has recognized that an employer may set reasonable conditions that must occur before a commission is considered "earned." One opinion letter states: "Commissions are due and payable after the reasonable conditions precedent of the employment agreement have been met. If commissions cannot be calculated until after an event has happened then the commissions are not 'earned' under Labor Code Section 204 until the happening of that event so long as the event is reasonably tied to the calculation."[788]

7.6.3 Advances and chargebacks

Employers may advance commissions on a sale and then charge back the advance if the sale does not go through.[789] Thus, if the employer advances an employee a commission for selling a magazine subscription, the advance can be "charged back" against future commissions (cancelling out commissions generated in future sales) if the purchaser cancels the subscription within one month.[790] The employer's position is strongest if the employee has authorized the chargeback arrangement in writing and if the arrangement ensures that the employee will always receive the lawful minimum in compensation.[791]

Advances paid against commissions to be earned may be recovered at termination of employment only if there is a specific written agreement to that effect and, for nonexempt employees, only to the extent that the balance due exceeds the minimum wage and any overtime premium pay.

The Court of Appeal struck down a chargeback arrangement in *Hudgins v. Neiman Marcus*. In that case, a retailer addressed the problem of rescinded sales in certain sections of the store by imposing on all sales commissions in each section a pro rata deduction for "unidentified returns" (items returned that could not be tracked to a particular sales associate). The Court of Appeal concluded that this unidentified-returns policy effected a "forfeiture of commissions individually earned," on the rationale that "[a]s to those items of merchandise the customer decides to keep, the sales associate has clearly earned his or her commission at the moment that the sales documents are completed and the customer takes possession of the purchased items."[792] The policy was unlawful under California law, the court concluded, because it effectively required sales associates to "repay a portion of commissions" on "completed sales" to compensate the employer for commissions paid on sales that other employees did not complete—amounts that would otherwise be a business loss that "the conscientious sales associate has done nothing to cause."

The *Neiman Marcus* court contrasted this practice with "identified returns, where the sale is reversed and the individual sales associate is required to return the commission because his or her sale was rescinded." While the court did not decide whether an

"identified returns" policy would necessarily be lawful, the DLSE has interpreted *Neiman Marcus* as allowing a chargeback of commissions paid to an employee for identified returns.[793]

7.6.4 Written contracts required for commission agreements

As of 2013, employers contracting for services within California and contemplating payment in the form of commissions must put the commission agreement in writing and describe how commissions are computed and paid.[794] Further, employers must give a signed copy of that agreement to each commissioned employee, and obtain a signed receipt from the employee.[795]

The statute defines "commission" for these purposes as "compensation paid to any person for services rendered in the sale of such employer's property or services and based proportionally upon the amount or value thereof."[796] But the following forms of pay do not qualify as "commissions":

(1) short-term productivity bonuses such as those paid to retail clerks;

(2) temporary, variable incentive payments that increase, but do not decrease, payment under the written contract, and

(3) bonus and profit-sharing plans, unless the employer offered to pay a fixed percentage of sales or profits as pay for work performed.

7.7 Bonuses

A bonus is money promised to an employee in addition to ordinary salary or wages. Unless a bonus plan expressly conditions payment upon continued employment, California bonuses are often treated as earned pro rata and payable, as wages, upon termination. Further, if an employee is prevented from earning a bonus by being dismissed without cause, then a California court likely would hold that the employee is entitled to a pro rata share of the bonus, on the theory that the employer has prevented the employee's performance needed to earn the bonus.[797] But if a written bonus plan clearly requires the employee to remain employed through a certain date, then an employer can deny the entire bonus when an employee resigns or is dismissed for good cause before that date.[798]

7.7.1 Bonuses affected by workers' compensation claims

Some employers base bonuses in part on how successfully the company has avoided workers' compensation costs. California Labor Code Section 3751, however, forbids an employer to deduct from employee earnings, either directly or indirectly, "to cover the whole or any part of the cost" of workers' compensation.[799] A 2003 California appellate court decision (*Ralphs I*) interpreted Section 3751 to mean that workers' compensation costs must be ignored in a profit-based bonus plan.[800] This ruling, had it remained in

effect, would have invalidated countless traditional profit-based bonus plans, including those for CEOs of large corporations.

But then, in 2007, the California Supreme Court overruled *Ralphs I* in a decision (*Ralphs II*) involving the same employer and the same bonus plan.[801] *Ralphs II* holds that traditional net-profits-based bonus systems are lawful, even though net profits necessarily reflect workers' compensation costs and other business losses. *Ralphs II* distinguished bonus or commission plans that first promise a payment and then reduce the promised payment to adjust for business losses. These plans, the court explained, unlawfully charge employees for the company's cost of doing business.[802] A profit-based plan, by contrast, does "not create an expectation or entitlement in a specified wage, then take deductions or contributions from that wage to reimburse [the employer] for its business costs." Rather, each employee receives, in addition to a guaranteed wage paid regardless of profit, a promised supplemental incentive compensation based on a profit to be calculated for a relevant period of operation. The bonus plan thus does not recapture or deduct from what the employer had originally promised,[803] but rather rewards employees' "cooperative and collective contributions" by giving them a portion of profits that the employer "would otherwise be entitled to retain itself."[804]

Notwithstanding the "reason and common sense" the court thus invoked, its opinion drew the support of just four of the seven justices. The three dissenters protested that the Labor Code must be read liberally in the California employee's favor: "Section 3751 prohibits the pass-through of workers' compensation costs in the broadest possible terms."[805] The dissenters insisted: "What [the employer] cannot do in constructing its formula is include factors the Legislature has decided should play no role in the calculation of employment compensation. Workers' compensation is such a factor."[806]

Profit-based bonuses in California are thus safe, for now, by a 4-3 majority of the Supreme Court.

7.7.2 Bonuses affected by cash and merchandise shortages

Where bonuses depend on net profits, which depend in turn on such items as theft and cash shortages, plaintiffs have claimed that the bonus calculation amounts to a deduction in violation of Section 8 of the wage orders. *Ralphs I* distinguished between nonexempt employees (covered by Section 8) and exempt employees (not covered by Section 8).[807] As to exempt employees, *Ralphs I* held that California employers lawfully may calculate bonuses using a formula that includes deductions for cash and merchandise shortages, because that calculation appropriately encourages exempt employees to manage the business to increase revenue while minimizing expenses. With regard to nonexempt employees, however, *Ralph I* held that the employer's profit-

based bonus calculation would unlawfully require them to bear the costs of management.

The California Supreme Court's *Ralphs II* decision, which overruled *Ralphs I* with respect to its interpretation of Labor Code Section 3751 (see § 7.7.1), also overruled *Ralphs I* with respect to its view that employers must not deduct cash and merchandise shortages in calculating profits for purposes of a profits-based bonus for nonexempt employees.[808] But *Ralphs II* was a hotly contested, 4-3 decision, and the three dissenting justices, while arguing that the employer unlawfully considered workers' compensation costs in its profits-based bonus plan, suggested that they would also find unlawful the "deduction of cash and merchandise shortages."[809]

7.7.3 Longevity bonuses involving restricted company stock

The California Supreme Court has upheld a voluntary employee incentive compensation plan that permitted employees to take shares of restricted company stock at a reduced price in lieu of receiving a portion of annual cash compensation.[810] The plan provided that the stock did not vest unless the employee was still employed on a specified date, and that the employee would forfeit the stock—and the portion of cash compensation that had been paid in the form of the restricted stock—if the employee quit or was dismissed for cause before the vesting date. An employee who took restricted stock and then quit before the vesting date sued to challenge the forfeiture provisions, arguing that they violated Labor Code requirements that employees be paid all earned, unpaid wages upon termination or resignation, and a Labor Code provision that prohibits agreements that purport to circumvent those requirements. The Supreme Court rejected the employee's challenge because, according to the terms of the incentive plan, there were no earned, unpaid wages remaining unpaid upon termination of employment. That is, the plan amounted to a longevity bonus, which the employee never earned because he quit before the relevant date.

Even in granting the employer a victory, however, the court found it necessary to opine that bonuses, commissions, and other incentive compensation may have to be paid out where the worker does not quit but is fired: "If the employee is discharged before completion of all of the terms of the bonus agreement, and there is not valid cause, based on conduct of the employee, for the discharge, the employee may be entitled to recover at least a pro-rata share of the promised bonus." For this proposition the court cited no law but rather to a DLSE Manual provision and a DLSE opinion letter. The court's gratuitous dictum did not address how it would interpret a longevity bonus plan that expressly requires continued employment to a given date, regardless of the reasons for the termination of employment, but the court's language strongly implies

that a California employer could not deny the bonus if the employer has dismissed the employee without cause.

7.7.4 Retroactive bonus overtime pay

Employers must pay overtime on non-discretionary bonuses paid to nonexempt employees. Federal law permits the employer to adopt any "reasonable and equitable method of allocation" of the bonus to the relevant workweeks, such as assuming that the employee earned an equal amount of bonus each hour of the relevant period and determining the resultant hourly increase by dividing the total bonus by the number of hours worked by the employee during the period for which it is paid. "The additional compensation due for the overtime workweeks in the period may then be computed by multiplying the total number of statutory overtime hours worked in each such workweek during the period by one-half this hourly increase,"[811] in recognition of the fact that the employee already has received the straight-time portion of the bonus.

California is different. The DLSE recognizes the appropriateness of the foregoing treatment for a production or formula bonus,[812] but takes a different attitude where the bonus is a flat sum, such as a payment of $300 for working through the end of a season. As to a flat-sum bonus, the DLSE thinks that the regular rate must be calculated as the bonus divided by non-overtime hours only, and that the rate is then multiplied by 1.5 or 2.0 (instead of 0.5 or 1.0) before being multiplied by the relevant overtime hours. The DLSE believes that this peculiar arithmetic is necessary to avoid encouraging the use of overtime.[813]

7.8 Vacation Pay

California differs from most states by treating accrued vacation, outside the context of a collective bargaining agreement, as a form of wages.[814] More specifically,

- earned vacation must not be forfeited,
- unused vacation pay must be paid on termination of employment, at the final rate of pay,
- vacation is deemed to be earned daily,
- "use it or lose it" policies are unenforceable, and
- "paid time off" is treated as vacation.

7.8.1 Vacation pay is a form of wages

An employer need not provide any paid vacation at all. But if it does, California treats the vacation as wages earned on a daily basis and not subject to any forfeiture and

requires that all earned, unused vacation be paid upon termination of employment at the final rate of pay, regardless of when the vacation was earned or whether the employee was eligible to use the vacation.[815] The basis for this peculiar doctrine is a California statute providing that "all vested vacation shall be paid to the [employee] at his final rate" and that no employer policy shall provide for "forfeiture of vested vacation time upon termination."[816] Because the right to be paid for the amount of vacation time offered by an employer constitutes deferred wages for services rendered, the employee is entitled to receive pay, at the time of termination, for the *pro rata* share earned during the time that the employee rendered services to the employer.

The statute also empowers the Labor Commissioner to "apply the principles of equity and fairness" "in the resolution of any dispute with regard to vested vacation time." Pursuant to this broad, vague mandate, the DLSE has promulgated interpretations that sometimes have appeared arbitrary and capricious to many employers.

The statute does not apply to vacation pay provided under a collective bargaining agreement.

7.8.2 Impermissible "use it or lose it" policies and permissible caps

Many employers provide that paid vacation time, if not used within a given time (such as a calendar year), is forfeited. You must "use it or lose it." Not so in California. Because California law deems vacation pay to be a form of wages that vests daily, it is not subject to forfeiture. Accordingly, "use it or lose it" vacation policies are not enforceable in California.[817]

Nonetheless, employers can approximate the same result with a "no further accrual" policy. That policy permissibly may provide that once employees accrue a particular number of vacation days ("a cap"), they no longer continue to earn vacation until they take vacation to reduce the accumulated number of unused vacation days below the cap.[818] The DLSE has opined, however, that the level of the "cap" must be reasonable. Bowing to reason, the DLSE has now withdrawn an opinion letter that arbitrarily required the cap to be 1.75 times the annual vacation accrual rate.[819]

7.8.3 Problems with denying vacation pay to short-term employees

Vacation pay is deemed to have been earned from the first day of employment if the vacation pay plan provides that an employee has earned a given amount of vacation pay (e.g., two weeks) upon completion of the first six months or one year of employment. Thus, if California employers want to avoid paying accrued vacation pay to short term terminated employees, then they must clearly provide that no vacation is earned for some specific initial period of time.[820] If an employer also wants to permit an

employee to take vacation immediately after that initial period, then it can arrange for the employee to take the vacation pay in the form of an advance against wages to be earned in the future, pursuant to a written agreement. But the DLSE has opined that California employers must not deduct from a final paycheck to recover for advanced, unearned vacation.[821]

7.8.4 "Personal time off" policies

Some employers have combined vacation and sick leave to create an overall benefit typically called "personal time off." This arrangement has administrative advantages, but enhances employer liability under California law. That is because PTO will be treated by the DLSE as simply vacation by another name, unless use of the PTO is conditioned upon a specific event, such as illness, an anniversary date, or a holiday. (A PTO arrangement also has "kin care" implications, see § 2.10.)

7.8.5 Sabbaticals

Some employers seek competitive advantage by providing a sabbatical, a paid leave to promote retention and increase productivity upon the employees' return to work. An employer thus might entitle employees to an eight-week paid leave—in addition to regular vacation—once they complete seven years of service. The DLSE acknowledges that a true sabbatical is not subject to the anti-forfeiture rules that protect regular vacation. But the DLSE insists that a "sabbatical" is really just extra vacation unless the leave (a) is awarded in addition to earned vacation, (b) occurs only after lengthy employment (such as seven years), (c) is granted for an extended period longer than the normal vacation, and (d) is provided only to high level managers and advanced professionals.[822]

One Court of Appeal decision, *Paton v. Advanced Micro Devices, Inc.*,[823] rejected the DLSE's arbitrary view that true sabbaticals are offered only to high-level or professional employees,[824] but the *Paton* court generally adopted the DLSE's approach and declined to define a clear set of rules on which employers could rely to ensure that the sabbaticals they grant will not be mistaken for vacation.[825]

The trial court in *Paton* had granted summary judgment to an employer sued by 1,432 former salaried employees who claimed that the employer's failure to pay them for unused sabbatical leaves amounted to an unlawful forfeiture of vested vacation pay. The leaves—available for eight weeks once an employee reached seven years of employment—were in addition to regular vacation. The Court of Appeal distinguished regular vacation—deferred compensation typically earned in proportion to the length of employment—with a true sabbatical, which the court defined as a leave "designed to … provide incentive for experienced employees to continue with and improve their

service to the employer."[826] The court reversed the summary judgment for the employer, reasoning that because the employer imposed no condition on how employees used their sabbaticals, a reasonable jury could find that the sabbatical was really just extra vacation for long-term employees.[827]

The *Paton* court declined to apply a definitive test that would distinguish a sabbatical from a regular vacation. Rather, the court announced a four-factor test, applied on a case-by-case basis, to determine if a particular form of unconditional leave qualifies as a true sabbatical: (1) whether the leave is granted infrequently (e.g., every seven years), (2) whether the length of the leave is adequate to achieve the employer's purpose (an unconditional leave should be longer than regular vacation), (3) whether (as always must be the case) the sabbatical is granted in addition to the average vacation given in the relevant labor market, and (4) whether the employee is expected to return to work once the leave ends.[828]

7.8.6 ERISA preemption

Some employers have sought to avoid California vacation law by funding vacation pay through an ERISA plan.[829]

7.8.7 Claims for vacation pay do not accrue until termination

The DLSE, in an unusually pro-employer opinion letter, once decided that the time for an employee to claim vacation pay begins to accrue when the vacation pay is earned. Employers that had used improper "use it or lose it" vacation plans could at least limit their liability to long-term employees by disregarding vacation pay earned beyond the statutory limitations period. But the Court of Appeal then held that a claim for unused vested vacation pay accrues only upon termination of employment, not before, regardless of when the vacation pay was earned.[830] An employee suing for unpaid vacation pay at the end of employment thus can rely on vacation earned at any time during the employment.

The Court of Appeal has recognized that Labor Code Section 227.3—the basis for California's peculiar rule that employers must pay accrued, unused vacation to nonunion employees at the *termination* of their employment—does *not* require payment of vacation benefits at an employee's regular rate of pay *during* employment. The Court of Appeal thus affirmed the dismissal of a claim by employees complaining that they received vacation pay during their employment in flat sums of $500 or so per week instead of receiving their (higher) regular rate of weekly pay.[831]

7.9 Tips

In America generally, employers may use a "tip credit" by which they can count the amount of tips that customers leave for employees toward payment of the employee's minimum wage: federal law and many state laws permit an employer to pay a tipped employee a sub-minimum base wage as low as one-half the minimum wage, provided that the amount of tips brings the actual wage up to the minimum wage.[832]

California is different. Employers of California service employees encounter a triple whammy. *First*, the state minimum wage is considerably higher than the federal minimum wage (see § 7.1.4). *Second*, the tip credit permitted by federal law is forbidden under California law: every gratuity becomes the sole property of the employee to whom it is paid, regardless of the base rate of pay, which means that the employee must receive at least the minimum hourly wage without regard to how many tips the employee receives.[833] *Third*, certain limitations apply to any "tip pooling" scheme.[834] For example, tips from the pool must not go to any "agent" of the employer.[835]

As to tips paid by credit card, California employers must pay the employee the full amount of the gratuity indicated by the customer on the credit card slip, without deducting for any processing fees, and must pay the gratuity to the employee no later than the next regular payday following the date the patron authorized the credit card payment.[836]

The California Supreme Court has held that there is not a private right of action for employees to challenge a violation of the Labor Code Section that prohibits employers from taking any tip that a patron pays to or leaves for an employee.[837]

7.10 Criminal Penalties

California employers face misdemeanor penalties for willful violation of many Labor Code provisions.[838] Criminal penalties can apply even for neglecting to comply with certain provisions of the Labor Code or with any order or ruling of the Industrial Welfare Commission.[839]

7.11 Civil Penalties

The Labor Code subjects employers to enormous civil penalties for violations of the Labor Code or the IWC wage orders.[840] The California Legislature, believing that existing civil penalties were too small, enacted the Labor Code Private Attorneys General Act of 2004 (PAGA). PAGA amended certain Labor Code provisions, including Sections 210, 225.5, and 1197.1, to double the existing per-employee, per-pay-period civil penalties from $50 for a first violation and $100 for further violations to $100 for a first violation and $200 for further violations, and created new penalties as well (see below). Charted below are some commonly

applicable Labor Code provisions, together with common Wage Order provisions, and the associated civil penalties.

"LC 210" refers to civil penalties imposed by Section 210 for certain wage payment violations—$100 per employee for the first violation, $200 per employee for each later violation or for willful or intentional violation, plus 25% of the amount unlawfully withheld.

"LC 225.5" refers to civil penalties imposed by Section 225.5 for certain additional wage payment violations—$100 per employee for first violation, $200 per employee for each later violation or for willful or intentional violation, plus 25% of the amount unlawfully withheld.

"LC 558" refers to civil penalties imposed by Section 558 for violations of certain Labor Code provisions and Wage Order provisions regulating hours and days of work—$50 for each "underpaid employee" for each pay period of underpayment for the first violation, $100 per underpaid employee for each further violation.

"LC 1197.1" refers to civil penalties imposed under Section 1197.1 for failure to pay minimum wage—$100 per underpaid employee per pay period for the first intentional violation and $250 per underpaid employee per pay period (regardless of intent) for each further occurrence of the "same specific offense." These penalties are "in addition to an amount sufficient [for an employee] to recover underpaid wages and liquidated damages pursuant to Section 1194.2."[841]

"LC 2699" refers to the likelihood that the PAGA has created a new penalty for violation of the provision in question, in the amount of $100 per employee per pay period for the first violation and $200 per employee per pay period for each further violation.[842]

We group Labor Code provisions, for ease of reference, into these categories:

- provisions forbidding certain conditions of employment (§ 7.11.1 below),
- provisions forbidding certain employer inquiries or surveillance (§ 7.11.2 below)
- provisions governing hiring employees (§ 7.11.3 below),
- provisions governing paying wages to employees (§ 7.11.4 below),
- provisions governing paying benefits to employees (§ 7.11.5 below),
- provisions governing indemnification of employees (§ 7.11.6 below),
- provisions governing disclosure of information to employees (§ 7.11.7 below),
- provisions governing scheduling employees (§ 7.11.8 below),
- provisions governing accommodating employees (§ 7.11.9 below),

- provisions governing respecting protected activities of employees (§ 7.11.10 below),
- provisions governing safety conditions of employees (§ 7.11.11 below),
- provisions governing termination of employment (§ 7.11.12 below),
- provisions governing labor organizations (§ 7.11.13 below),
- provisions governing minor status of employees (§ 7.11.14 below), and
- miscellaneous provisions (§ 7.11.15 below).

7.11.1 Impermissible conditions of employment

LC §	Description	Civil Penalty
226.8	**Willful misclassification as independent contractor.** Employers must not willfully misclassify workers as independent contractors or impose deductions or charges on such employees that would be unlawful to impose on employees.	**$5,000 to $25,000**
407	**Illegal Consideration to Secure Employment**. Employers must not condition employment on investment in or purchase of stock in business.	**LC 2699**
432.2	**Polygraph and Similar Tests**. Employers must not require applicants or employees to take polygraph, lie detector, or similar tests or examinations as a condition of employment. Any "request" that employees take the test must be accompanied by written notice of this code section.	**LC 2699**
432.5	**Forcing Written Agreement to Illegal Terms of Employment**. Employers must not require applicants or employees to agree to any term or condition of employment that the employer knows to be unlawful.	**LC 2699**
450	**No Coercion to Patronize Employer**. Employers must not require employees to patronize the employer or other person in purchases of things of value, such as equipment, or supplies. Employers must not charge employees to submit employment applications.	**LC 2699**
1051	**Employee Photos and Fingerprints**. Employers commit a misdemeanor if they require employees or applicants to be fingerprinted or photographed if employer intends to give fingerprints or photos to third person, to possible detriment of employee, or if they fail to take all reasonable steps to prevent such a violation.	**LC 1054:** treble damages; **LC 2699?**

7.11.2 Employer inquiries or surveillance

LC §	Description	Civil Penalty
432.7	**No Inquiries Regarding Arrest That Does Not Lead to Conviction**.[843] Employers must not ask employees or applicants about arrests or detentions that have not led to conviction. Employers must not ask about or use information about participation in diversion programs. Employers must not ask about a conviction that has been judicially dismissed or ordered sealed pursuant to law. Employers must not seek, or use as a factor in determining any condition of employment, information regarding participation in diversion programs or arrests or detentions, unless the arrest led to conviction. Employers may ask employees/applicants about arrests pending trial, but must not rely on it for any adverse employment decision unless it results in a conviction. ***Exceptions:*** an employer is not prohibited from asking an applicant about the information above if (1) the employer is required by law to obtain information regarding conviction of an applicant, (2) the applicant would be required to possess or use a firearm in the course of employment, (3) an individual who has been convicted of a crime is prohibited by law from holding the position sought, regardless of whether that conviction was expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation, and (4) the employer is prohibited by law from hiring an applicant who has been convicted of a crime. In addition, health care employers defined in Section 1250 of the H&S Code may ask certain applicants about arrests under any section specified in Penal Code § 290 and H&S Code § 11590.	**LC 2699**
432.8	**No Inquiries Regarding Marijuana Arrests Over Two Years Old**. Employers must not ask employees or applicants to disclose misdemeanor marijuana arrests or convictions that are over two years old, or consider those arrests or convictions in making employment decisions.	**LC 2699**
435	**No Audio or Video Recording in Private Areas**. Employers must not record by audiotape or videotape any activity in locker rooms, restrooms, or any other area where employees change clothes.	**LC 2699**

7.11.3 Hiring

LC §	Description	Civil Penalty
970	**Misrepresentation of Employment Conditions to Induce Employee Move**. Employers must not induce employees to move from one location to another by misrepresenting the kind, character, length of work, housing conditions	**LC 970**: double damages; **LC 2699?**

LC §	Description	Civil Penalty
	surrounding work, or existence or non-existence of labor disputes.	
973	**Notice of Strike in Employment Advertisements**. Employers must include notice in any job advertisement of any strike, lockout, or trade dispute. The ad must also identify the person placing the ad and anyone he represents in placing the ad.	**LC 2699**
976	**No Willful Misleading Regarding Compensation or Commissions**. Employers must not willfully mislead or falsely represent an employee or applicant regarding compensation or commissions that may be earned.	**LC 2699**
1021	**Hiring Unlicensed Workers by One Without State Contractor's License**. Employer incurs a civil penalty if they lacks a valid contractor's license and employ a worker to perform services for which such a license is required.	$200 per employee per day
1021.5	**Hiring Unlicensed Independent Contractor by One Holding State Contractor's License**. Employers who hold valid contractor's license incur civil penalties by hiring as an independent contractor, for services requiring a license, someone who cannot establish independent contractor status or who lacks a license.	Same as above

7.11.4 Paying wages (pre-termination)

LC §	Description	Penalty
203.1	**Bad Check.** If an employer's final paycheck bounces, then the employee can recover penalties of up to 30 days of continuing wages and fringe benefits. (The title of this section refers to the building and construction industries, but the language of the statutory provision is not so limited.)	**203.1**
204	**Paydays.** Employers must pay nonexempt employees at least semi-monthly on designated paydays, paying, for work done between 1st and 15th, no later than 26th, and paying, for work done between 16th and end of month, no later than 10th of next month. Employers must pay all overtime wages no later than payday for next regular payroll period. (Employees covered by collective bargaining agreement with different pay arrangements are subject to CBA.) Employers satisfy these requirements by paying wages for weekly, biweekly, or semimonthly payrolls not more than seven days following the close of the payroll period. Employers may make monthly payments to salaried executive, administrative, and professional employees by 26th if entire month's salary, including unearned portion, is then paid. **Exception:** Per Section 204c, exempt employees may be paid monthly for all work within seven days of the close of	**LC 210**

LC §	Description	Penalty
	their monthly payroll period.	
204b	**Weekly Paid Employees.** Employers must pay weekly paid employees by the next weekly payday for work done in a week on or before a payday, and by seven days after the next weekly payday for work done in a week after the payday for that week.	**LC 210**
204.2	**Nonexempt Salaried Executive, Administrative, Professional Employees.** Salaries earned for labor performed in excess of 40 hours in calendar week are due by 26th day of next calendar month, unless employees are covered by a CBA that provides different pay arrangements.	**LC 210**
204.3	**Comp Time Off.** Employers can provide comp time off in lieu of overtime pay to nonexempt employees at same rate employee would have earned overtime pay if (1) written agreement is in place before work is performed, (2) employee has not accrued comp time > 240 hours, (3) employee written to request comp time in lieu of overtime, and (4) employee is scheduled to work no less than 40 hours in a workweek. Any comp time must be paid at employee's rate of pay at time of payment. At termination, comp time must be paid at higher of (i) current pay rate or (ii) average pay rate over prior three years. Employees shall be permitted to use comp time within "reasonable time" of request to use it, if it does not unduly interrupt operations. Reasonable time is determined by (A) normal work schedule, (B) anticipated peak workloads based on past experience, (C) emergency requirements for staff and services, and (D) availability of qualified substitute staff. Upon request, employers shall pay overtime pay in cash in lieu of comp time off for any comp time that has accrued for at least two pay periods.	**LC 2699**
206	**Payments Where There Is a Dispute.** Employers must timely pay all wages conceded to be due. Employers who dispute portion of employees claim must pay undisputed portion. If Labor Commissioner finds employee claim valid, then employer must pay balance within ten days of notice of finding, or risk treble damages for willful failure to pay.	**LC 2699** (except where treble damages apply?)
206.5	**Release of Unpaid Wages Void.** Employers must "not require the execution of a release of a claim or right on account of wages due, or to become due, or made as an advance on wages to be earned, unless payment of those wages has been made." Any release so executed is void. By a 2008 amendment, "execution of a release" includes requiring an employee, as a condition of being paid, to execute a statement of the hours … worked during a pay period which the employer knows to be false."	**LC 2699**

LC §	Description	Penalty
207	**Notice of Paydays.** Employers must post notices of regular time and place of payment.	**LC 2699**
208	**Payment at Separation.** Employers must pay discharged employees at place of discharge. Employer must pay quitting employee at office of employer in county where employee worked.	**LC 2699**
209	**Payment of Striking Employees.** Employer must pay striking employee all unpaid wages on the next regular payday, and must return all employee deposits.	**LC 2699**
212(a)	**Payment by Check or Cash.** Employers must pay wages in negotiable instruments (checks) or cash, and maintain sufficient funds to cover the check for at least 30 days. Coupons redeemable in goods or services are not legal payment.	**LC 225.5**
213(d)	**Direct Deposit.** Employers may deposit wages in a bank account of the employee's choice with voluntary authorization, including timely termination wages.	**LC 2699?**
216	**Falsely Denying Wages Due.** Employers commit misdemeanor if they willfully refuse to pay, after demand is made, wages due that they have the ability to pay, or if they falsely deny the amount or validity of a wage demand, with an intent to secure a discount, or with the intent to harass or delay or defraud.	**LC 225.5**
219	**No Contracting Around These Rules.** Employers must not circumvent wage rules by private agreement.	**LC 2699?**
221	**No Kickbacks.** Employers must not collect or receive from employees any part of wages paid by employer to employee.	**LC 225.5**
222	**Withholding Prohibited.** Employers must not withhold any portion of agreed-upon wages unless authorized by law (such as taxes) or by employee (See sec. 224).	**LC 225.5**
222.5	**Withholding for Medical/Physical Exams Prohibited.** Employers must pay for any required medical examination.	**LC 2699**
223	**No Secret Payment Below Scale.** Employers must not secretly pay lower wage while purporting to pay wages required by statute or contract.	**LC 225.5**

LC §	Description	Penalty
240-243	**Failing to Pay Wages Adjudged Due Under Sections 200-234.** Employers who fail to timely pay wages adjudged to be due are subject to bond requirements and injunctions. Sanctions increase for multiple violations within 10-year period.	**LC 2699**
300	**Limits on Wage Assignments.** No wage assignment is valid unless it meets specific requirements of Section 300, including signed written statement specifying transaction for which assignment occurs, spousal consent, notarization, maximum 50% of wages assigned. An assignment is revocable at any time.	**LC 2699**
351	**Ownership of Gratuities (tip pooling).** Employers must not take any portion of gratuities left for employees. No deductions allowed for cost to process tips left on credit card. Credit card tips must be paid next regular payday.	**LC 2699**
353	**Record of Gratuities.** Employers must record gratuities received either from employees or indirectly by wage deductions.	**LC 2699**
356	**Not Contracting Around Gratuity Laws.** Employers must not attempt to circumvent the gratuity laws with private agreements.	**LC 2699**
510	**Daily, Weekly, Seventh-Day Overtime.** Employers must pay nonexempt employees 1.5 times the regular rate for > eight hours per workday, 40 hours per workweek, or eight hours on seventh consecutive day of work in workweek. Employers must pay double time for work > 12 hours in workday or eight hours on seventh consecutive workday. Employers must pay for all time, including travel time, spent from first place where employers require employee's presence. Employers need not pay overtime rates to employees if CBA covers wages, hours of work, and working conditions, provides premium rate for overtime, and imposes regular wage of at least 1.3 times minimum.	**LC 558**

LC §	Description	Penalty
511	**Alternative Workweek.** Employers may adopt four-day ten-hour regular workweek without paying daily overtime after eight, if two-thirds of employees so choose in secret ballot election subject to strict specific procedures. Any work over 40 hours in week, or over regularly scheduled hours in an alternative workday up to 12 hours, must be paid at 1.5 times the employee's regular rate. Hours over 12 in a workday and after eight hours on a day that the employee is not normally scheduled to work must be paid at double time. Employers must make reasonable effort to accommodate those who cannot work more than eight hours per day. ***Exception:*** Where CBA covers wages, hours of work, and working conditions, and provides premium wage rates for overtime and a regular hourly rate of not less than 30 percent more than the state minimum wage.	**LC 558**
513	**Makeup Work Time.** Employers may approve written employee requests to make up lost time at straight time rates, provided request is not solicited by employer and employee does not work more than 11 hours in any workday or 40 hours in workweek. Each incident makeup work must be requested by employee and reduced to written agreement. Managers must not encourage employees to request to make up work time.	**LC 558**
1194.2	**Liquidated Damages for Failure to Pay Minimum Wage.**[844] Employees can recover liquidated damages in an amount equal to the wages unlawfully unpaid.	**LC 1194.2**
1197-1197.1	**No Payment of Less Than Minimum Wage Fixed by IWC.**[845] Employers must not pay less than the minimum wage fixed by the IWC. Penalties for an intentional first violation are $100 per employee per pay period, and penalties for a further violation, whether or not the first was intentional, are $250 per employee per pay period.	**LC 1197.1**
1197.5	**No Gender-Based Wage Discrimination.** Employers must not pay less for equal work because of gender. Employers must maintain (for at least two years) records regarding wages, job classifications, and other terms and conditions of employment.	**LC 2699**

7.11.5 Paying benefits

LC §	Description	Penalty
227	**Failure to Make Benefits Payments.**[846] Employers must not fail to remit to the appropriate state agency withholdings from an employee's wages that were made pursuant to state, local, or federal law. Employers must not willfully fail to make benefits payments under terms of health or welfare fund, pension fund or vacation plan, other employee benefit plan, negotiated industrial promotion fund, or CBA.	**LC 2699**
233	**Kin Care Leave.** Employers who have a sick leave policy must permit employees to use one-half of annual sick leave accrual to attend to employees' sick children, parents, spouses, domestic partners, and sick child of domestic partners.	**LC 2699**
2800.2	**Notification of Cal-COBRA and COBRA.** Employers must give Cal-COBRA notices (which can include notice to former employee spouses and former spouses).	**LC 2699**
2803.4	**Medical Eligibility Not an Exception to ERISA Health Benefits.** Employers must not reduce or deny ERISA health plan benefits because of Medi-Cal or Medicaid eligibility.	**LC 2699**
2803.5	**Compliance With Laws Regarding Health Coverage for Children of Employees.** All employers must comply with laws regarding health benefits for employees' children.	**LC 2699**
2806	**15 Days' Notice to Cancel Health Benefits.** Employers must give 15-days' notice of plans to discontinue offer of non-ERISA health benefits.	**LC 2699**
2807	**HIPP Notice.** Employers must give employees standardized written description of California Health Insurance Premium Program.	**LC 2699**
2808	**Explanation of Benefits.** Employers must explain all health coverages they offer. Employers must give notice to terminated employees of all continuation, disability extension, and conversion coverage options under any employer-sponsored coverage for which the employee may remain eligible after employment.	**LC 2699**
2809	**Explanation of Employer-Managed Deferred Compensation Plan.** Employers who offer employer-managed deferred compensation plans must notify employees in writing of financial risks, and must (by itself or through plan manager) provide quarterly reports of financial condition of employer and financial performance.	**LC 2699**

7.11.6 Indemnification

LC §	Description	Penalty
231	**Employer Must Pay for Driver's License Physical.** Employers that require driver's license of employees must pay cost of any required physical examination, except where examination was taken before employee applied for employment.	**LC 2699**
401	**Payment for Bonds or Photos.** If employer requires a photograph or bond of an employee, then employer must bear the cost.	**LC 2699**
402-403	**Employer Acceptance of Cash Bonds.** Employers must not require cash bonds unless employee/applicant is entrusted with property of equal value or employer regularly advances goods to employee. All cash bonds require written agreement, deposit in bank account, and withdrawal only by signature of both employer and employee/applicant. When employee/applicant returns the money or property and fulfills agreement, employer must immediately return the bond money, with interest.	**LC 2699**
405	**Use of Property Put Up as Bond.** Employer must not use employee property for any purpose other than liquidating accounts. Employer must hold property in trust and not mingle it with other property. No contract shall abrogate this section.	**LC 2699**
406	**All Property Is a Bond.** Any property employee/applicant puts up as part of employment contract is deemed to be put up as a bond, regardless of wording of contract.	**LC 2699**
2800	**Indemnification.** Employers must indemnify employees for any loss caused by the employer's "want of due care."	**LC 2699**
2802	**Indemnification for Necessary Expenditures.** Employers must indemnify employees for necessary expenditures or losses incurred by employees in direct consequence of discharge of duties, or of obedience to employer directions, even though unlawful, unless employee, when obeying directions, thought them unlawful.	**LC 2699**

7.11.7 Disclosing information

LC §	Description	Penalty
226(a)	**Itemized Wage Statements.**[847] Employers must provide with each wage payment an itemized statement showing (1) gross wages earned, (2) total hours worked by the employee, except for exempt employees paid solely by salary, (3) the number of piece-rate units earned and any applicable piece rate if employee is paid on piece-rate basis, (4) all deductions, provided, that all deductions made on written orders of employee may be aggregated and shown as one item, (5) net wages earned, (6) inclusive dates of period for which the employee is paid, (7) name and social security number of employee, (8) name and address of legal entity that is the employer, and (9) all hourly rates in effect during the pay period and the number of hours worked at each hourly rate. The employer must maintain a copy of the statement and the record of deductions for at least three years at the place of employment or at a central location within California, although a copy can take the form of a computer-generated record that shows all of the information required. Temporary services employers must record the rate of pay and total hours worked for each temporary services assignment.	**LC 226.3:** $250 per employee in initial citation, $1,000 for later citations; **LC 226(e):** "actual damages" or $50 per employee per pay period for knowing, intentional violation, $100 for each further violation, to $4,000 maximum
226(b) & (c)	**Request to Review Payroll Records.**[848] Employer that must keep Section 226(a) data must let afford current and former employees inspect or copy records pertaining to the employee, upon reasonable request. Employers may take reasonable steps to assure employee's identity. Employer who provides copies may charge employee the actual cost of reproduction. Employers who receive a request to inspect or copy records must comply within 21 calendar days of the request.	**LC 226(f):** $750, to employee or to DLSE
227.5	**Annual Benefits Statement.** Employers must give annual statements, upon written request, to employees covered by employer-funded health or welfare funds, pension funds, vacation plans, or other employee benefits plans.	**LC 2699**
432	**Copies of Documents Signed by Employee.** Employers must provide, on request, a copy of any document that an employee or applicant has signed to obtain or hold employment.	**LC 2699**

LC §	Description	Penalty
1174	**Employer Obligations to Provide Information to IWC and DLSE.** Employers must comply with all IWC information requests, must allow IWC or DLSE free access to sites to investigate and inspect employment records, must record names and addresses of all employees and the ages of all minors, and must keep at a central California location, or at establishments where employees work, payroll records (for not less than two years) showing daily hours worked and wages paid.	**LC 1174.5:** $500
1198.5	**Employee Right to Inspect Personnel Records.**[849] Employers must, upon written request and at reasonable intervals and times, provide a copy or and make available for inspection the personnel records that relate to a current or former employee's performance or to any grievance concerning the employee. The employer must comply within 30 calendar days of receiving a written request, unless the employer and employee, or the employee's representative, agree to a date up to 35 calendar days after the employer receives a written request. Employers need not make records available when the employee is required to render service to the employer, if the requester is the employee. As to current employees, employers must make personnel records available where the employee reports to work or at another location agreeable to the requester, with no loss to the employee if he or she is the requester. As to former employees, employers must make personnel records available where it stores the records, unless the parties agree in writing to a different location. Employers must maintain a copy of personnel records for at least three years after employment. **Exceptions:** Employers need not disclose (1) records relating to investigation of possible crime, (2) letters of reference, and (3) records that were (A) obtained before employment, (B) prepared by identifiable examination committee members, or (C) obtained for a promotional examination.	**LC 2699**

LC §	Description	Penalty
2751	California employers paying commissions must put the commission arrangement in a written contract and give the employee a signed copy.	**uncertain**
2810	**Retention of contractors.**[850] A California business that retains certain contractors can be liable to the contractor's employees for Labor Code violations if the business knew or should have known that the relevant agreement did not include enough money to the permit contractor to satisfy all applicable federal, state, and local labor laws.	**uncertain**
2810.5	**"Wage Theft" Act notice.**[851] California employers must notify employees, at the time of hire, of (1) the employee's rate or rates of pay and the basis thereof (e.g., hourly, salary, commission, etc.), including any applicable overtime rates, (2) allowances, if any, claimed as part of the minimum wage, including meal or lodging allowances, (3) the regular payday designated by the employer, (4) the name, address, and telephone number of the employer, including any "doing business as" names used by the employer, (5) the name, address, and telephone number of the employer's worker's compensation insurance carrier, and (6) any other information the Labor Commissioner deems "material and necessary."	**N/a notice statutes. LC 2699(g)(2).**
2930	**Shopping Investigator.** Employers who base discipline or dismissal on shopper's report by outside agency must give employee, before imposing discipline or dismissal and before concluding an interview that might result in discipline or dismissal, a copy of the report.	**LC 2699**
3550	**Workers' Compensation Posting.** Employers must post, where it may be easily read by employees during the workday, a notice with the information specified in this section.	**LC 6431:** up to $7,000 per violation.
3551	**Workers' Compensation Notice to New Hires.** Employers must give new hires, by end of first pay period, information contained in workers' compensation posting.	**LC 2699**
3553	**Workers' Compensation Notice to Employee Victims of Crime.** Employers must tell workplace crime victims they are eligible for workers' compensation for resulting injuries, including psychiatric injuries. This notice must be either personal or by first-class mail, within one working day of the workplace crime, or within one working day of when employer reasonably should have known of crime.	**LC 2699**

7.11.8 Scheduling

LC §	Description	Penalty
226.7	**Meal/Rest/Recovery Periods.**[852] Employers must not require employees to work during any meal or rest or recovery period mandated by state law and must pay employees "one additional hour of pay at the … regular rate … for each work day that the meal or rest or recovery period is not provided." **Exception:** Exempt employees are exempt from the requirements	One hour of pay, considered a wage **LC 2699?**
512	**Mandatory Meal Period.** Employers must provide a 30-minute meal period if employee works more than five hours, though parties can waive meal period where total work period does not exceed six hours. Employers must provide second meal period if employee works more than ten hours, though parties can waive second meal period by written agreement where total work period does not exceed 12 hours.	**LC 226.7** **LC 558**
551, 552	**One Day of Rest in Seven.** Employers must not cause employees to work more than six of seven days. Days of rest may be accumulated throughout the month if all rest days are given in the month. ***Exceptions*** (Sections 554, 556): emergencies, work to protect life or property from loss, certain railroad-related work, certain agricultural work, employees who work less than six hours daily or 30 hours weekly.	**LC 2699?** (already covered in part by wage order § 3(f))
850-854	**Pharmacy Workers.** Employees who sell drugs or medicine at retail or who compound physician's prescriptions must not work more than nine hours per day, or for more than 108 hours in any two consecutive weeks or for more than 12 days in any two consecutive weeks. Except on Sundays and holidays, and a meal period (not more than one hour), the hours of work permitted per day by this chapter shall be consecutive. ***Exceptions:*** hospitals employing one person to compound prescriptions; "emergencies" that involve accident, death, sickness or epidemic.	**LC 2699**

7.11.9 Accommodating employees

LC §	Description	Penalty
230(a)	**Jury Duty Leave.** Employers must not discharge or discriminate against employees for taking time off for jury service, after giving reasonable notice, and must permit employees on such leave to use otherwise available vacation, personal leave, or compensatory time off, unless otherwise provided by a CBA. The entitlement of any employee under this section shall not be diminished by any CBA.	**LC 2699**
230(b)	**Witness Duty Leave.** Employers must not discharge or discriminate or retaliate against employees for taking time off to testify under subpoena, and must permit employees on such leave to use otherwise available vacation, personal leave, or compensatory time off, unless otherwise provided by CBA No employee entitlement under this section shall be diminished by any CBA.	**LC 2699**
230(c)	**Domestic Violence/Sexual Assault/Stalking Leave.**[853] Employers must not discharge or discriminate or retaliate against victims of domestic violence, sexual assault, or stalking for taking time off from work to seek relief to help ensure health, safety, or welfare of victim or victim's child, and must permit employees on such leave to use otherwise available vacation, personal leave, or compensatory time off, unless otherwise provided by CBA. Where possible, employees must give reasonable advance notice. Employers must not take action on basis of unscheduled absence if employee completes certification as set forth in Section 230(d)(2)(A)-(C). Employers must engage in the interactive process and provide reasonable accommodations for victims of domestic violence, sexual assault, or stalking who request an accommodation for safety while at work. Employers must maintain confidentiality of employees who request leave, to extent required by law. No employee entitlement under this section shall be diminished by any CBA.	**LC 2699**

LC §	Description	Penalty
230.1	**Additional Rights for Victims of Domestic Violence / Sexual Assault/Stalking.**[854] Employers with 25+ employees must not discharge or discriminate or retaliate against victims of domestic violence, sexual assault, or stalking for taking time off from work to (1) seek medical attention for injuries caused by domestic violence, sexual assault, or stalking, (2) obtain services from domestic violence shelter, program, or rape crisis center as a result of domestic violence or sexual assault, (3) obtain psychological counseling related to an experience of domestic violence, sexual assault, or stalking, (4) participate in safety planning and take other actions to increase safety from future domestic violence, sexual assault, or stalking, and must permit employees on such leave to use otherwise available vacation, personal leave, or compensatory time off, unless otherwise provided by CBA. Although employees must give reasonable advance notice where possible, employers must not take action on basis of unscheduled absence if employee completes certification as set forth in Section 230(d)(2)(A)-(C). Employers must maintain confidentiality of employees who request leave, to the extent required by law. No employee entitlement under this section shall be diminished by any CBA. This section does not create employee rights to unpaid leave exceeding that permitted by the federal Family and Medical Leave Act	**LC 2699**
230.2	**Crime Victim Leave.** Employers must permit a crime victim, and a crime victim's immediate family member, registered domestic partner, or child of registered domestic partner, to leave work to attend judicial proceedings related to the crime, and must permit employees on the leave to use otherwise available vacation, personal leave, or compensatory time off. Employers must keep the reason for this leave confidential. Employers must not discriminate against employees for taking the leave.	**LC 2699**
230.3	**Volunteer Leave.** Employer must not discharge or discriminate against employees for taking time off to perform emergency duty as a volunteer firefighter, a reserve peace officer, or emergency rescue personnel. ***Exception:*** employers that are public safety agencies or providers of emergency medical services, where employer determines the employee's absence hinder public safety or emergency medical services.	**LC 2699**
230.4	**Training Leave for Fire, Law Enforcement, and Emergency Rescue Personnel.**[855] Employers with 50+ employees must provide leaves (two weeks per calendar year) for fire, law enforcement, or emergency personnel training.	**LC 2699**

LC §	Description	Penalty
230.5	**Victim of Specified Offenses Leave.** Effective January 1, 2014, employers must not discharge or discriminate or retaliate against victims of specified offenses for taking time off from work to appear in court to be heard at any proceeding in which a right of the victim is at issue. Specified offenses include vehicular manslaughter while intoxicated, felony child abuse likely to produce great bodily harm or a death, assault resulting in the death of a child under eight years of age, felony domestic violence, felony physical abuse of an elder or dependent adult, felony stalking, solicitation for murder, "serious felony," hit-and-run causing death or injury, felony driving under the influence causing injury, and sexual assault. The employee must give reasonable advance notice, unless not reasonable.	**LC 2699**
230.7	**School Discipline Leave for Parents.** Employers must not discriminate against parents or guardians who take time off for school appearance under Education Code § 48900.1 (child suspended), upon reasonable notice of the appearance.	**LC 2699**
230.8	**School Activities Leave.** Employers must not discriminate against parents, guardians, or grandparents with custody of K-12 children, for attending licensed child day care facility, for taking off up to 40 hours each year, not exceeding eight hours per calendar month, to participate in activities of school or licensed child day care facility of employee's children, upon reasonable notice of absence, and must permit use of existing vacation, personal leave, or compensatory time off for this absence (unless it is vacation period that all eligible employees take at same time every year), unless otherwise provided by CBA entered into before January 1, 1995, and in effect on that date. If both parents work for same employer, only the first to ask is entitled to leave. No CBA may diminish an entitlement under this section.	treble lost wages & work benefits for willful refusal to rehire, promote, or restore employee eligible for rehire or promotion **+LC 2699?**
233	**Kin Care Leave.** Employers who have a sick leave policy must permit employees to use one-half of annual sick leave accrual to attend to employees' sick children, parents, spouses, domestic partners, and sick child of domestic partners.	**LC 2699**

LC §	Description	Penalty
1025	**Accommodation of Employee Attending Drug or Alcohol Rehab.** Employers with 25+ employees must accommodate those who voluntarily enter drug or alcohol rehabilitation, if accommodation does not impose "undue hardship" on employer, though employers can deny employment to those whose current use of alcohol or drugs renders them unable to perform job duties, or to perform them in manner that would not endanger health or safety of individual or others.	**LC 2699**
1027	**Accrued Sick Time for Rehabilitation.** Employers must allow employees to use their accrued sick leave while attending an alcohol or drug rehabilitation program.	**LC 2699**
1030-1031	**Lactation Accommodation.** Employers must provide break time for employees to express milk for their babies, concurrent with otherwise allowable break time, where possible. The private location provided must not be a toilet stall or other bathroom station, and must be close to the employee's workstation, if employee lacks own office with locking door.	$100 penalty per violation
1041-1044	**Literacy Accommodation.** Employers with 25+ employees must reasonably accommodate employees with personal literacy problems who seek assistance, absent unreasonable hardship. Employer must provide information about literacy programs, but need not give paid leave for literacy training. Employers must take reasonable steps to ensure employee privacy regarding literacy problems. Employer must not discharge employee for revealing illiteracy if job performance is satisfactory.	**LC 2699**
1027	**Employer Must Allow Employee to Use Accrued Sick Time for Rehab.** Employers must allow employees to use available sick leave for rehab program.	**LC 2699**

7.11.10 Respecting protected activities

LC §	Description	Penalty
98.6	**Lawful Off-Duty Conduct.**[856] Employers must not discharge or in any manner discriminate, retaliate, or take any adverse action against any employee or applicant for engaging in conduct protected by Section 96(k) (lawful off-premises conduct occurring during nonworking hours).	**98.6**
98.6	**Exercising Labor Code Rights.** Employers must not discriminate, retaliate, or take any adverse action against employees or applicants for exercising rights under the Labor Code, including bona fide claims with the Labor	**98.6**

LC §	Description	Penalty
	Commissioner. Section 98.6(b)(3) provides for civil penalties of $10,000 per employee for each violation.	
132a	**Workers' Compensation Claims.** Employers must not discriminate against workers who file workers' compensation claims or indicate intent to do so.	**LC 2699**
232	**Disclosure of Wages.** Employers must not (a) require that employees refrain from disclosing their wages, (b) require employees to sign waiver of this right, or (c) discharge, discipline, or otherwise discriminate against employees who disclose their wages.	**LC 2699**
232.5	**Disclosure of Working Conditions.** Employers must not (a) require that employees refrain from disclosing information about employer's working conditions, (b) require employees to waive that right, or (c) discharge, discipline, or otherwise discriminate against employees who disclose information about employer's working conditions. This section does not permit disclosure of proprietary information, trade secrets, or other legally privileged information.	**LC 2699**
234	**Kin Care Absences.** Employers must not count kin-care absences as absences that may lead to discipline, discharge, demotion, or suspension.	**LC 2699**
244(a)	**No Need To Exhaust Administrative Remedies.** Employees can pursue lawsuits without first exhausting administrative remedies, unless there is an express statutory requirement of exhaustion.,	**n/a**
244(b)	**Ban on retaliatory reporting of suspected citizenship or immigration status.** An employer commits an "adverse action" if it reports to a government agency the suspected citizenship or immigration status of an employee, former employee, or prospective employee, or of that individual's family member, because the individual has exercised rights under the Labor, Government, or Civil Codes.	**LC 2699?**
921-922	**Employee Rights to Organize.** Employers must not attempt to influence or interfere with workers' rights to join or support a union. Employers must not force employees to agree not to join a union.	**LC 2699**
923	**Selection of Bargaining Representative or With Concerted Activities.** Public policy gives employees the right to be free of interference, restraint, or coercion in designating representatives or in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection."	**LC 2699**
1028	**Drug and Alcohol Rehabilitation.** Employers must not discharge or discriminate against employees who opt for voluntary drug or alcohol	**LC 2699**

LC §	Description	Penalty
	rehabilitation.	
1024.6	**Employee Updating Personal Information.** Employers must not discriminate, retaliate, or take any adverse action against an employee because the employee had updated or attempted to update the employee's personal information, unless the changes are directly related to the skill set, qualifications, or knowledge required for the job.	**LC 2699**
1101	**Employee Political Affiliations.** Employers must not restrict employees from participating in politics or running for political office. Employers must not control or direct political activities or affiliations of employees.	**LC 2699**
1102	**No Influence or Coercion in Political Activities.** Employers must not use threat of discharge or other adverse employment action to influence or coerce employees regarding political activity.	**LC 2699**
1102.5	**Whistleblower Protection.**[857] Employers must not adopt or enforce rules against providing information to (a) state or federal agencies, (b) a person with authority over the employee, or (c) another employee who has authority to investigate, discover, or correct the violation or noncompliance, or against providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry. And employers must not retaliate against employees for engaging in these activities, where the employee has reasonable cause to believe the information discloses violation of state or federal statute or non-compliance with a regulation.	**LC 1102.5(f)** civil penalty up to $10,000 per violation.
6310	**No Discrimination vs. Safety Whistleblowers.** Employers must not discharge or discriminate against employees who bring safety complaints either to employer or to administrative agency, or employee's representative (i.e., union), who start or participate in proceedings to enforce safety rights, or who participate in an occupational health and safety committee pursuant to an IIPP under Section 6401.7.	**LC 2699**
6311	**No Discipline for Refusal to Work in Violation of Safety Laws Where Violation Would Create Hazard.** Employers must not discharge, lay off, or fail to pay employees who refuse to work because of violation of safety or health law, where violation would create real and apparent hazard to any employee.	**LC 2699**

7.11.11 Safety conditions

LC §	Description	Penalty
2260	**Sanitary Facilities.** All employers must comply with sanitary facilities standards adopted by the Occupational Safety & Health Standards Board.	**LC 2699**
2350	**Workplace Free from Effluvia and With Sufficient Toilets.** Employers must provide clean workplace free of foul smelling vapors, and must provide sufficient number of bathrooms, including sufficient gender-designated bathrooms.	**LC 2699**
2351	**Proper Ventilation.** Employers must ventilate every workplace to prevent injury to employee health by injurious vapors, gases, dust, etc. generated by the work.	**LC 2699**
2353	**Fans.** Employers must use properly fitted exhaust fans or blowers with pipes and hoods to prevent dust, filaments, or injurious gases from escaping into the atmosphere of any room where employees work.	**LC 2699**
2440	**First Aid.** All employers must comply with standards for medical services and first aid adopted by Occupational Safety & Health Standards Board.	**LC 2699**
2441	**Free, Fresh, and Pure Drinking Water.** Employers must provide fresh, free, and pure drinking water for employees, at reasonable and convenient times and places.	**LC 2699**
2650-2667	**Industrial Homework.** No industrial homework is permitted in various industries, including manufacture of food items, garments, toys and dolls, tobacco, drugs and poisons, bandages and other sanitary goods, explosives, fireworks. Licenses are required for other industrial homework.	**LC 2699**
6314	**Workplace Inspections by Division of Occupational Safety and Health ("DOSH").** Employers must give DOSH free access to employer premises to inspect and gather information (including statistics and physical materials), and to speak privately with employees regarding safety issues. Employers must post and comply with any order to preserve accident site or related physical materials.	**LC 2699**
6318	**Posting Citations, Orders, Actions Related to OSHA Violations.** Employers must post, at or near each place of violation and for three working days or until condition is abated, any DOSH citation or order. Employers also must post notice regarding abatement of violation.	**LC 2699**
6325	**Removal of Notices Prohibiting Entry to Hazardous Area.** No unauthorized person to remove DOSH notice to prevent entry into area determined by DOSH as imminent hazard to employees until hazard has been determined to be	**LC 2699**

LC §	Description	Penalty
	abated.	
6326	**Entry / Use of Hazardous Area.** After notice has been posted pursuant to sec. 6325, it is unlawful for anyone to enter area or use or operate equipment or device before it is made safe (except for purpose of abating safety issue).	**LC 2699**
6328	**Postings.** Employers must post safety notices. For postings, see http://www.dir.ca.gov/wpnodb.html.	**LC 2699**
6386	**Laboratory Employers and Hazardous Substances.** Laboratory employers must ensure that labels regarding hazardous substances are not removed or defaced, and must maintain any material safety data sheets received with shipments of hazardous substances and ensure they are readily available to laboratory employees.	**LC 2699**
6398	**Notice to Employees Who Work with Hazardous Substances.** Employers must (a) timely make available Material Safety Data Sheets (MSDS) to employees, collective bargaining representatives, or employees' physicians, (b) furnish MSDS information, either in writing or through training, to employees exposed to hazardous substance, and (c) inform employees of rights to this information.	**LC 2699**
6399	**Employers Must Obtain Updated MSDS from Manufacturers on Request from Employee, Union, Physician.** Employer must request MSDS from manufacturer within seven days of request by employee, union rep, or employee's physician, if employer (a) has not requested MSDS on the substance within prior 12 months and does not have MSDS on the substance, or (b) has not requested update to MSDS from manufacturer within past six months. Employers who do not receive response from manufacturer within 25 days of request must send copy of request to director with note that no response has been received.	**LC 2699**
6399.7	**No Discrimination Against Whistleblowers.** Employers must not discharge or discriminate against employees for filing complaints or instituting proceeding relating to hazardous substances.	**LC 2699**
6400	**Safe and Healthful Environment Required.** Employers, including joint employers, must furnish safe and healthful employment.	**LC 2699**
6401, 6403, 6406	**Employers Must Provide and Maintain Safety Devices.** Employers must supply safety devices and safeguards, and processes reasonably adequate to render employment safe and healthful. Employer must do everything reasonably necessary to protect employee safety and health. Employers must	**LC 2699**

LC §	Description	Penalty
	not (a) remove or damage any safety device or warning furnished for use in employment, (b) interfere with the use thereof, or (c) interfere with process adopted for employee protection.	
6401.7	**Injury Illness Prevention Program Required.** Employers must maintain effective injury prevention programs, timely correct unsafe and unhealthy conditions and practices, comply with employee training obligations, and record steps taken to implement their IIPPs.	**LC 2699**
6402	**No Employees in Unsafe Places.** Employers must not require or permit employees to go or be anywhere that is not safe and healthful.	**LC 2699**
6404	**All Workplaces Must Be Safe and Healthful.** Employers must not occupy or maintain any place of employment that is not safe and healthful.	**LC 2699**
6404.5	**Smoking Restrictions.** Employers must prohibit smoking in all enclosed spaces in the workplace and take certain minimum steps to prevent smoking in the workplace by nonemployees, such as (1) posting prominent signs, as follows: (A) where smoking is prohibited throughout the building, a sign stating "No smoking" shall be posted at each entrance, (B) Where smoking is permitted in designated areas of the building, a sign stating "Smoking is prohibited except in designated areas" shall be posted at each entrance, and (2) requesting, when appropriate, that smoking nonemployees refrain from smoking in enclosed workplace. ***Exceptions:*** medical research or treatment sites, if smoking is integral to research and treatment being conducted; patient smoking areas in long-term health care facilities; and employer-designated smoking breakroom, provided that four conditions are met: (A) air from smoking room is exhausted directly to the outside by exhaust fan, (B) employer complies with ventilation standards adopted by the Occupational Safety and Health Standards Board or the federal EPA, (C) smoking room is located in nonwork area where no one must enter as part of job, (D) there are enough nonsmoking breakrooms to accommodate nonsmokers. For postings, see http://www.dir.ca.gov/wpnodb.html..	**LC 2699**
6407	**Compliance Mandatory.** Employers must comply with occupational safety/ health standards, with H&S Code § 25910 (relating to spraying of asbestos), and with all rules, regulations, and orders that apply to its own conduct.	**LC 2699**
6408	**Obligation to Provide Information and Access.** Employers must give employees information in various ways, as prescribed by regulations: (a) post information about employee rights and obligations under occupational safety and health laws, (b) post each citation issued under § 6317, at or near place	**LC 6431:** up to $7,000 per violation

LC §	Description	Penalty
	where violation occurred, (c) tell employees or their representatives they can observe monitoring or measuring of employee exposure to hazards conducted pursuant to [OSHA] standards promulgated under § 142.3, (d) allow access by employees or their representatives to accurate records of exposures to potentially toxic materials or harmful physical agents, (e) notify any employee exposed to toxic materials or harmful physical agents in concentrations or at levels exceeding those prescribed by an applicable standard, order, or special order, and inform employee of corrective action being taken.	
6409	**Filing Physician's Report on Industrial Injury or Illness.** The employer or insurer must file the report within five days with the Division of Labor Statistics and Research. The report must include injured employee's social security number.	$50 - $200 for pattern of or willful violations
6409.1	**Obligations to File Reports on Industrial Injury or Illness.** Employers must report to Division of Labor Statistics & Research any injury or illness that results in time lost beyond day of incident, and must file amended report if employee dies as result of illness/injury. For serious illness, injury, or death, employers must also report immediately to DOSH by telephone or telegraph.	same as above, plus $5,000+ for failure to report serious illness, injury or death
6410	**Recordkeeping Requirements.** Reports required by 6409 and 6409.1 must be maintained.	**LC 6431:** up to $7,000 per violation
6411	**Completing Forms from the Division.** Employers receiving forms with directions from Division of Labor Statistics & Research must complete them correctly, and give a good reason for any failure to answer.	**LC 2699**
7156	**No Obstruction of Safety.** Employers must not, in employing or directing work building construction, repairing, painting, etc., (a) knowingly or negligently furnish or erect improper scaffolding, slings, ladders, or other mechanical contrivances, (b) hinder or obstruct any DOSH official trying to inspect that equipment, or (c) deface or remove any official notice that equipment has been declared unsafe .	**LC 2699**
7328-7329	**Safety Devices on Windows.** Employers must not employ or direct anyone to perform window-washing services without requisite safety devices on buildings over 3 stories high, absent exception.	**LC 2699**

7.11.12 Termination of employment

LC §	Description	Penalty
201	**Payment of Wages Upon Discharge.** Employers must pay immediately on discharge all wages due (including salary, hourly wage, overtime, accrued vacation, benefits).	**LC 203:** "waiting time" penalty, <= 30 working days
201.3	**Temporary service employees.** Added in 2008, this section permits weekly payment, "regardless of when the assignment ends," with certain specified exceptions: employers must pay daily to nonexempt, non-clerical employees assigned to work on a day-to-day basis and to employees working for a client engaged in a trade dispute; employees must pay temporary employees on the day of discharge; and employees who quit must be paid in accordance with Labor Code Section 202.	**LC 203**
202	**Payment of Wages Upon Resignation.** Payment is due on last day of work where employee resigns with > 72 hours of notice. To extent employees fail to give 72 hours' notice, employers must pay final wages within 72 hours of the quit. Employers may pay by mail if employee so requests, providing an address.	same as above
227.3	**Vacation Payment at Termination.** Employees must pay separating employees all unused vested vacation time, as wages.	**LC 203**
2926-2927	**Employer Must Pay All Wages Earned Through Termination.** Employer must pay employees all wages earned through the time of dismissal or resignation.	**LC 2699**
2929	**No Discharge for Garnishment.** Employers must not discharge employee for threat of garnishment of wages or for only one garnishment.	**LC 2699**

7.11.13 Labor organizations

LC §	Description	Penalty
1011	**Misrepresentation of Labor Engaged in Production, Manufacture, or Sale of Products.** Employers must not misrepresent the kind, nature, and character of labor employed, the extent of labor employed, the number or kind of persons employed, that a particular kind of laborers is employed when in fact another kind is employed. Employers thus not misrepresent that union labor is used when it is not, or that an item is "made in America" when it was made	**LC 2699**

LC §	Description	Penalty
	elsewhere.	
1012	**Misrepresentation of Union Labor Employed.** Employers must not willfully misrepresent or falsely state that union labor was employed in the manufacture, production, or sale of articles or performance of services.	**LC 2699**
1015	**Forgery of Union Label or Trademark.** Employers must not willfully forge a union label or other mark, with intent to sell items to which unauthorized label is attached.	**LC 2699**
1016	**Unauthorized Use of Union Label or Trademark.** Employers must not willfully use union label, trademark, insignia, seal, device or form of advertisement without authorization.	**LC 2699**
1122	**Employer-dominated Employee Groups.** Employers are liable for organizing employee groups that are employer-financed or dominated.	**LC 2699**
1130-1136.2	**No Professional Strikebreakers.** Employers must not willingly or knowingly hire or use professional strikebreakers.	**LC 2699**

7.11.14 Status of minors

LC §	Description	Penalty
1299	**Files on Minors.** Employers of minors must keep on file all relevant permits and certificates to work or to employ such minors. The files shall be open at all times 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.	**LC 2699**
1302	**Employers Must Permit Inspections of Files on Minors.** Employers must allow attendance supervisor or probation officer to enter workplace to inspect work permits regarding minors.	**LC 2699**
1391	**Work Hours for Minors 16-17 Years Old.** Minors 16-17 years old must not work > eight hours within 24 hours, > 48 hours within one week, or before 5 a.m. or after 10 p.m. on any day preceding a schoolday, except that they can work during the evening preceding a nonschoolday until 12:30 a.m. of the nonschoolday. When school is in session, minors 16-17 years old must not work more than four hours in a schoolday unless are employed in “personal attendant” occupation, school-approved work experience, or cooperative vocational education program, or have a work permit.	$500-1,000 for 1st violation, $1,000 for 2d, , $5,000-10,000 for further, & more for repeated or willful

LC §	Description	Penalty
1391.1	**Minors Work Between 10 p.m.-12:30 a.m.** Minors 16-18 years old enrolled in work experience or cooperative vocational education programs may work after 10 p.m. but not later than 12:30 a.m. if not detrimental to health, education, or welfare of minor and with approval of parent and work experience coordinator, but work between 10 p.m. to 12:30 a.m. is subject to minimum wage paid to adults.	**LC 2699**
1392.2	**Minors Who Have High School Equivalency Can Be Employed As Adults.** For minors under 18 who have completed high school equivalency can be employed on same terms as adults, if paid in manner equivalent to adults.	**LC 2699**

7.11.15 Miscellaneous

LC §	Description	Penalty
1050, 1052	**No Misrepresentations to Prevent Reemployment.** Employers commit a misdemeanor if they make misrepresentations to prevent a former employee from obtaining new job, or if they fail to take all reasonable steps to prevent such a violation.	**LC 1054:** treble damages; **LC 2699?**
1053	**Employer Can Make Truthful Statement Upon Request.** Upon special request, employers can give truthful statements about reason for former employee's discharge or quit, but "mark, sign, or other means conveying information different from that expressed by words" is evidence of a violation of Section § 1050.	**LC 1054:** treble damages; **LC 2699?**
10601	**Employment of Displaced Janitors.** Successor service contractors must hire janitor-employees who worked for former service contractor for at least four months, and retain them 60 days absent substantiated cause not to do so (based on performance or conduct). Contractors must state this requirement in all initial bid packages, and must make written job offers in primary language or other language in which the offeree is literate. The same wages and benefits are not required. The offer shall state time it will remain open (not < ten days). If fewer employees are needed, then seniority within job classification shall be basis for layoffs. Contractors must also identify employees not retained and reason therefore, to place them on preferential hiring list. Contractors must give each retained employee a written performance evaluation at end of 60 days. If the evaluation is satisfactory, then the contractors must offer continued employment, which may be at will.	**LC 2699**

LC §	Description	Penalty
1171.5	**Inquiries re: Immigration Status.** In employment proceeding, no inquiry is permitted into a person's immigration status, unless the inquiry is necessary to comply with federal immigration law.	**LC 2699?**
1400-1408	**California WARN.** Employers who own or operate any facility employing 75+ employees within the last 12 months must give 60-day written notice of any mass layoff (50+ employees within 30 days), relocation (moving > 100 miles), or termination of business at that facility. ***Exception:*** where physical calamity or act of war is the reason for the mass layoff, relocation, or termination.	$500 for each day of violation
2870-2872	**Employee Inventions.** Employers must not require or enforce contract provisions that assign rights in employee inventions if developed entirely on employee's own time, without using employer's equipment, supplies, facilities, or trade secret information. ***Exception:*** inventions that either (a) at time of conception or reduction to practice, relate to employer's business or employer's actual or demonstrably anticipated research or development, or (2) result from work by employee for employer. Any employment agreement requiring employees to assign invention rights to the employer must include written notice that agreement does not apply to any invention that would qualify under this section.	**LC 2699**

7.12 Personal Liability for Wage Payment Violations

Some California plaintiffs seeking repaid wages have sued corporate officials personally. The California Supreme Court limited that practice in 2005, by holding that corporate officers, directors, and shareholders cannot be personally liable for unpaid overtime wages as an "employer," even if they "exercised" control over the payment of wages.[858] The court also rejected a theory that the individual defendants were jointly liable for directing or participating in tortious conduct: a "simple failure to comply with statutory overtime requirements" does not qualify as tortious, the court explained. Finally, the court held that the individual defendants could not be liable for "conspiring" with their corporate employer to withhold wages, because corporate agents acting on the corporation's behalf are not considered to be co-conspirators.[859]

At the same time, however, the court, encouraging plaintiffs' counsel not to despair, speculated as to circumstances in which personal liability for unpaid wages could still be possible. *First*, the Labor Commissioner can continue to use the broad definition of "employer" found in the wage orders to seek financial recovery from individuals in administrative hearings.[860] *Second*, in cases of thinly capitalized corporations that have played fast and loose with the corporate form, the "alter ego" doctrine can make controlling individuals liable for unpaid wages. *Third*, huge civil penalties ($100 per underpaid employee per pay period) could be sought by aggrieved employees, under the Labor Code Private Attorneys General Act of 2004, against "any person acting on behalf of an employer who violates, or causes to be violated," a statute or wage order regarding wages.[861]

7.13 Does California Law Affect Out-of-State Employees?

7.13.1 Out-of-state residents who temporarily work in California

In compensating employees, employers traditionally have applied the wage and hour laws of the state in which the employee resides or performs the most work, even when an employee performs occasional work in another state. In California, however, this practice is problematic.

In a 2011 decision, *Sullivan v. Oracle*, the California Supreme Court held that non-California residents who work in California for a California-based employer were subject to California daily overtime laws if they performed their California work for whole days.[862] The *Sullivan* court also held that California's Unfair Competition Law[863] applies to this work.[864]

Although the *Sullivan* court explicitly limited its decision to the circumstances of that case, the decision raises ongoing questions about is broader implications:

- whether *Sullivan* applies to partial days of work performed within California for non-California residents performing work in California,
- whether *Sullivan*'s rationale covers employees based in states other than Colorado or Arizona,
- whether other wage and hour provisions, not just California's daily overtime provision, apply to nonresident employees who work in California, and
- whether *Sullivan*'s rationale extends to employees who work daily overtime in California for employers who are not based in California.

7.13.2 Out-of-state employees of a California employer violating the FLSA

The California Supreme Court in *Sullivan v. Oracle* also ruled on the plaintiffs' ambitious claim that they could use California's Unfair Competition Law to pursue FLSA violations that occurred outside of California.[865] On this issue the California Supreme Court ruled in favor of the employer, concluding that the UCL applies only to work performed within California.[866]

7.14 Broadened Definition of Employer?

In 2010 the California Supreme Court held that the wage orders require a broad definition of "employer" that extends beyond the definition of "employer" ordinarily followed for federal statutes (i.e., the common law definition of employer). The California definition of employer, under the wage order, extends to anyone who (1) exercises control over wages, hours, working conditions, (2) suffers or permits worker to work, or (3) engages a worker to work, thereby creating a common law relationship.[867] The Supreme Court reaffirmed its earlier recognition, however, that a definition of employer does not impose liability on individual corporate agents who were acting within the scope of their agency, even if this result effectively leaves workers without a remedy where their primary employer has gone bankrupt. In the case before it, the court recognized that merchants who purchased produce from a grower were not the "employers" of the grower's agricultural workers absent any evidence those merchants exercised control over the workers' wages and hours.

In a 2012 case, the Court of Appeal further promoted a broad notion of employment liability. At issue was whether a pizza franchisor could be held liable for torts against a teenage pizza store employee committed by the manager of a pizza store franchisee.[868] The Court of Appeal held that liability for the franchisor was possible, on the basis of a franchise contract that arguably gave the franchisor extensive control over the pizza store franchise's local operations, and on the basis of extra-contractual evidence suggesting that the franchisor exercised extensive local management control over the franchisee in areas including employee conduct and discipline. The California Supreme Court has granted review of this decision,[869] and is expected to rule during 2014.

8. Employee Benefits

8.1 Domestic Partners

California helped lead the national trend toward recognizing unmarried domestic partners as the equivalent of married couples for various purposes. Domestic partners in California—two adults who have chosen to share one another's lives in an intimate, committed relationship of mutual care—may file a Declaration of Domestic Partnership with the Secretary of State. Heterosexual couples may register if one partner is over age 62. Homosexual couples may register if both partners are over age 18.[870] California has allowed domestic partners to register with the state and has granted registered partners workplace rights with respect to unemployment insurance (where one partner quit a job to relocate because of the employment of the other partner) and kin care leave, allowing employees to use some of their paid sick leave to care for an ill domestic partner.

The California Supreme Court has held that registered domestic partners can bring marital status discrimination claims under the California Unruh Act (for discrimination in public accommodations), and there is no reason to suppose that the court would not similarly hold that domestic partners can sue for marital status discrimination in the context of an employment discrimination lawsuit.[871]

8.1.1 Same rights and responsibilities as spouses

Under the Domestic Partner Rights and Responsibilities Act of 2003, registered domestic partners have virtually all of the same rights and responsibilities afforded to married spouses.[872] California employers must give domestic partners the same legal treatment as spouses in most areas of state law. One probable effect is that the California Family Rights Act, which grants leave to an employee to care for a sick spouse, now requires leave for an employee to care for a sick registered domestic partner.

8.1.2 Insurance benefits

Employers must offer dependent care coverage for domestic partners under the same terms and conditions as spousal coverage, with the insurance premium for this coverage exempt from taxable wages under state law. The Insurance Equality Act provides that California group health insurance policies shall be deemed to provide coverage for registered domestic partners that is equal to the coverage provided to a spouse of an employee, insured, or policyholder.[873]

As of 2012, every health care service plan contract and every health insurance policy that is marketed, sold, or issued to a California resident must extend identical coverage

to same sex and opposite spouses and domestic partners. Further, it can now be a crime in California to discriminate between the coverage for (a) heterosexual spouses or domestic partners and (b) partners in same-sex relationships. The 2005 law mandating equal coverage between domestic partners and spouses applied unless the insurance policy was issued outside of California to an employer mostly located outside of California. The 2012 law goes further by mandating equality in health coverage for same sex and opposite sex couples (whether domestic partners or spouses) for every group health care service plan contract (HMO) and every group health insurance policy that is marketed, issued, or delivered to a California resident.[874]

In 2013 the U.S. Supreme Court, in *United States v. Windsor*,[875] struck down Section 3 of the Defense of Marriage Act as unconstitutional. *Windsor* and resulting regulatory guidance is to the effect that same-sex marriages must be recognized for all federal purposes, as long as the marriage was valid in the jurisdiction where it was entered into. In California, where same-sex marriage is lawful, a same-sex domestic partnership remains another legal option. As a result, fully insured benefits are still subject to California insurance laws and employers must continue to recognize same-sex domestic partnerships.

8.2 Required Coverage

Autism and Pervasive Development Disorder Coverage. Every health care service contract and health insurance policy amended or renewed after July 1, 2012 must cover medical services related to autism. This means providing coverage for behavioral health treatment, including applied behavioral analysis therapy. Health care service plans and health insurers must maintain an adequate network of qualified autism providers, and the new law imposes specific requirements on autism service providers with respect to treatment plans they prescribe. This law ends (or "sunsets") January 1, 2015.[876]

Maternity Services Coverage. As of July 1, 2012, every group and individual health insurance policy must cover maternity services, which include such things as prenatal care, ambulatory care maternity services, involuntary complications of pregnancy, neonatal care, and inpatient hospital maternity care (including labor and delivery and postpartum care). This definition is subject to change when the federal Patient Protection and Affordable Care Act (Public Law 111-148) defines the scope of benefits to be provided under its own maternity benefit requirement. There are exceptions for Medicare supplement insurance, short-term limited duration health insurance, CHAMPUS-supplement insurance, or TRI-CARE supplement insurance, or to hospital indemnity, accident-only, or specified disease insurance.[877]

Group Coverage Maintained During Pregnancy Leave. As discussed (§ 2.1), California employers must, effective 2012, maintain and pay for coverage for eligible employees who take pregnancy disability leave under a group health plan, throughout the leave (up to four

months over a 12-month period), at the level and under the conditions coverage would have existed had the employee continued in continuous employment during the leave.[878]

8.3 Cal-COBRA

The federal Consolidated Omnibus Budget Reconciliation Act (COBRA)[879] generally requires an employer of 20 or more employees who offers a group healthcare plan to offer the option of continuing healthcare coverage for up to 18 months if coverage is lost or reduced. Members of the employee's family must also be given the opportunity to continue their coverage.

California law operates with respect to employers too small to be covered by federal COBRA and with respect to periods following the federal COBRA period. Under Cal-COBRA, employers of 2-19 employees must offer 36 months (not just 18) of continuation coverage.[880] Cal-COBRA provides an extension for those who have exhausted their 18 months on federal COBRA (or 29 months for disabled individuals) for a total extension that cannot exceed 36 months. This special Cal-COBRA extension applies to insured plans where the employer's master policy is issued in California. If the group master policy is not issued in California, then the employer must employ 51% or more of its employees in California and have its principal place of business in California.[881]

The legislation directly regulates only the health care service plan or insurer, and not employers as such. But presumably an employer will find it more expensive to purchase group coverage as the provider knows that it has a 36-month continuation coverage tail as well as mandatory conversion coverage obligations.

California has a Health Insurance Premium Program (HIPP), by which the state will pay that premiums of qualifying individuals for private insurance, employer group insurance or under COBRA, Cal-COBRA, or OBRA (the extension of COBRA for up to 29 months for disabled individuals). California employers must give a HIPP notice to terminating employees.[882]

California employers must give a notice of rights to convert group medical coverage into an individual coverage, within 15 days of the termination of group coverage. Termination doesn't occur until the end of any continuation period (e.g. COBRA, extensions, OBRA).[883]

8.4 Mandatory Employer-Funded Health Care

8.4.1 Health care security laws

Employers generally are free to decide whether to provide health care to their employees (subject to financial penalties under the Patient Protection and Affordable Care Act for certain employers who do not provide a minimum level of health insurance coverage to full-time employees, beginning January 1, 2015). In California, it's different, or at least it is in San Francisco. The San Francisco Health Care Security

Ordinance requires employers engaging in business in the City of San Francisco that have on average at least 20 employees during a quarter to make "health care expenditures" for their employees who work in San Francisco or to make payments directly to the City.[884] The Ninth Circuit has upheld the San Francisco ordinance against a challenge that ERISA preempts the ordinance.[885]

8.4.2 "Pay or Play"

The California Health Insurance Act of 2003 required California employers (of at least 20 employees) to provide health insurance benefits to employees or pay a fee to cover state-provided health insurance coverage. This arguably ERISA-preempted law was narrowly overturned in a November 2004 referendum, before its 2006 effective date.

8.5 Explanation Of Benefits

8.5.1 Discontinuation of medical coverage

Before discontinuing medical, surgical, or hospital coverage, California employers must give all covered employees at least 15 days advance written notice.[886]

8.5.2 Notice of available medical benefits

California employers must explain to employees, in at least outline form, the benefits provided under employer-sponsored health coverage, including the identity of the provider organization(s), and must give terminated employees notification of all continuation, disability extension, and conversion options under any employer-sponsored coverage for which the employee may remain eligible after employment terminates.[887]

8.5.3 Disclosures for deferred compensation plans

California employers who offer employer-managed deferred compensation plans must provide each employee, before the employee's enrollment in the plan, written notice of the reasonably foreseeable financial risks concerning participation in the plan, together with historical information to date as to the performance of plan investments and documents showing the employers' financial condition though at least the immediately preceding year. Employers that directly manage investments of such a plan must also provide quarterly reports for each plan investment fund and the actual performance of the employee's investment.[888]

9. Special Posting, Distribution, and Notice Requirements

9.1 Posting Requirements

All California employers must meet special workplace posting obligations. For an overview, see www.dir.ca.gov/wpnodb.html. Among the items California employers must post, in addition to the information required by federal law, are the:

- poster on Safety and Health Protection on the Job, revised January 2011, available from the Department of Industrial Relations, Division of Occupational Safety and Health,
- poster S-500, on Emergency Phone Numbers, available from the Department of Industrial Relations, Division of Occupational Safety and Health,
- poster DFEH 100-20 or 100-21 (depending on the number of employees), on Family Care/Medical Leave/Pregnancy Disability Leave, available from the Fair Employment and Housing Commission, that must be posted in English and any other that is the primary language of 10% of the employees,[889]
- poster DWC 7 on Notice to Employees—Injuries Caused by Work, revised 2010,[890]
- poster on notice of workers' compensation carrier and coverage, which must be posted in English and in Spanish where there are Spanish-speaking employees, obtained from the employer's workers' compensation insurance carrier,[891]
- poster on human trafficking for employers in certain industries, including transportation and some healthcare, available from the Department of Justice on April 1, 2013,[892]
- poster DFEH 162, available from the Department of Fair Employment and Housing,
- poster of Payday Notice, available from the Department of Industrial Relations,
- poster on Time Off to Vote, available from the Secretary of State's Office, Election Division,
- posters DE 1857A and DE 1857D, on Notice to Employees: Unemployment Insurance and Disability Insurance and Unemployment Insurance Benefits, available from the Employment Development Department,
- poster MW-2007, on the California minimum wage, available from the Department of Industrial Relations,
- a list of employee rights and responsibilities under the whistleblower laws, including the telephone number of the whistleblower hotline for the Office of the Attorney General, all

in lettering larger than fourteen-point type, a sample of which is available from the Department of Industrial Relations,[893]

- no-smoking signage,[894] and
- the applicable wage order, available from the Department of Industrial Relations, see www.dir.ca.gov/IWC/WageOrderIndustries.htm. Employers must post the wage order recently amended to increase the minimum wage. See Section 7.1.4.

9.2 Distribution Requirements

9.2.1 Distribution required to all employees

California employers must give all employees:

- a yearly notice about pregnancy disability leave, or update the employee handbook, and
- a sexual harassment information sheet, available from the DFEH.[895]

9.2.2 New hire distribution requirements

California employers must give new hires:

- a form containing pay rates and other basic information (see §16.1.2),
- a pamphlet DE 2515, on State Disability Insurance Provisions and available from the Employment Development Department,
- a pamphlet describing workers' compensation rights, available in both English and Spanish, by the end of the first pay period,[896]
- a form that the employee may use to exercise to notify the employer of the employee's personal physician or chiropractor,[897] and
- a pamphlet explaining Family Temporary Disability Insurance (see § 2.4) to each new hire and to each employee leaving work to attend a sick relative.

9.2.3 Special event distribution requirements

California employers must give:

- to any worker victimized by a workplace crime, a notice of eligibility for workers' compensation for injuries resulting from the crime, within one working day of the date the employer reasonably should have known of the crime,[898]
- to any employee unable to work because of illness or injury, Pamphlet DE 2515, on State Disability Insurance, available from the EDD (even though the pamphlet was issued upon hire of the employee), and

- notice to employees, before they enroll in certain employer-managed deferred compensation plans, of the reasonably foreseeable financial risk accompanying participation in the plan, and quarterly information about the performance of the plan.[899]

9.2.4 Distribution requirements upon interrupting employment or benefits

9.2.4.1 unemployment compensation information

California employers must give, to employees whose continuous employment status is being disrupted, materials related to claims for benefits.[900] For forms, see www.edd.ca.gov/payroll_taxes/Required_Notices_and_Pamphlets.htm.

9.2.4.2 health insurance information

California employers of 20 or more employees must provide, to terminating employees with health insurance, not only the federal COBRA notice but also a standardized written description of the Health Insurance Premium Program (HIPP), which is available from the State Department of Health Services.[901]

10. Employee Access to Personnel Records

10.1 Personnel Records

California employers must permit current and former employees or their representatives to inspect and receive a copy of the "personnel records" that the employer maintains relating to the employee's performance or to any grievance concerning the employee, within 30 days of the employee's request, although the employee (or the representative) and the employer may agree to extend this deadline to 35 days.[902] The request must be in writing, and employers may create a request form that employees can choose to use.[903]

For current employees, the employer must (a) make the personnel records available at the place where the employee reports to work within a reasonable period of time following the request, or (b) permit the employee to inspect the personnel records where the employer stores the personnel records, with no loss of compensation to the employee.[904]

For former employees, employers must maintain personnel records for at least three years after the termination of employment.[905] To make records available for former employees, employers may use the location where records are stored, use a mutually agreed-upon location, use the mail (and be reimbursed for postage), or—for employees terminated for a harassment or workplace violence—use a location within a reasonable driving distance from the employee's residence.[906]

As to each former employee, the employer need only comply with one yearly request to inspect or copy; and as to an employee representative, the employer need only comply with 50 requests per month.[907] The employer's obligations do not apply during an employee's lawsuit against the employer, or to an employee covered by a valid collective bargaining agreement with specified provisions.[908]

"Personnel records" do not include records relating to an investigation of criminal conduct, letters of reference, ratings, reports, or records obtained before the employee's employment,[909] and employers can redact names of nonsupervisory employees from personnel records before submitting a copy or permitting an inspection.[910]

Failure to timely comply entitles the employee or the Labor Commissioner to recover a penalty of $750, plus injunctive relief and attorney fees.[911]

10.2 Signed Employee Instruments

California employers must provide to an employee, upon request, a copy of any document that the employee has signed concerning the employee's employment.[912]

10.3 Shopping Investigator's Report

An employee disciplined on the basis of a report by a shopping investigator generally must be given a copy of the report before the discipline is imposed.[913]

10.4 Payroll Records

California employers must comply with oral or written requests from current or former employees to inspect and copy their payroll records within 21 calendar days.[914] Failure to comply entitles the current or former employee, or the Labor Commissioner, to recover a $750 penalty from the employer, and injunctive relief and attorney fees are also available to ensure compliance.[915]

California employers must provide itemized wage statements to employees (see § 16.3), and permit employees to inspect those records.[916]

California employers must make work records available to state inspectors.[917]

11. Employer Retention of Records

California employers must retain certain records that are not addressed by federal law or for periods longer than federal law requires. Records subject to California retention requirements include:

- wage statements (three years),[918]

- job application records (two years), those records to include "data regarding the race, sex, and national origin of each applicant and for the job for which he or she applied,"[919]
- help wanted ads (two years),
- wage records (two years),
- child labor certificates (two years),
- personnel records (three years),[920]
- employee health records (three years after termination of employment),[921]
- pension and welfare plan information (two years),
- employee contracts (two years), and
- business records regarding total annual sales volume and goods purchased (two years).

12. Covenants Not to Compete

12.1 General Prohibition

12.1.1 The broad statutory language

Most states enforce agreements by which employees agree not to compete with the employer for a reasonable period after employment, within a reasonable geographical area. California is different. Its Business and Professions Code states that, with a few narrow exceptions, "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."[922]

12.1.2 The literal judicial interpretation

This broad statutory language notwithstanding, some courts upheld contractual restrictions that did not totally restrain trade but rather simply limited how trade could be pursued. In 2008, however, the California Supreme Court, in *Edwards v. Arthur Andersen*,[923] ruled that even narrowly drawn restraints are contractually invalid, unless they fall within a specific statutory exception, e.g., an agreement in connection with the sale or dissolution of a business organization.[924] The Supreme Court thus struck down a provision in an employment agreement restricting a departing employee from serving the employer's customers. The Supreme Court rejected the Ninth Circuit's view that California law permits agreements that only "partially" or "narrowly" restrict an employee's ability to practice a trade or profession.

12.1.3 Disregard for "blue penciling" and other approaches used in other states

In some states, courts "blue pencil" (redraw) an overly broad anti-competitive covenant to save the covenant's lawful portions. California courts, however, refuse to enforce agreements with an anti-competitive effect even if the parties have agreed to "save" the clause to the extent possible.[925] In a case where former employees challenged the enforceability of their agreement not to solicit the employer's customers, the Court of Appeal declared the agreement invalid under California law, even though the agreement called for New Jersey law to apply. The Court of Appeal concluded that the agreement ran afoul of California law because the non-solicitation provision was "not narrowly tailored to protect trade secrets and confidential information."[926]

In another customer solicitation case, the Court of Appeal overturned a preliminary injunction against former employees soliciting customers, because California law "bars a court from specifically enforcing (by way of injunctive relief) a contractual clause purporting to ban a former employee from soliciting former customers to transfer their business away from the former employer to the employee's new business."[927] At the same time, the Court of Appeal said that a trial court could enjoin "tortious conduct (as violative of either the Uniform Trade Secrets Act and/or the Unfair Competition Law) by banning the former employee[s] from using trade secret information to identify existing customers, to facilitate the solicitation of such customers, or to otherwise unfairly compete with the former employer."[928] Accordingly, California seems to make solicitation of customers by a former employee in California enjoinable only where the solicitation involves misappropriation of trade secrets.

California's ban on covenants restraining trade can apply even if the parties entered into the covenant in a state where such covenants are lawful.[929] This peculiar hostility to noncompete covenants has encouraged a "race to the courthouse" to get a dispute heard in the state most congenial to a party's litigation interest.[930] So it is that California has become a favored forum for parties seeking judicial declarations that covenants not to compete are invalid.[931]

Some employers have avoided California determinations of their employment agreements by convincing federal courts to enforce forum-selection clauses that call for litigation to occur exclusively in some other designated state.[932] But a choice-of-forum clause addresses only the site of the adjudication, not the choice of which state's law to apply, so that an out-of-state court could still apply California law.[933]

In 2013, the U.S. Supreme Court addressed the enforceability of forum-selection clauses.[934] This decision, although not involving an employment dispute, could be used to support arguments that (1) forum-selection clauses calling for litigation to occur

exclusively in a state other than California are valid, and (2) such clauses can require that, upon transfer of a California-based action to the non-California jurisdiction, the law of that jurisdiction should apply.[935]

12.1.4 The ban on anti-competitive covenants as applied to buy-sell contracts

The California ban on anti-competitive covenants is subject to an exception applying upon the sale of all or substantially all of a business, including its goodwill.[936] But recently the Court of Appeal held that when the sale involves two separate agreements—a stock purchase agreement and an employment agreement—the agreements must be read together. The Court of Appeal concluded that the employment agreement's covenant not to compete or solicit, which was not designed to protect the acquired company's goodwill, failed to qualify under the "sale of business" exception.[937]

12.1.5 The ban as applied to settlement agreements

Settlement agreements, like agreements generally, are enforceable, notwithstanding California's ban on anti-competitive covenants, to the extent that the settlement agreement protects trade secrets. In a settlement of a trade-secret lawsuit, the parties agreed to a stipulated injunction by which defendants would refrain from contacting customers on plaintiff's customer list (allegedly including trade secrets). When a dispute arose about compliance with this stipulated injunction, the plaintiff successfully moved for an order of contempt. On appeal, the court held that the stipulated injunction was facially valid, as it existed to protect trade secrets.[938]

12.1.6 The ban as applied to third-party contracts

The California ban on anti-competitive covenants can extend even to contracts to which an employee is not a party, such as "no hire" contracts between two businesses. At issue in one case was a provision in a contract between a consulting firm and its customer that the customer would not hire the consulting firm's employees for 12 months following the contract's termination. This provision was to protect the consulting firm's key asset—the expertise of its consultants—by discouraging the firm's customers from hiring away the firm's consultants. When the customer breached the contract, the consulting firm successfully sued its customer to recover damages. On appeal, however, the judgment was reversed, with the Court of Appeal reasoning that because "the interests of the employee trump the interests of the employers as a matter of public policy," "it logically follows that a broad-ranging contractual provision such as the one at issue here cannot stand."[939] The Court of Appeal concluded that "enforcing this clause would present many of the same problems as covenants not to compete and unfairly limit the mobility of an employee who actively sought an

opportunity with [the customer]."[940] The Court of Appeal allowed that a "more narrowly drawn and limited no-hire provision" might be permissible under California law, but noted that the provision in question covered all hiring (not just solicitation by the customer) and covered all of the consultant firm's employees (not just those who worked for the customer or those whom the consulting firm even employed at the time). Outweighing this "broad provision" was "the policy favoring freedom of mobility for employees."[941]

12.2 Implications for Wrongful Termination

California courts have held that where an individual refuses to sign a document containing an unlawful covenant not to compete, the employer violates public policy and incurs tort liability if the employer responds by firing or refusing to hire the individual.[942] The Court of Appeal has extended that principle to hold that an employer could be liable for wrongful termination if it fired an employee for breaching a non-compete agreement that the employee had entered into with a *former* employer.[943] The Court of Appeal reasoned that firing the employee in those circumstances amounted to enforcing a no-hire agreement between the former and current employer, an agreement that would be void as an unlawful non-compete agreement.[944]

The U.S. Department of Justice accused several Silicon Valley companies of unlawfully restraining trade by agreeing to refrain from poaching other companies' employees, inducing the companies ultimately to enter into a consent decree.[945] Meanwhile, Silicon Valley employees filed a class action (certified in October 2013) alleging that these companies entered into anti-competitive agreements not to poach each other's employees, in order to keep workers' wages low.[946]

12.3 Permissible Contractual Restrictions

12.3.1 Covenants not to solicit or raid employees

During employment, an employee, even in California, owes a duty of loyalty to the employer—which includes a duty not to solicit co-workers to leave employment.[947]

Some courts have also enforced an agreement not to solicit co-workers even after employment, where those agreements have been limited in time.[948] Whether such an agreement is valid after the California Supreme Court's 2008 decision in *Edwards v. Arthur Andersen* is unclear. Moreover, an anti-raiding provision may be of scant practical comfort to many employers, because former employees (or their new employers) are free to hire people who make unsolicited requests to join the new employer. A 2010 federal court case applying California law held that provisions forbidding non-solicitation of employees remain enforceable if they are limited in duration and scope.[949]

12.3.2 Protection of trade secrets

Employers remain free, of course, to contract with their employees to protect employer trade secrets.[950] It may seem superfluous for an employer to contract for protection of trade secrets, when statutory protection for those trade secrets already exists (see § 12.4). But formal employment agreements could help define trade secrets, provide additional deterrents to misappropriation of trade secrets, provide contractual remedies, and call for special procedures to seek trade-secret protection, such as a provision for private arbitration and a provision for prevailing-party attorney fees, at least for certain employees.

12.4 Protection of Trade Secrets

Virtually every state, including California, has enacted the Uniform Trade Secrets Act.[951] The UTSA could forbid a former employee to use the former employer's trade secrets, such as confidential client lists, to solicit clients.[952]

12.4.1 Application to customer lists

Some but not all customer lists qualify for protection as trade secrets. Important factors to consider are whether the names are generally known or readily ascertainable to others in the same business, and how much effort one would need to compile the list.[953]

12.4.2 Inapplicability of "inevitable disclosure" doctrine

In many jurisdictions, courts help employers victimized by disloyal departing employees by applying the "inevitable disclosure" doctrine, which holds that an employer can enjoin a former employee from working for a competitor where the employee's duties with the competing employer are such that the employee would inevitably disclose the former employer's trade secrets. California is different. The Court of Appeal has rejected the inevitable disclosure doctrine.[954] Employers concerned about theft of trade secrets can, however, use California's version of the Uniform Trade Secrets Act, which authorizes injunctions against threatened misappropriation of trade secrets.[955]

12.4.3 Preemption of common law claims premised on trade secret misappropriation theory?

Employers once clearly could pursue tort claims for employee theft or misuse of company information, even if the misappropriated information was not a trade secret.[956] But California courts have held that the California Uniform Trade Secrets Act ("CUTSA") preempts tort claims—such as conversion, breach of loyalty, and tortious

interference—that rely on the same nucleus of facts as a trade secret misappropriation claim.[957]

Some federal court decisions have been more kind to employers, holding that the CUTSA does not preempt a tort claim when the claim relies on different facts or theories of liability than those supporting a trade secret claim,[958] and that a CUTSA defendant's motion to dismiss on the basis of CUTSA preemption "cannot be addressed until it is determined whether the allegedly misappropriated information constitutes a trade secret."[959] But a federal district court has held that the trade secret status of allegedly misappropriated information can be determined on a motion to dismiss, and that the CUTSA preempts an employer's claims for misappropriation of proprietary non-trade secret information unless (1) the information was "made property by some provision of positive law" or (2) the non-trade secret claims allege "wrongdoing that is materiall[y] distinct [from] the wrongdoing alleged in a [C]UTSA claim."[960] A 2013 California appellate decision provided a narrower interpretation of the CUTSA's preemptive effect, by finding that claims for breach of fiduciary duty, unfair competition, interference with business relations and conversion were not preempted by the CUTSA.[961] The California Supreme Court may eventually resolve this difference of opinion.

12.5 Preventing Data Theft with the Computer Fraud and Abuse Act?

Until recently, California employers could augment trade secret claims against former employees with claims brought under the federal Computer Fraud and Abuse Act ("CFAA").[962] Although a criminal statute, the CFAA authorizes civil remedies for certain violations, including unauthorized access of computer systems to steal company data. The CFAA has enabled employers to obtain injunctions requiring the return of stolen data and the recovery of the employer's investigation costs, regardless of whether the misappropriated information was a trade secret. So it was that in *United States v. Nosal*, a Ninth Circuit panel held that a former employee "exceeds authorized access" to data on the employer's computer system under the CFAA where the employee takes actions on the computer that are contrary to the employer's written policies on acceptable use, such as prohibitions against copying files to help a third party compete with the employer.[963]

But then the Ninth Circuit agreed to rehear *Nosal en banc*. In April 2012, in a decision diminishing the use of the CFAA as a tool against employee misappropriation, the Ninth Circuit held that so long as the employer has authorized an employee to use the computer, there is no CFAA liability for taking information from the company database, even if that action violated company policy.[964] The *Nosal* decision makes California and other states within the Ninth Circuit peculiar in that *Nosal* rejects the views of three other circuits that have permitted employers to pursue CFAA claims against employees who violate computer-use policies or who violate their duties of loyalty.[965]

But *Nosal* left open the possibility of viable claims against former employees who, after leaving the company's employ, have gained gain unauthorized access to company computers. In 2013 a federal jury convicted Nosal under the CFAA for conspiring with other former employees to use the password of a current company employee (Nosal's former secretary) to access his former employer's computers.

13. Procedural Quirks Regarding Termination of Employment and Post-Termination

13.1 Cal-WARN Act

California employers who implement a mass layoff or relocate or terminate operations at any industrial or commercial facility at which they have employed 75 or more persons within the preceding 12 months must first give the affected employees 60 days of notice. "Employees" includes temporary and seasonal as well as full-time employees. A "mass layoff" means a layoff during any 30-day period of 50 or more employees at a covered establishment. "Relocation" is the removal of all or substantially all of the operations at the facility to a different location 100 miles or more away. "Termination" is the cessation or substantial cessation of the operations of the facility. An "employee" is one who has been employed for at least six months of the 12 months preceding the triggering event.

Does the mass transfer of employees from one employer to another, with no other change in the terms and conditions of employment, constitute a "layoff"? One California appellate court has said no: a layoff under Cal-WARN is "a separation from a position for lack of funds or lack of work,"[966] and that language did not apply where employees continued to work as they had before. [967]

This California version of the federal WARN Act[968] exceeds the scope of the federal act in two major respects: (1) Cal-WARN applies to companies that are too small to be covered by WARN, (2) Cal-WARN applies to business decisions affecting groups of employees that are too small to be covered by WARN. For these and other differences between California and federal WARN law, see § 13.1.4.

13.1.1 Recipients of notice

The notice must go to (a) the affected employees, (b) the EDD, (c) the local workforce investment board, and (d) the chief elected officer of each city and county government within which the triggering event occurs. The notice should also include the elements required under the WARN Act, if the federal law applies.[969]

13.1.2 Exemptions

Cal-WARN exempts employees in the broadcasting, motion picture industries, and certain occupations in the drilling, logging, and mining industries, if those employees were hired with the understanding that their employment was limited to the duration of a particular project. The law also does not apply to those employed in seasonal jobs, if they were hired with the understanding that the job was seasonal and temporary.

Beyond “physical calamity” and “act of war,” the only exigent-circumstances exception to the law’s requirements applies where the employer is actively seeking capital or business that would enable it to avoid or postpone a relocation or termination, and where it reasonably and in good faith believed that giving 60 days’ notice would preclude the employer from obtaining the capital or business. This exception applies only to relocations and terminations, not mass layoffs. To claim this exemption, the employer must give the EDD documentation under penalty of perjury.

13.1.3 Remedies for violation

A non-complying employer is liable to each affected employee for back pay and the value of benefits lost, for a period of up to 60 days. This liability is subject to offsets for payments made by the employer as separation wages or continued benefits during the period. The employer is also subject to a civil penalty of not more than $500 for each day of the violation, but this penalty is not imposed if the employer pays the employees what is due within three weeks of the triggering event. The penalty may also be reduced if the employer can prove that it acted in good faith.

An affected employee, a local government, or an employee representative may sue the employer for violation of Cal-WARN.

13.1.4 Comparing Cal-WARN with federal law

Cal-WARN differs in some material respects from the federal WARN Act.

Issue	California law	Federal law
Employer responsible for notice	Company and any parent corporation ordering the reduction in force	The employer
Definition of employer	Employer of 75 full- or part-time employees at establishment (any industrial or commercial facility), employed for six or more months of the 12 months preceding date on which notice is required	Employer of 100 full-time employees or full- and part-time employees who work 40 or more hours weekly
Triggering event	Layoff within any 30-day period of 50 or more employees or cessation (or substantial cessation) or relocation of 100 or more miles of all (or substantially all) operations of a covered establishment	Plant closing affecting 50 or more employees during a 30-day period; mass layoff of 500 or more employees during a 30-day period, or layoff of 50 or more employees constituting at least one-third of employer's active workforce; or, if employment losses during a 30-day period fail to meet the foregoing thresholds, employment losses for multiple groups of workers that, when aggregated, meet the threshold level during any 90-day period through either a plant closing or mass layoff, unless employer shows that employment losses during the 90-day period resulted from separate and distinct actions and causes.
Exceptions	No exception for business circumstances "not reasonably foreseeable" or for sale of business	Exceptions include business circumstances "not reasonably foreseeable" and the sale of going business
Officials to notify	Affected employees, EDD, local work force investment board, city elected official, chief county elected official	Affected employees, union representative, state displaced worker's unit, local government

13.2 Notices Required

13.2.1 Health insurance continuation

California requires, in addition to a COBRA notice, a notice of the right to continued health insurance benefits beyond the COBRA period. (See § 8, Employee Benefits.)[970]

13.2.2 EDD notice

California employers must provide employees who are terminating employment, either voluntarily or involuntarily, with written notice regarding entitlement to unemployment compensation benefits.[971]

13.3 Final Pay Checks

13.3.1 Time of payment

California employers generally must pay discharged employees in full on the day of discharge. An employee without a written contract for a definite period who resigns must be paid within 72 hours of the notice of resignation. (See § 7.5.3.)

13.3.2 Wages due

The final check must include all wages earned and unpaid.[972]

13.3.3 Paying all accrued vacation pay

See § 7.8, Vacation Pay.

13.3.4 Penalties

Willful failure to fully pay a discharged or resigning employee can result in substantial penalties. As to the amount owed but unpaid, there are virtually no defenses for the failure to pay promptly. If demand is made and the amount is not in dispute, penalties will most certainly be awarded. The penalty imposed is an amount not exceeding 30 working days of pay. (See § 7.5.3.)

13.4 Separation Agreements

13.4.1 Limitations on broad releases of claims

Settlement agreements, including severance or separation agreements presented to some employees upon termination of employment, typically provide for a general release of any claims the former employee may have against the employer. California imposes obstacles to the use of broad release language.

13.4.1.1 waiver of unknown claims

A California statute provides that a general release does not include unknown claims.[973] That is why California settlement agreements often contain explicit language purporting to waive the protection of this statutory provision.

13.4.1.2 waiver of non-waivable statutory protections

Courts often uphold a general release of "any and all actions, causes of action" as not applying to claims that, as a matter of law, cannot be waived. A California appellate court in 2006 held that this kind of language impermissibly purported to waive a former employee's non-waivable right to indemnification,[974] and that the employer's insistence on this general release, with no appropriate carve-out, violated public policy.[975] The California Supreme Court, fortunately, has ruled that a carve-out was unnecessary: a contract provision whereby an employee releases "any and all" claims does not encompass nonwaivable statutory protections.[976] Employers in the meanwhile generally have finessed the issue with release language specifying what had always seemed obvious—that the release agreement does not cover rights that cannot be waived as a matter of law.

13.4.2 Release of claims for wages

Employers settling accounts with a departing employee often consider making the payment of a bonus, or other deferred compensation, a part of the settlement package, in an effort to gain additional leverage over the employee. This practice can backfire in California. A Labor Code provision makes it a misdemeanor for an employer to "require the execution of any release of any claim or right on account of wages due, or to become due, or made as an advance on wages to be earned, unless payment of such wages has been made." Any such release is null and void.[977]

In 2009, however, a Court of Appeal decision, addressing an issue of first impression, held that employers can settle wage disputes in enforceable settlements so long as there was a "good faith dispute" as to whether the wages were owed.[978]

13.4.3 Release of USERRA claims

Federal USERRA claims[979] can be released, much like other statutory claims, so long as the release agreement is "clear, convincing, specific, unequivocal, and not under duress."[980] But not in California. One appellate decision ruled, without careful analysis, that a broad release of state and federal claims was unenforceable as to USERRA claims.[981] The plaintiff learned of his dismissal upon returning to work from a military

leave. He signed an agreement that promised him six weeks' salary in exchange for his release of claims under any "federal or state law … relating to claims or rights of employees." The plaintiff signed the agreement to get the money and then sued under USERRA. Although the trial court found that he had released his USERRA-based wrongful termination and contract claims, the Court of Appeal reversed, relying on no authority other than a mechanical reading of the statutory language that USERRA "supersedes any...contract, agreement…or other matter that reduces, limits, or eliminates in any manner any [USERRA] right or benefit."[982]

13.5 Worker Retention Laws

Los Angeles and other California cities (e.g., Santa Monica, San Francisco, Gardena) have enacted "worker retention" ordinances to require purchasers of major supermarkets to retain certain members of the pre-existing workforce for at least 90 days, subject only to the employer's right to fire a worker for cause. Other ordinances of this general kind similarly protect service workers in the event that one city contractor replaces another. In 2008 the California Grocers Association obtained an injunction against enforcement of the Los Angeles grocery worker retention ordinance and in 2009, the Court of Appeal, in a 2-1 decision, upheld the injunction, ruling that the ordinance is unconstitutional because it conflicts with the California Retail Food Code and is preempted by the National Labor Relations Act.[983]

Then, however, the California Supreme Court entered the fray. In July 2011, the court decided, 6-1, to reverse the Court of Appeal, concluding that the worker-retention ordinance was not preempted by the California Retail Food Code or the National Labor Relations Act and that the Code did not violate equal protection.[984] On January 23, 2012, the United States Supreme Court declined to hear the California Grocers Association's request to review the case.[985]

14. Health and Safety Legislation

14.1 Injury and Illness Prevention Program

California employers must prepare a comprehensive written injury and illness prevention program[986] and keep records of the steps taken to maintain the program.[987] The program must include (a) name(s) of the person(s) responsible for implementing the program, (b) a system to identify and evaluate workplace hazards, including scheduled periodic inspections to identify unsafe conditions and work practices, (c) the methods and procedures for correcting unsafe or unhealthy conditions and work practices in a timely manner, (d) an occupational health and safety training program, (e) a system for communicating with employees on occupational health and safety matters, and (f) a system to ensure that employees comply with safe and healthy work practices.

Employers that operate healthcare facilities must include within their prevention programs a "patient protection and healthcare worker back and musculoskeletal injury prevention plan," which includes a "safe patient handling policy" for all patient care units.[988]

14.2 "Be a Manager, Go to Jail" Act

The Corporate Criminal Liability Act of 1989 makes individual managers liable criminally for failing to disclose "concealed hazards."[989] Any employer who fails to report a fatal injury or the serious injury or illness of an employee to Cal-OSHA within eight hours of its occurrence faces a minimum penalty of $5,000. A serious injury or illness is defined as amputation of a member of the body, disfigurement, or in-patient hospitalization for more than 24 hours for other than observation. For more information, see www.dir.ca.gov/DOSH.

14.3 Proposition 65

The Safe Drinking Water and Toxic Enforcement Initiative of 1986 (aka Proposition 65) requires that businesses with ten or more employees give clear warning to anyone they knowingly expose to a toxic chemical. (This is why California restaurants warn people about the toxic dangers of the wine they might drink there.)

14.4 Cal OSHA Hazardous Substance Communication Standards

California employers whose employees may be exposed to hazardous substances must identify the substances and maintain a communication and training program for employees.

14.5 Anti-Retaliation Provisions

Employees may file complaints of discrimination with the DLSE, alleging retaliation for complaining about unsafe working conditions. For employees who complain about conditions at a health care facility, there is a rebuttable presumption that any adverse employment action that occurs within 120 days of the complaint was in retaliation for the complaint.[990]

14.6 Tobacco Smoking

Smoking is forbidden in enclosed spaces in all California workplaces, with limited exceptions for breakrooms that are designated for smoking and properly ventilated.[991] Certain workplaces are exempted, such as areas of hotels, some warehouses, meeting and banquet rooms, and casinos.

14.7 Drug-free Workplace

California employers that receive state government contracts or grants must (1) publish and provide to each employee a statement that prohibits the unlawful manufacture, sale, distribution, dispensation, possession, or use of controlled substances, and lists the actions to

be taken against employees who violate that prohibition, and (2) establish a drug-free awareness program.[992]

14.8 Repetitive Motion Injuries (RMIs)

Under California's first-in-the nation ergonomics regulation, employers with ten or more employees must create a program to minimize RMIs if (a) two or more employees suffer RMIs within the previous 12 months, (b) the injuries occur in jobs requiring the same repetitive motion, such as word processing, assembly, or loading, (c) the injuries result predominantly (more than 50%) from the repetitive job, and (d) a licensed physician diagnoses the injury as a musculoskeletal injury.[993] The prevention program must consist of (1) worksite evaluation of each job similar to the one where the injury occurred, to reduce exposures that have caused RMIs, and (2) training employees regarding the exposures, methods employed to reduce exposures, symptoms and consequences associated with RMIs, and the importance of reporting them.

14.9 "Hands off that Cell Phone!"

California drivers operating a moving vehicle must not use a cell phone unless the phone permits hands-free listening and talking and is so used while driving.[994] Employers whose employees drive on duty will have policies against unlawful cell-phone use, to minimize the prospect that related torts will be considered a predictable risk of employment (see § 5.8).

14.10 "Hands off that Blackberry!"

California drivers operating a moving vehicle must not read or transmit text on an electronic device.[995] Employers whose employees drive on duty will have policies against unlawful texting, to minimize the prospect that related torts will be considered a predictable risk of employment (see § 5.8).

15. Unemployment Compensation

15.1 Conditions for Eligibility

Both full-time and part-time employees can be eligible for unemployment compensation in California.[996]

15.2 Ineligibility and Disqualification

Discharge for misconduct results in disqualification for unemployment compensation benefits.[997] Misconduct is conduct showing "willful or wanton disregard of the employer's interest." Mere inefficiency or poor job performance is not misconduct.[998]

Voluntary termination of employment also generally disqualifies an individual for unemployment compensation. But quitting does not disqualify the employee for unemployment benefits if the quitting was for good cause. A quit generally is for good cause for employees who leave because they have:

- suffered discrimination unlawful under the FEHA,[999]
- suffered sexual harassment,[1000]
- needed to accommodate the job relocation of a spouse or a domestic partner,[1001] or
- left employment to protect their families or themselves from domestic violence.[1002]

15.3 The Claims Process

15.3.1 Determination of eligibility

The EDD makes its initial determination on the basis of the former employee's claim and the employer's response. A party dissatisfied with that determination can request a hearing before an administrative law judge (ALJ). The employer has the burden of proof to show that the employee was discharged for misconduct. The ALJ's decision can be appealed to the UIAB. (See § 1.6.)

15.3.2 No issue preclusion

The ALJ's decision in an unemployment compensation proceeding has no preclusive effect in a later proceeding.[1003]

15.3.3 Transcript provided

Witnesses before the ALJ give tape-recorded testimony under oath. Parties can obtain copies of the tape.

15.3.4 Decision admissible

Although the ALJ's decision has no preclusive effect, the decision may be admissible in a later proceeding.

16. Employer Reporting and Disclosure Requirements

16.1 New Hires

16.1.1 Reporting

Although the duty comes from federal law, all California employers must report to the California New Employee Registry, within 20 days of the start of work, the following information about each newly hired California employee (whether full-time, part-time, temporary, or seasonal): the employee's first and last name and middle initial, social security number, home address, and start-of-work date.[1004] The employer must also report the employer's business name and address, California Employer Account Number, Federal Employer Identification Number, and the contact person's name and telephone number. This requirement applies to employees hired as part of the acquisition of an ongoing business. Form DE 34, fit for this purpose, can be found within www.edd.ca.gov. The penalty for failing to report is $24 per hire, and $490 if the failure to report is part of an agreement between the employer and the employee. Multistate employers that file magnetically may elect to report all new hires to one state in which they have employees.

16.1.2 Disclosure

California's self-righteously entitled Wage Theft Protection Act requires employers to notify employees, at the time of hire, of these facts: (1) the employee's rate or rates of pay and the basis thereof (e.g., hourly, salary, commission, etc.), including any applicable overtime rates, (2) allowances, if any, claimed as part of the minimum wage, including meal or lodging allowances, (3) the regular payday designated by the employer, (4) the name, address, and telephone number of the employer, including any "doing business as" names used by the employer, (5) the name, address, and telephone number of the employer's worker's compensation insurance carrier, and (6) any other information the Labor Commissioner deems "material and necessary."[1005] Employers must also give written notice of any changes to this information within seven calendar days, unless the changes are reflected in a timely itemized wage statement or other writing.[1006] The statute exempts government employees, employees who are exempt from the payment of overtime wages under California law, and employees covered by certain collective bargaining agreements.[1007]

As of January 1, 2013, temporary services employers must include in the notice the name, the physical address of the main office, the mailing address (if different from the physical address) of the main office, and the telephone number of the legal entity for whom the employee will perform work, and any other information the Labor Commissioner deems "material and necessary."[1008] Exempted from these requirements are security services companies that solely

provide security services and that are licensed by the California Department of Consumer Affairs.[1009]

The Labor Commissioner has prepared a template notice that employers may use to fulfill their statutory obligations. See www.dir.ca.gov/dlse/LC_2810.5_Notice.pdf. The DLSE also has issued Frequently Asked Questions (FAQs). Employers must consider whether to use the DLSE template or to use a customized notice while assuring that it is disclosing all the required information.

16.2 Retention of Independent Contractors

California businesses that must file federal Form 1099-MISC must give the EDD identifying information about individual independent contractors who perform work in California and receive payment exceeding $600 or contract for such a payment. The business must provide this information to the EDD within 20 days of engaging the independent contractor. The EDD provides a downloadable form, at www.edd.ca.gov/taxform.htm, to record basic information about the business and the independent contractor, including taxpayer identification number and the dates of the contract's beginning and end or when calendar year payments reach $600. Because the law aims to enhance enforcement of child support obligations, its requirements do not apply to independent contractors that are corporations, general partnerships, or limited liability businesses.[1010] Failures to timely report this information trigger civil penalties, just as noted above with respect to the failure to report new hires, and the penalties are higher if the business and the contractor conspired not to report.

16.3 Itemized Wage Statements

California employers must, when paying employees their wages, provide them with an "accurate itemized statement in writing," listing "gross wages earned," "total hours worked," specified deductions, "net wages earned," and certain other information.[1011] Employers need not report total hours worked by salaried exempt employees. Wage statements to piece-rate workers must disclose the number of piece-rate units and the applicable piece-rate for all employees paid on that basis. Farm labor contractors that employers use must include in the itemized statement the name and address of the legal entity that secured the employer's services.[1012] As of July 2013, temporary services employers must include the rate of pay and the total hours worked for each temporary services assignment.[1013]

Substantial compliance with this wage-itemization requirement is not necessarily a defense. A California appellate opinion has quoted with approval a DLSE opinion that "failure to list the precise number of hours worked during the pay period conflicts with the express language of the statute and stands in the way of the statutory purpose." "If it is left to the employee to add up the daily hours shown on the time cards or other records so that the employee must

perform arithmetical computations to determine the *total hours worked* during the pay period, the requirements of section 226 would not be met."[1014]

Some common sense nonetheless appeared in judicial interpretation of the wage-statement requirements. A 2010 appellate opinion recognized that a wage statement that separately lists the total number of regular hours worked and the total number of overtime hours, without including a separate line summing up the two figures, complied with the requirement to list "total hours worked" in the wage statement.[1015]

16.3.1 large penalties and the "injury" requirement

Wage-statement violations can result in liability to injured employees in the amount of actual damages or a penalty of $50 per employee for the initial pay period in which a violation occurs and $100 per employee for each subsequent pay period in which a violation occurs, up to a maximum of $4,000, plus costs and attorney fees.[1016] These penalties are available only if the employee receiving an inadequate wage statement has suffered an "injury" as a result of a knowing and intentional failure by the employer to comply with the statute.[1017] The "injury" requirement once meant that trivial imperfections did not create monetary employer liability. One Court of Appeal concluded that deprivation of information on a wage statement "standing alone is not a cognizable injury."[1018] The former employee alleged that his wage statements failed to include the total hours worked, the net wages earned, and all applicable hourly rates of pay.[1019] Although the employee claimed that the lack of this wage-statement information "caused confusion and possible underpayment of wages due" and resulted in a "mathematical injury" requiring reconstruction of time and pay records, the Court of Appeal concluded that the deprivation of this information, standing alone, was not a cognizable injury, as it did not result in the type of injury that required "computations to analyze whether the wages paid in fact compensated [the employee] for all hours worked."[1020]

Then the California Legislature got back to work, broadening the definition of what constitutes a wage-itemization injury. Effective January 1, 2013, the Labor Code deems an injury to occur if the employer (a) fails to provide a wage statement or (b) fails to provide accurate and complete information and the employee cannot promptly determine, from the wage statement alone, the following items: (1) gross and net wages paid during the pay period, (2) total hours worked, except for any employee who is exempt from the payment of overtime under the administrative, professional, or executive exemptions, (3) the number of piece rate units earned and any applicable piece rate if the employee is paid on a piece rate basis, (4) all deductions, (5) the inclusive dates of the pay period, (6) hourly rates and corresponding hours worked at each rate (and, beginning July 1, 2013, if the employer is a temporary services

employer, the rate of pay and the total hours worked for each temporary services assignment), (7) the employer's name and address, (8) the employee's name, and (9) the employee's last four digits (only) of his or her social security number or employee identification number.[1021] The Legislature does allow that a "knowing and intentional failure" does not include an isolated and unintentional payroll error due to a clerical or inadvertent mistake.[1022]

Supporters of the 2013 amendment contended that it would benefit both workers (by protecting their fundamental right to receive accurate information) and employers ("by shielding them from liability over 'minor' or 'insignificant' inaccuracies on the wage statements"). It is likely that the expanded definition of "injury" applies only back to January 1, 2013, the date the amended statute went into effect.

16.3.2 Labor Commission penalties

Even if the employee does not suffer injury, the Labor Commissioner can pursue a California employer for additional penalties, absent a clerical error or inadvertent mistake, in the amount of $250 per employee for each violation in an initial citation and $1,000 per employee for each violation in a further citation.[1023] A California appellate opinion in 2011 confirmed that an employer's misunderstanding of the law is not "inadvertent" and thus cannot shield the employer from the imposition of penalties.[1024]

16.3.3 social security numbers

Among the data originally required on the wage statement was the employee's social security number. Realizing that this requirement created risks of identity theft, the California Legislature permitted employers to use alternatives to the SSN, such as an employee-identification number, which can include no more than the last four digits of the SSN. As of 2008, itemized wage statements must use such a number and can no longer use SSNs.[1025]

16.3.4 electronic wage statements

The DLSE has advised that even though the statute refers to the wage statement as a "detachable part of the check," employers can meet wage itemization requirements by giving employees access to electronic wage statements, provided that employees can print hard copies at no cost at nearby locations and that wage statements are electronically stored for at least three years.[1026]

16.3.5 special record retention requirement

Many employers do not keep copies of the wage statement provided to employees, because distributing those copies is the role of a third-party payroll administrator employers commonly retain for this purpose. Effective in 2012, however, the Labor Code requires employer to maintain copies of wage statements for up to three years.[1027] A copy can include a computer-generated record rather than an actual duplicate copy.[1028]

16.4 Executive Compensation

Under the California Corporate Disclosure Act, publicly traded corporations must report to the Secretary of State the salary and certain stock option rights of the five most highly compensated executives who are not on the board of directors.[1029]

16.5 Filing Job Applications

California once required employers that require job applicants to sign an application for employment to file the application form with the DLSE.[1030] That provision was repealed in August 2004.

16.6 EITC Information

California employers must, within a week of providing an employee any annual wage summary (e.g., Form W-2), deliver to or mail the employee written notice regarding the employee's possible eligibility for earned income tax credit.[1031]

17. Workers' Compensation Laws

The California workers' compensation system, since the early 1900s, has compensated employees for work-related injuries. It is a no-fault system, entitling injured workers to benefits without having to prove that the injury was the employer's fault. The system is a trade off: while injured workers get benefits without proof of employer negligence, generally those benefits are the exclusive remedy. The workers' compensation benefits are paid by either the employer (if the employer is authorized to self insure) or by the employer's workers' compensation insurance carrier.[1032]

While comprehensive details of California's enormously complicated workers' compensation system[1033] are beyond the scope of this modest monograph, aspects of that system intersect with employment law generally at various points, discussed briefly below.

17.1 Disability Discrimination

Under California's very liberal definition of "disability," virtually all job-related injuries will entitle the worker not only to compensation benefits but to protection as a disabled worker.[1034]

17.2 Privacy Implications

Medical information regarding an injured worker that an insurance carrier obtains during workers' compensation proceedings may be shielded from disclosure to the employer except insofar as the information is related to diagnosis of the condition for which compensation is claimed or is needed for the employer to modify the employee's work duties (see § 4.7.2).

17.3 Workers' Compensation Preemption

Remedies obtained through administrative agencies (see §§ 1.7, 1.8), may provide the exclusive remedy with respect to certain theories of liability that would otherwise be available to an employee suing an employer, although the scope of workers' compensation preemption in California is very narrow compared to that of most states (see § 5.5.1).

17.4 Compensation Implications

California employers must not deduct the cost of workers' compensation from employee earnings.[1035]

17.5 Good Faith Personnel Actions

While California workers' compensation broadly covers any injury arising out of employment, including psychiatric illness or injury, compensation for psychiatric injury may be denied when the employee has been employed less than six months (unless the stress resulted from "sudden and extraordinary" conditions, as opposed to "regular and routine" employment events), when the injury resulted from lawful, non-discriminatory, good faith personnel actions, or when the psychiatric claim was first made after notice of the employee's dismissal.[1036]

17.6 Temporary Labor

An employer using temporary workers supplied by a placement service can secure workers' compensation coverage by contracting with the placement service to have the placement service provide that coverage.[1037]

17.7 Coverage of Employees Only

17.7.1 Workers covered

Any person rendering service for another, other than an independent contractor, is presumed to be an employee for purposes of workers' compensation liability.[1038]

17.7.2 Independent contractors

Workers' compensation insurance is not required for independent contractors who work for a California employer. Some businesses buy services from independent

contractors to save money on workers' compensation insurance as well as taxes and other expenses normally associated with employment. Correct classification of a worker as an independent contractor is essential, because if a person improperly labeled as an independent contractor is injured while doing work for an employer's business, then the employer may have to pay for the medical bills for the injured worker. Similarly, if an employee hired by an improperly classified independent contractor to do some work is hurt, and the "independent contractor" does not carry workers' compensation insurance, then the employer may have to cover medical bills and compensation for the injured worker.

A California employer engaging an independent contractor should ask to see an insurance certificate establishing that the independent contractor's employees have workers' compensation insurance. For good measure, the employer should also ensure that the independent contractor has general liability insurance.

17.8 Discrimination Against Injured Workers—Labor Code § 132a

Section 132a makes it unlawful to discharge, to threaten to discharge, or to discriminate "in any manner" against a California worker who has made known any intent to file for workers' compensation benefits or who has received a workers' compensation rating, award, or settlement. This prohibition extends to protect workers were injured in jobs for a prior employer. Section 132a has been interpreted liberally, so that even a uniformly administered rule regarding termination of employment (e.g., a rule that anyone on disability leave for more than a year will be dismissed) can be unlawful, unless the employer shows that its discharge of the injured worker was based on "business necessity."[1039] A violation is a misdemeanor. Civil remedies include reinstatement, back pay, and an increase by one-half in the employee's workers' compensation benefits, or $10,000, whichever is less.

While civil remedies are available under Section 132a, a violation of this statute does not give rise to a common law wrongful termination claim, since the statute contains limitations in scope and remedy.[1040]

The logical sweep of Section 132a, as interpreted, arguably might reach even the continuation of medical benefits for an injured worker on leave. But the WCAB has held that an employer may discontinue medical benefits for employees on leave because of work-related injury, provided that the discontinuation was pursuant to an ERISA benefit plan.[1041] Moreover, the California Supreme Court has held that, beyond the termination context, the antidiscrimination rule of Section 132a simply requires that workers with industrial injuries be treated no worse than their co-workers.[1042]

18. Rights of Organized Labor

18.1 Agricultural Workers

In America generally, collective bargaining laws do not protect farm workers, as the National Labor Relations Act (NLRA) exempts agricultural labor. California, the home of Cesar Chavez, is different. Since 1975, the California Agricultural Labor Relations Act (ALRA) has given farm workers the right to be recognized at the bargaining table, under state procedures similar to those used under the NLRA. But the ALRA goes a big step further: while the NLRA simply requires employers to bargain, and does not mandate results, the ALRA imposes, on growers who refuse to meet union demands, a neutral mediator who can decree the terms of a binding contract, subject to final approval by ALRB.[1043] The constitutionality of this provision is questionable.

18.2 Anti-Injunction Laws re Mass Picketing

In America generally, employers can obtain injunctions against union-generated mass picketing that disrupts with business operations. California is different. California favors union speech. The 1975 Moscone Act limits the equity jurisdiction of courts with respect to labor disputes by declaring that conduct relating to a "labor dispute," such as peaceful picketing, "shall be legal, and no court … shall have jurisdiction to issue any restraining order or preliminary or permanent injunction which, in specific or general terms, prohibits any person or persons, whether singly or in concert, from [engaging in the specified conduct]."[1044]

Further favoring unions is California Labor Code Section 1138.1, which creates virtually insurmountable obstacles to any employer trying to enjoin union interference with business operations during a labor dispute. Section 1138.1 requires that employers seeking a temporary restraining order as to a labor dispute must produce live witnesses at a hearing (not just written declarations under oath), must prove that law enforcement is unable or unwilling to protect the employer's property, and must furnish "clear proof" (instead of the traditional "preponderance of the evidence") that the defendant union actually participated in or authorized unlawful acts.[1045]

These pro-union statutes attracted serious constitutional scrutiny in 2010 and 2011, when two Court of Appeal decisions struck them down as unconstitutional because their pro-union favoritism discriminates on the basis of the content of speech. In one case, a trial court relied on these statutes to deny an injunction against union agents trespassing on store premises to distribute flyers urging shoppers to boycott the store for failing to employ union workers. The Court of Appeal held that the statutes unconstitutionally favor speech related to a labor dispute over speech related to other issues: California could not constitutionally keep courts from exercising their equity jurisdiction to enjoin trespassing union agents just as they enjoin other trespassers.[1046]

In the other case, involving the same union and the same store employer, but in a different judicial district, the union used an "informational picket line" to tell shoppers that store workers were not unionized. Again, the statutes in question tied the hands of a judge who otherwise could enjoin the trespassing. The Court of Appeal in this second case also held the statutes unconstitutional, reasoning that there "is no compelling reason for the state to single [pro-union speech] out as the only form of speech that can be exercised despite the objection of the owner of private property upon which the speech activity occurs."[1047]

The California Supreme Court then, in 2012, re-tilted the playing field in favor of unions by invalidating these appellate decisions and issuing its own decision.[1048] The Supreme Court upheld the constitutionality of the Moscone Act and Section 1138.1 as being "justified by the state's interest in promoting collective bargaining to resolve labor disputes, the recognition that union picketing is a component of the collective bargaining process, and the understanding that the area outside the entrance of the targeted business is 'the most effective point of persuasion.'" For support, the Supreme Court cited other laws protecting labor-related speech in the context of economic regulations, and U.S. Supreme Court decisions that "support the proposition that labor-related speech may be treated differently than speech on other topics."

Chief Justice Cantil-Sakauye issued a concurring opinion, citing the portion of the Moscone Act that proscribes unlawful conduct—such as breach of the peace, disorderly conduct, and blocking of ingress and egress—to stress that the Moscone Act and Section 1138.1 do not protect union conduct that involves violence or aims to harm businesses by using tactics that go beyond "persuasion of patrons to labor's position." The chief justice opined that using more signs or individuals in a small area than reasonably required to publicize a dispute would be unlawful. But since these legal interpretations are not part of the majority opinion, it is unclear how much weight lower courts will give them.

The California Supreme Court's decision, which conflicts with federal opinions, might now be reviewed by the U.S. Supreme Court.

In another development related to the privileged nature that California has conferred upon pro-union activities, the Court of Appeal, applying California's constitutional protection of free speech to a private shopping mall, has held it was unconstitutional for the mall, having permitted union picketing of mall premises, to prohibit picketing by an animal rights' organization that was protesting the practices of a pet shop located within the mall.[1049]

18.3 Advertising for Strike-Breakers

Any advertisement seeking persons to work during a California trade dispute must contain certain disclosures, such as the fact of a dispute and the name of the advertiser and the employer who is represented.[1050]

18.4 Gag Orders for State Government Contractors

A union-inspired statute provided that employers contracting with or providing services to the state must not use state money to assist, promote, or deter union organization. State contractors were also forbidden to hold meetings on state property to assist, promote, or deter union organizing. Employers subject to this law had to certify in writing and maintain accounting records to prove that there had been no misuse of funds. Among the penalties for violation were a fine of repayment of the state funds plus a penalty equal to twice the amount of repayment. Taxpayers could sue to enforce this law, and prevailing plaintiffs could recover attorney fees.[1051]

When California employers challenged this restriction on employer speech as preempted by the National Labor Relations Act, the Ninth Circuit, in a 2006 *en banc* decision, ruled 12-3 that the legislation was valid.[1052] The Supreme Court now has held otherwise. In a 2008 decision, the Court ruled 7-2 that federal labor law preempted the California legislation, because that legislation impermissibly regulated within "a zone protected and reserved for market freedom."[1053]

18.5 Right to Leaflet in Private Shopping Malls

In America generally, the property rights of shopping mall owners permit them to exclude leafleting, as the constitutional right of free speech applies only against governmental, not private, action. California is different. In a 2007 case, the California Supreme Court, ruling in favor of labor organizers, held that the right to free speech under the California Constitution "includes the right to urge customers in a shopping mall to boycott one of the stores in the mall."[1054] Thus, a union may intrude upon the premises of a private shopping mall to urge a boycott of tenant stores, even though that activity interferes with the store's business.

In the underlying case, a union having a labor dispute with a newspaper prepared leaflets describing the newspaper's mistreatment of workers and distributed the leaflets outside a department store, because the store advertised in the newspaper. Mall officials told the union members, who were breaking a mall rule against urging boycotts of mall stores, that they were trespassing. The union filed an unfair labor practice charge against the mall with the NLRB. When the NLRB held that the mall's rules violated the NLRA, the mall appealed to the D.C. Circuit. Because "no California court has squarely decided whether a shopping center may lawfully ban from its premises speech urging the public to boycott a tenant," that court asked the California Supreme Court to decide whether the mall's rule was lawful.

The California Supreme Court ruled for the labor organizers and against the shopping mall. The Supreme Court first found that "[l]isteners' reaction to speech is not a content-neutral basis for regulation." Accordingly, the mall's content-based restriction on constitutionally protected speech required a "compelling interest" under the "strict scrutiny" test. Brushing aside the

mall's concern that encouraging a boycott interferes with the store's business operation, the Supreme Court concluded that the mall's anti-boycott rule was invalid: "[t]he Mall's purpose to maximize profits of its merchants is not compelling compared to the Union's right to free expression."[1055] Therefore, the mall could not enforce its anti-boycotting rule against the union.

A strong dissenting opinion urged the California Supreme Court to join the "judicial mainstream" by overruling California precedent that the property rights of shopping malls must yield to free-speech considerations. The dissent observed that California's peculiar law in this respect "has received scant support and overwhelming rejection around the country"; indeed, 14 states with free speech-provisions in their constitutions almost identical to California's had rejected the peculiar California rule. And four states that previously had adopted a similar approach to California's (Colorado, Massachusetts, New Jersey, and Washington) were "generally retreating."[1056]

Thus, while courts respect property rights in the context of private sidewalks or private parking lots of stand-alone stores,[1057] California, almost alone among the states, holds that shopping malls must remain open to the public for general speech purposes, subject only to reasonable time, place, and manner restrictions, meaning that unions in California have free rein to urge primary or secondary boycotts of stores inside privately owned shopping malls.

19. Independent Contractors

19.1 The Plaintiff's Preference for Employee Status

19.1.1 The individual who wants wages, benefits, penalties

People who provide services as independent contractors enjoy many advantages over similarly situated employees, such as lack of supervision, freedom to schedule work, the ability to contract the work out, avoidance of tax withholding, and the ability to make operational choices to maximize profit. Once a dispute arises between a business and its independent contractors, however, individuals who once bargained for the advantages that an independent contractor enjoys may seek to recharacterize themselves as employees.

Individuals can engage in this tactic because the agreements they have signed describing them as independent contractors are not conclusive of their status, and they will be tempted to engage in this tactic because employees, unlike independent contractors, can:

- seek reimbursement of expenses they necessarily incurred in discharging their duties,

- challenge requirements to buy supplies from the principal,
- challenge, as unlawful payroll deductions, deductions made for expenses advanced,
- sue for payments an employer would owe for denying meal or rest breaks,
- seek penalties incurred for the absence of accurate wage-itemization statements,
- seek money payable under employee benefit plans,
- sue in tort for wrongful termination in violation of public policy,
- sue for violation of minimum-wage and overtime-pay laws,
- seek contractually owed payments as unpaid wages, while seeking attorney fees,
- sue for waiting-time penalties for failing to pay timely termination wages,[1058]
- sue for violation of antidiscrimination and retaliation laws,
- seek workers' compensation benefits,
- seek unemployment compensation benefits, and
- have the DLSE act on their behalf to seek statutory and contractual remedies.

A 2012 California appellate decision lent plaintiffs' lawyers a helping hand by holding that a group of newspaper carriers, claiming to be employees misclassified as independent contractors, could pursue a class action, even though there were material differences among the class members as to several factors for the trier of fact to consider, in combination, in determining whether any particular individual is an employee or an independent contractor.[1059] The California Supreme Court has agreed to review this decision, and is expected to rule sometime in 2014.[1060]

19.1.2 The government official who wants taxes and penalties

Taxing authorities prefer that workers be characterized as employees rather than independent contractors, because employers owe payroll taxes for employees and owe no similar taxes with respect to their independent contractors (see §§ 1.6.2.).

19.1.3 The tort plaintiff who wants damages

Third parties injured by an independent contractor of an organization have an incentive to re-characterize independent contractors as employees, to argue that the injuries upon the third party were inflicted within the scope of employment, triggering liability of the organization as an employer.

19.2 Presumptions of Employment in Various Contexts

Ordinarily individuals who sue to obtain the benefits of employee status must bear the burden of proof to show that they are actually employees. In various California contexts, however, the standard of proof shifts in favor of the person claiming employment status and suing for benefits or wages.

19.2.1 Workers' compensation

For purposes of workers' compensation coverage, the Labor Code presumes that an individual retained to provide services for a fee is an employee, even if the individual has agreed in writing to be an independent contractor.[1061]

19.2.2 Unemployment compensation

California courts have held that, in unemployment insurance cases, public policy prefers that the organization rather than the individual shoulder the cost of social insurance.[1062] The law therefore requires organizations to prove independent-contractor status instead of requiring individuals to prove employee status.[1063]

19.2.3 Providing services under a license

California law presumes that a worker who provides services pursuant to a business license or for a person required to have such a license is an employee.[1064]

19.2.4 DLSE's presumption of employment where services provided

The DLSE has adopted a presumption of employment where an individual has provided services to an employer: "where employment status is at issue, that is, employee or independent contractor, DLSE starts with the presumption that the worker is an employee."[1065]

19.2.5 Labor Code claims

The Ninth Circuit has concluded that California law presumes workers to be employees, not independent contractors—even where workers have agreed in writing that they are independent contractors—and has rejected defendants' attempts rely on contractual choice-of-law provisions that call for the application of the law of another state, such as Texas or Georgia.[1066]

19.3 Inversion of Common Law Standards in Standard Jury Instruction

Under the common law, as restated in the Restatement of Agency, the question of employee status versus the status of independent contractor depends on various factors, the most

important of which is whether the principal has the right to control the manner and means of performing the services that the individual was retained to provide.[1067] The California Judicial Council, however, has approved a pro-plaintiff standard jury instruction, by which a jury that decides that the principal lacks the right to control the manner and means of performance can still find that the worker is an employee on the basis of secondary factors, such as the principal supplying equipment or tools or the place of work, paying by the hour instead of the job, having an unlimited right to end the relationship, supervising the work, having a long-term relationship with the worker, etc.[1068]

One basis for this jury instruction may be cases that arise under the workers' compensation statute, which advances special social policies not present in every case in which employee status is in dispute.[1069] But a 2011 California appellate decision advanced the pro-plaintiff proposition that even where control factors indicate the plaintiff is an independent contractor, the plaintiff can still present a triable issue of employee status by citing secondary factors. Thus, in that case even though the plaintiff truck drivers were owner-operators who controlled their own delivery operations, and thus seemed to be independent contractors under the primary factor of "right to control," the drivers could go to trial on their employee-status claim by citing such secondary factors as the W-2 forms they received, their tax withholding, their health plan benefits, their hourly rates for certain activities, the 24 hour termination provision in their contracts, and their function as a part of the defendant's regular business of providing transportation of property.[1070]

19.4 Absence of Statutory Protection as to Newspaper Carriers

For well over a century, the newspaper industry has regarded individuals contracting to provide home delivery of papers as independent contractors, not employees. Federal wage and hour law honors this characterization; the FLSA expressly exempts from its requirements "carriers engaged in making deliveries to the home or subscribers or other consumers of newspapers."[1071] Yet California is different. Unlike many other states, California has failed to adopt the newspaper-carrier exemption in its Labor Code.

19.5 Special Reporting Requirements.

Businesses that retain independent contractors must report them to the EDD (see § 16.2).

19.6 Administrative Enforcement

The EDD administers California's employment tax laws.[1072] The California Code of Regulations lists the rules generally applicable to common law determinations of employment.[1073]

19.7 Special Penalties for Willful Misclassification

Legislation effective in 2012 forbids California employers to willfully misclassify any individual as an employee[1074] or to assess against such an individual any deduction or fee that an

employer could not lawfully assess against an employee.[1075] Penalties range from $5,000 to $25,000 per violation.[1076] The legislation also decrees an electronic Scarlett Letter, by requiring any entity found to have willfully misclassified to "display prominently on its Internet Web site" a notice confessing it "committed a serious violation of the law by engaging in that willful misclassification of employees"[1077] and declaring that it has changed its business practices to avoid further violations.[1078]

The legislation casts a broader net by imposing joint and several liability on any "person who, for money or other valuable consideration, knowingly advises an employer to treat an in individual as an independent contractor to avoid employee status for that individual."[1079]

19.8 Dealing with Certain Labor Contractors

A California business must not enter an agreement for labor or services with certain contractors if the business knows or should know that the agreement fails to provide enough funds to allow the contractor to satisfy labor laws. The contractors affected are construction, farm-labor, garment, janitorial, security-guard, and warehouse contractors.[1080] Organizations that breach this obligation can be liable for actual damages or statutory penalties to workers who suffer injury from labor-law violations.[1081] The business must, upon request, give the Labor Commissioner a copy of the contractor agreement and other related documentation.[1082]

20. Miscellaneous Statutory Provisions

20.1 Agreement to Illegal Terms of Employment

California employers must not require employees or applicants to agree in writing to any condition the employer knows to be unlawful.[1083]

20.2 Garnishments

California employers must not discharge an employee for being subject to garnishment for the payment of one judgment.[1084] Under Family Code provisions, California employers must not rely on a wage-assignment support order to deny hire, to discharge, to discipline, to deny a promotion, or to taking any other adverse employment action. Violations of this prohibition subject the employer to a civil penalty up to $500.[1085]

Historically, the amount of California wages protected from garnishment reflected the federal minimum wage, which is less than the California minimum wage. Starting in 2013, the amount of California wages exempt from garnishment has increased, from $217.50 to $320. Weekly wages exceeding $320 may be garnished up to a limit of 25% of the debtor's disposable income.[1086]

20.3 Forced Patronage

Some companies require their employees to patronize company products or services. Thus, for example, employees of the Brand X department store might be expected to wear Brand X clothes. Not so in California, which forbids employers to require employees to purchase "anything of value" (e.g., safety training, auto insurance, banking services) from the employer or any particular vendor.[1087] California also forbids employers to require an employee to buy or sell stock in order to secure a job.[1088] (For rules on company-required uniforms, see § 7.1.8.)

20.4 Restrictions on Employer Rights to Employee Inventions

An employer may provide in its employment contracts for confidential disclosure of all of an employee's inventions made individually or jointly with others during the term of employment.[1089] But California employers must not require an employee to assign rights to an invention that the employee has developed on his or her own time without using the employer's equipment, supplies, facilities, or trade-secret information, unless the invention results from work for the employer or relates to the employer's business when the invention was developed.[1090] Further, any agreement requiring a California employee to assign invention rights must notify the employee of these limitations.[1091]

20.5 Indemnification of Employee Expenses

Under Labor Code Section 2802, California employers must indemnify employees for money that they necessarily expend or lose in direct consequence of discharging their duties or as a result of following their employer's direction.[1092] An employee who successfully sues the employer for indemnification is entitled to reasonable attorney fees and costs.[1093] A prevailing employee also would be entitled to interest on an award, at the rate applicable in civil actions, from the date on which the employee incurred the necessary expenditure or loss.

Although in effect since 1937, Section 2802 traditionally was simply a means to obtain employer "indemnification" only in the narrow sense of the word: "to reimburse (another) for a loss suffered because of a third party's act or default."[1094] Examples of these cases are noted below (see § 20.5.1 and § 20.5.2). More recently, however, employees have invoked Section 2802 to seek other kinds of employee expenses (see § 20.5.3).

20.5.1 Reimbursement for payment of attorney fees

California employers must indemnify an employee for the attorney fees incurred by the employee in defending a suit filed by a third party for liability arising out of the employee's employment. For example, an employee who successfully defended an action for co-worker sexual harassment was entitled to indemnification from the employer for his fees and costs in defending the action.[1095]

20.5.2 Reimbursement for value of stolen tools

An employer who requires employees to leave the employee's personal tools on the employer's premises must indemnify an employee for tools that are stolen from the premises.[1096]

20.5.3 Employee business expenses?

Although judicial decisions interpreting Section 2802 typically have addressed circumstances in which an employee seeks reimbursement for lost or damaged tools or equipment, or for the legal expenses incurred to defend a lawsuit arising out of the employee's job duties, the DLSE has interpreted Section 2802 to apply more broadly, to require employers to reimburse for routine employee business expenses. For example, the DLSE thinks that Section 2802 requires the employer to reimburse employee for such expenses as auto expenses (for other than commuting), client entertainment, and cell phone charges.[1097]

A 2005 appellate decision, *Gattuso v. Harte-Hank Shoppers, Inc.*, endorsed the DLSE's extension of Section 2802 to car mileage expenses.[1098] The California Supreme Court reviewed this case, and issued its own decision in 2007.[1099] The high court's decision assumed, without officially deciding, that Section 2802 does indeed require employers to reimburse employees for their ordinary business expenses.[1100]

At issue in *Gattuso* was whether the employer could satisfy any duty it had to reimburse necessary expenses by increasing the employee's overall compensation, as opposed to having to pay employees expenses as they were incurred and claimed on expense reports. *Gattuso* held that an employer can choose among various alternative methods to reimburse employee mileage expenses, including (1) tracking the actual costs to the employee for necessary fuel, insurance, depreciation, and service, and reimbursing that amount, (2) paying the employee a lump sum payment each month so long as the lump sum actually covered all necessary mileage expenses, (3) paying a per-mile rate, such as the IRS mileage rate, or (4) increasing the employee's commission rate with the extra commissions being devoted to cover the employees' expenses.[1101]

This employer victory was partial only. First, the *Gattuso* court held that because Labor Code Section 2804 forbids the employer and employee to waive the right to reimbursement, the employee will always be entitled to reimbursement of all necessary expenses, meaning that the employer who provides a fixed expense allowance or an enhanced commission rate must ensure that expense reimbursement payments actually cover all necessary expenses.[1102]

Second, *Gattuso* held that the employer must provide some method or formula to identify the amount of the combined employee compensation payment that is intended to provide expense reimbursement. The court also stated that, going forward, employers must identify the portion of wages allocated to expenses on itemized wage statements.[1103]

Gattuso effectively derailed the DLSE's proposed regulations, which would forbidden employers to indemnify travel expenses by paying higher base salaries or commission rates as a matter of contract. The DLSE also would require employers to reimburse the employee for all expenses necessarily incurred while traveling on business, and would treat as presumptively reasonable the vehicle mileage reimbursement rate set forth in IRS publication 463 (Entertainment, Gift, and Car Expense) and the lump sum per diem rate set forth in IRS publication 1542.[1104]

Another decision has held what *Gattuso* implies—that California employers must reimburse employee business expenses. In that case FedEx delivery drivers, arguing that they were employees, not independent contractors, sued FedEx under Section 2802 for reimbursement of work-related expenses.[1105] The Court of Appeal affirmed the trial court's finding that the drivers were employees for purposes of Section 2802 and that FedEx had failed to indemnify the drivers fully for their business expenses.

A federal district court has held that employers can be liable for business expenses even when the employee has failed to submit required expense reports. The court reasoned that the law focuses not on whether an employee requests reimbursement but rather on whether the employer either knows or has reason to know that the employee has incurred a reimbursable expense. If the employer has that actual or constructive knowledge, then it must exercise due diligence to ensure that the employee is reimbursed.[1106]

20.6 Child Labor

California's child labor laws are numerous and complicated. For a summary, see www.dir.ca.gov/DLSE/ChildLaborPamphlet2000.html.

Even here California goes to peculiar lengths. It forbids employment on a motion picture set or location of an infant under the age of one month, unless a board-certified pediatric physician and surgeon certifies that the infant is at least 15 days old, was carried to full term, was of normal birth weight, and has the lungs, eyes, heart, and immune system one needs to handle the stress and potential risks of filmmaking. Violation of this provision is a misdemeanor punishable by a fine of $2,500 to $5,000, 60-day jail term, or both. The medical certification must be provided in advance to the Labor Commissioner, who will consent to the minor's employment through issuance of a permit.[1107]

20.7 Human Trafficking

A non-traditional employment law is the California Transparency in Supply Chains Act of 2010, which requires retail sellers and manufacturers doing business in California and having at least $100 million in annual worldwide gross receipts to disclose, on their website, their efforts to eradicate slavery and human trafficking from their direct supply chains for tangible goods offered for sale.[1108] The exclusive remedy for a violation (so far) is an injunctive action by the California Attorney General.[1109] Further, as of 2013, certain businesses (e.g., truck stops, bus stations) must post notices providing hotline numbers to use to report incidents of human trafficking.[1110]

21. Some Provisions Favoring California Employers

This section lists a few unusual provisions of California law that can benefit employers (even if that was not their primary intent).

21.1 Claims for Unlawful Tape Recording

Corporate employers as well as individuals can sue for civil penalties when an employee surreptitiously tape-records confidential communications.[1111] Thus, wrongful termination plaintiffs who have secretly tape recorded disciplinary meetings with their supervisors have found themselves facing cross-complaints. The tapes are generally inadmissible in evidence.[1112]

21.2 Civil Harassment Actions

Employers can act on behalf of their employees to obtain injunctive relief against unlawful violence or a credible threat of violence that reasonably might be construed to be carried out at the workplace.[1113] One California appellate court has ruled that an employer's unsuccessful petition for an injunction would not support a malicious prosecution suit by the employee who had been the target of the petition.[1114]

21.3 Anti-SLAPP Motions

California's "anti-SLAPP" statute permits defendants to move to strike meritless claims that are based upon the defendant's exercise of constitutional rights.[1115] While this statute aims to protect public interest groups sued for defamation by corporate developers and other organizations, corporate employers have used this statute when sued for statements made to the government, such as the employers' position statements to the EDD or the EEOC or the tax forms that the employers have filed with the IRS.

21.4 Special Proof Required to Impose Punitive Damages

California law provides special protections against the imposition of punitive damages on corporate employers. The plaintiff must prove by "clear and convincing" evidence (not merely "the preponderance of the evidence") that she suffered from the fraudulent, malicious, or oppressive conduct of a corporate "managing agent," or that the "managing agent" ratified wrongful conduct or had advance knowledge of the wrongdoing employee's unfitness for employment.[1116] The "clear and convincing" standard of proof applies not only to whether the conduct was fraudulent, malicious, or oppressive but also to whether the corporate wrongdoer or ratifier was a managing agent of the corporate defendant.[1117] Another pro-defendant aspect of California law in this regard is that no award of punitive damages is valid absent proof of the defendant's net worth,[1118] and discovery into that net worth is forbidden unless the plaintiff first shows a likelihood that punitive damages will be awarded on the facts of the case.[1119]

Punitive damages are not available in claims for Labor Code violations.[1120]

21.5 Relatively Short Statute of Limitations

California once had an unusually short statute of limitations for personal injury claims—just one year. This statute applied to most employment-related torts, including wrongful termination in violation of public policy. The statute of limitations for those claims now is two years.[1121]

21.6 Contractually Authorized Judicial Review of Arbitration Awards

The California Supreme Court has held that California employers invoking the California arbitration statute (but not the Federal Arbitration Act) can enforce agreements by which arbitral awards can be reviewed for errors of law. (See § 5.1.3.2.)

21.7 Freedom from Compulsory Use of E-Verify

Some states and municipalities, concerned about unlawful immigration, require employers to use the otherwise optional E-Verify electronic employment verification system (administered by the U.S. Department of Homeland Security) when considering job applications. Arizona enacted such a law, and the City of Lancaster, California enacted a similar ordinance. When the U.S. Chamber of Commerce challenged the Arizona statute, arguing that it was preempted by federal immigration law, the U.S. Supreme Court upheld the statute.[1122]

California, however, differs from Arizona. Its Employment Acceleration Act of 2011—legislation sponsored by both business groups and the ACLU—forbids state and local governments from requiring employers to use electronic employment verification systems, except as required by federal law or as a condition of receiving federal funds.[1123]

Conclusion

Whether or not you consider California a leader in “progressive” employment laws likely will depend on whether you are a plaintiff’s attorney or an employer. Something that any objective observer must acknowledge, however, is that California employment law often is peculiar.

SEYFARTH SHAW

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Index of Statutory and Wage Order Provisions

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Unemployment Compensation Insurance Code

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IWC Wage Orders

Endnotes

[1] We do not cover California law comprehensively, but rather simply aim to raise consciousness (a California term) about certain legal issues. Elsewhere herein is a full-form disclaimer.

[2] As of June 2013, disability discrimination complaints were the most common, followed by retaliation, race and gender discrimination, and sexual harassment.

[3] The old FEHC, as one of its last acts, on December 30, 2012, promulgated long-awaited regulations on disability (2 Cal. Code Regs §§ 7293.5–7294.4) and pregnancy (2 Cal. Code Regs §§ 7291.2–7291.18).

[4] Lab. Code § 1173.

[5] See *California Labor Federation v. IWC*, 63 Cal. App. 4th 983 (1998).

[6] *Kettenring v. Los Angeles Unified School Dist.*, 167 Cal. App. 4th 507, 512 n.2 (2008). See www.dir.ca.gov/iwc/wageorderindustries.htm.

[7] Lab. Code § 21.

[8] Some industries historically have heavily relied on immigrant labor. California has enacted measures in recent years to protect immigrant workers (see §§ 3.5, 5.13)..

[9] See Lab. Code §§ 98(a) and 98.3.

[10] Lab. Code § 98.

[11] Lab. Code § 98(a).

[12] Lab. Code § 200.5(a). In 2013, the Court of Appeal held that, as long as a claimant is consistently pursuing remedies in any forum—administrative or judicial—the statute of limitations on a wage claim will be subject to equitable tolling, but this decision was then depublished by the California Supreme Court. *Bain v. Tax Reducers, Inc.*, 219 Cal .App. 4th 110 (2013), *rev. denied and ordered not to be officially published*, No. S213850 (Cal. Dec 11, 2013).

[13] Lab. Code § 98.2.

[14] *Sonic-Calabasas A, Inc. v. Moreno*, 51 Cal. 4th 659, *vacated,* 132 S. Ct. 496 (2011).

[15] 132 S. Ct. 496 (2011).

[16] *Sonic-Calabasas A, Inc., v. Moreno*, 57 Cal. 4th 1109 (2013).

[17] Lab. Code § 98.2(a).

[18] *Williams v. FreedomCard, Inc.*, 123 Cal. App. 4th 609 (2004) (employer found liable for failure to pay wages waived right to appeal Labor Commissioner's award of unpaid wages by failing to post surety bond or file declaration of indigency).

[19] Lab. Code § 98.2(b).

[20] *Id.*

[21] Lab. Code § 98.1(c).

[22] Lab. Code 98.4.

[23] Lab. Code 98.2(c).

[24] *Smith v. Rae-Venter Law Group*, 29 Cal. 4th 345 (2002) (party seeking *de novo* appeal of Labor Commissioner order, whether employer or employee, is liable for other side's fees and costs unless trial court judgment is more favorable to appealing party than was the award from which the appeal was taken).

[25] Lab. Code § 98.2(c) (amended effective 2004). See *Progressive Concrete, Inc. v. Parker*, 136 Cal. App. 4th 540 (2006) (attorney fees not available to employer who requested trial *de novo* after adverse ODA and succeeded in reducing award).

[26] *Murphy v. Kenneth Cole Productions, Inc.,* 40 Cal. 4th 1094, 1114-20 (2007) (employee who claimed only overtime and waiting-time penalties before the DLSE could add, during the trial *de novo* on the employer's appeal, additional claims for missing meal and rest breaks and inadequate wage-itemization statements).

[27] Lab. Code § 98.7. This provision has *not* been held to be an employee's exclusive remedy for discrimination of this sort. See generally § 5.5.2.

[28] Lab. Code § 1195.5.

[29] *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557, 573 (1996) (no deference owed to DLSE's Enforcement Manual, because it was not promulgated in conformity with Administrative Procedures Act). *See also McFarland v. Guardsmark*, 538 F. Supp. 2d 1209 (N.D. Cal. 2008) (holding that employee who agrees to on-duty meal break can wave second meal break when working more than 10 hours and not fewer than 12, and rejecting contrary interpretation set forth in DLSE manual as "void regulation"), *aff'd*, 588 F.3d 1236 (9th Cir. 2009); *Areso v. CarMax, Inc.*, 195 Cal. App. 4th 996, 1007 (2011) ("we afford no deference to the statement in the DLSE manual," because it was not properly adopted); *California School of Culinary Arts v. Lujan*, 112 Cal. App. 4th 16, 28 (2003) (rejecting as void a long-standing DLSE "underground regulation" limiting professional exemption for teachers to teachers in colleges that offer a baccalaureate degree).

[30] Executive Order by the Governor of the State of California, No. S-2-03 (Nov. 17, 2003), accessible at http://gov.ca.gov/news.php?id=3381 (visited on February 21, 2014).

[31] See, *e.g., Bell v. Farmers Ins. Exchange*, 87 Cal. App. 4th 805, 815 (2001) (quoting *Monzon v. Schaefer Ambulance Service, Inc.*, 224 Cal. App. 3d 16, 30 (1990)).

[32] See, *e.g., Hudgins v. Neiman Marcus Group, Inc.*, 34 Cal. App. 4th 1109, 1126 (1995) (rejecting DLSE opinion letter as poorly reasoned).

[33] Lab. Code §§ 226.8 and 2753. Penalties range from $5,000 to $25,000 per violation.

[34] 22 Cal. Code Regs § 4304-1.

[35] 22 Cal. Code Regs §§ 4304-2 to 4304-12.

[36] There are some limits to the Labor Commissioner's enforcement reach. In *Happy Nails & Spa of Fashion Valley v. Su*, 217 Cal. App. 4th 1459 (2013), ordered not officially published (Nov. 20, 2013), the Court of Appeal held that once the UIAB found that cosmetologists were independent contractors, the Labor Commissioner was collaterally estopped to pursue penalties on the basis that the workers were really employees.

[37] *Claxion v. Waters*, 34 Cal. 4th 367 (2004) (standard preprinted form used to settle workers' compensation claim releases only those claims within scope of the workers' compensation system, and not claims asserted in separate civil actions).

[38] DFEH regulations define the four months as the equivalent of what the employee works in four months (17.33 weeks). If an employee's hours vary from month to month, then the average number of hours per week is used, calculated by looking back for 17.33 weeks. 2 Cal. Code Regs §§ 11042(a)(1), 11035(*l*).

[39] DFEH regulations define pregnancy-related conditions to include morning sickness, preeclampsyia, pre- and post-natal care, and post-partum depression. 2 Cal. Code Regs § 11035(f).

[40] Gov't Code § 12945(b)(2).

[41] 2 Cal. Code Regs § 11043(a).

[42] *Sanchez v. Swissport, Inc.*, 213 Cal. App. 4th 1331 (2013) (employee placed on bed rest during most of her pregnancy, and then terminated after 19 weeks of pregnancy leave—three months before her due date— may have been entitled to entitled to additional, disability leave, under the FEHA, if the employer could not show that the extended leave would have imposed an undue hardship on the company).

[43] Gov't Code § 12945(c).

[44] 2 Cal. Code Regs § 11041(c).

[45] Gov't Code § 12945(a)(2)(A). Before 2012, an employer was not required to continue group health benefits during a pregnancy disability leave unless (1) the employer had a policy of continuing benefits during similar leaves or (2) the leave was covered by the federal Family and Medical Leave Act. Employers may recover from employees the premium paid to maintain their coverage during a leave to the extent that (1) employees fail to return to work after the pregnancy disability leave or (2) employees fail to return from leave for a reason other than either (a) taking leave under the California Family Rights Act or (b) the continuation, recurrence, or onset of a condition that entitles the employee to a pregnancy disability leave or other circumstances beyond the employee's control.

[46] An even longer leave could be required if pregnancy-related conditions require further leave under the reasonable-accommodation provisions of the FEHA. See *Sanchez v. Swissport, Inc.*, 213 Cal. App. 4th 1331 (2013).

[47] Gov't Code § 12945(a)(4).

[48] 29 U.S.C. § 207(r)(1).

[49] Lab. Code §§ 1030-1032.

[50] Gov't Code § 12945.2.

[51] Gov't Code § 12945.2(t) ("It shall be an unlawful employment practice for an employer to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right protected by this section."). This legislation, effective in 2012, aimed to incorporate parallel restrictions in the federal FMLA.

[52] On two occasions, an employee has a right to take intermittent CFRA bonding leave of less than two weeks' duration. 2 Cal. Code Regs § 11090(d).

[53] See generally 2 Cal. Code Regs § 11091(b)(2).

[54] *Faust v. California Portland Cement Co.*, 150 Cal. App. 4th 864, 882-83 (2007).

[55] *Lonicki v. Sutter Health Central*, 43 Cal. 4th 201 (2008).

[56] *Avila v. Continental Airlines, Inc.*, 165 Cal. App. 4th 1237 (2008).

[57] The deadline for the employer's response was once ten calendar days. See 2 Cal. Code Regs § 7297.4(a)(6). The 2013 proposed regulations would make the deadline five business days. 2 Cal. Code Regs § 11091 (a)(6).

[58] *Olofsson v. Mission Linen Supply*, 211 Cal. App. 4th 1236 (2012) (noting, however, that employer had invited litigation by taking weeks to calculate how many hours the employee had worked in the preceding 12 months, before finally concluding the employee was ineligible for leave, and could have avoided litigation with a more meticulous leave request process). The employee had requested unpaid FMLA/CFRA leave to care for his mother. The employer denied the request because the employee had not worked the requisite number of hours within the past 12 months. Between the employee's request for leave and the employer's denial, the employee spoke several times with supervisors and HR representatives about his request, with the employer providing a leave request form and asking the employee to submit a doctor's letter corroborating the need for leave.

[59] *Hollingsworth v. Perry*, 130 S. Ct. 705 (2013).

[60] *United States v. Windsor*, 13 S. Ct. 2675 (2013).

[61] *Richey v. AutoNation, Inc.*, 210 Cal. App. 4th 1516, 1537, 1540-41 (2012), *rev. granted*, No. S207536 (Feb. 13, 2013). The Court of Appeal reversed a judgment confirming an arbitration award for the employer, which had fired an employee while he was on CFRA leave, in the belief that he was misusing his leave by working part-time at the restaurant he owned. The Court of Appeal concluded that the arbitrator had committed clear legal error by accepting an "honest belief" defense, because that defense wrongly relieved the employer of its burden to prove the employee actually abused his medical leave by working at another job while on leave.

[62] SB770 (approved by the Governor September 24, 2013).

[63] Lab. Code §§ 1025, 1041. Under Section 1025, employers need not provide rehabilitation where (i) rehabilitation would cause undue hardship for the employer or (ii) the employer is denying employment because (a) the employee cannot perform duties because of the current use of alcohol or drugs, or (b) the employee cannot perform duties without endangering the health or safety of the employee or others.

[64] Lab. Code § 1026.

[65] Lab. Code §§ 230, 230.1, 230.2.

[66] Lab. Code § 230(a).

[67] Lab. Code § 230.5(a)(1),(b)(1). The specified offenses, listed in Section 230.5(a)(2), include vehicular manslaughter while intoxicated, felony child abuse likely to produce great bodily harm or death, assault resulting in the death of a child under eight years of age, felony domestic violence, felony physical abuse of an elder or dependent adult, felony stalking, solicitation for murder, "serious felony," hit-and-run causing death or injury, felony driving under the influence causing injury, and sexual assault.

[68] Lab. Code 230.5(b)(2).

[69] Lab. Code 230.5(f).

[70] Lab. Code §§ 230(f).

[71] Lab. Code §§ 230.1.

[72] Lab. Code §§ 1501-1507 (unpaid leave of not less than 10 days per calendar year).

[73] Lab. Code § 230.4 (temporary leaves of absence not to exceed an aggregate of 14 days per calendar year).

[74] Lab. Code §§ 230.3, 230.4.

[75] Election Code § 14000 *et seq.*

[76] Lab. Code § 230.8.

[77] See also Lab. Code § 230.7 (leave for parent of suspended pupil).

[78] DLSE Opinion Letter 2003.05.21, at 6 (PTO that employer implicitly permits to be used for sick leave constitutes sick leave for purposes of kin care).

[79] *McCarther v. Pacific Telesis Group, Inc.*, 48 Cal. 4th 104 (2010).

[80] Lab. Code § 234. Similarly, the San Francisco Family Friendly Workplace Ordinance, effective in 2014, prohibits retaliation for requesting time off to care for a family member, even if the employee has no sick time available. See § 2.14.

[81] Lab. Code § 233.

[82] Military & Veterans Code § 394.5 *et seq.*

[83] 20 C.F.R. § 1002.5(d)(1)(i) and DOL comments in preamble to same. See also 38 U.S.C. § 4303(4)(A)(i).

[84] *Haligowski v. Superior Court*, 200 Cal. App. 4th 983 (2011).

[85] Military & Veterans Code § 395.10.

[86] *Id.* § 395.10(d), (e).

[87] Lab. Code §§ 1508-1513.

[88] *Gerawan Farming, Inc. v. Lyons*, 24 Cal. 4th 468, 489-90 (2000).

[89] Cal. Const., art. I, § 1 ("All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.").

[90] Lab. Code §§ 96(k), 98.6(a).

Section 96 provides: "The Labor Commissioner and his or her deputies and representatives authorized by him or her in writing shall, upon the filing of a claim therefore by an employee, or an employee representative authorized in writing by an employee, with the Labor Commissioner, take assignments of:

... (k) Claims for loss of wages as the result of demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employer's premises."

Section 98.6 provides: "(a) No person shall discharge an employee or in any manner discriminate against any employee or applicant for employment because the employee or applicant engaged in any conduct delineated in this chapter, including the conduct described in subdivision (k) of Section 96 … . (b) Any employee who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated against in the terms and conditions of his or her employment because the employee engaged in any conduct delineated in this chapter, including the conduct described in subdivision (k) of Section 96 ... shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by such acts of the employer."

91 Lab. Code § 98.6(c)(2)(A).

92 Lab. Code § 98.6(c)(2)(B).

93 *Rulon-Miller v. IBM*, 162 Cal. App. 3d 241, 248 (1984) (observing "close question of whether those rules or regulations permit IBM to inquire into the purely personal life of the employee. … [T]he right of privacy, a constitutional right in California … , could be implicated by the IBM inquiry."). In upholding a jury verdict for the employee, the *Rulon-Miller* court relied on the implied covenant of good faith and fair dealing, with the constitutional discussion as background, rather than relying directly on the constitutional right to privacy itself.

94 *Barbee v. Household Automotive Finance Co.*, 113 Cal. App. 4th 525 (2003) (supervisor could be terminated for violating company policy against dating subordinates; Labor Code Section 96(k) does not describe any public policy but rather "simply outlines the types of claims over which the Labor Commissioner shall exercise jurisdiction").

95 *Grinzi v. San Diego Hospice Corp.*, 120 Cal. App. 4th 72 (2004) (case manager fired on suspicion of participating in Ponzi scheme has no public policy claim for wrongful termination based on first amendment of Constitution or on Labor Code Sections 96(k) or 98.6).

96 Lab. Code § 232.

97 *Grant-Burton v. Covenant Care, Inc.*, 99 Cal. App. 4th 1361 (2002) (upholding wrongful termination claim of employee fired after telling co-workers she had not received bonus because her supervisor did not believe in them; Labor Code Section 232, protecting disclosure of "wages," covers bonuses).

98 Lab. Code § 232.5.

99 *Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1079 & n.5 (9th Cir. 2007), *cert. dismissed,* 552 U.S. 1161 (2008).

100 *Luke v. Collotype Labels USA, Inc.*, 159 Cal. App. 4th 1463 (2008) (federal labor law preempts claim for wrongful termination in violation of public policy stated in Labor Code Sections 232.5 and 923).

101 Lab. Code § 923.

102 *Gelini v. Tishgart*, 77 Cal. App. 4th 219 (1999) (employer violated Labor Code Section 923 by firing employee because her lawyer wrote employer to request better hours and parental leave).

103 *Wysinger v. Automobile Club of Southern California*, 157 Cal. App. 4th 413 (2007) (discussed in § 6.3.5); *Claudio v. Regents of the University of California*, 134 Cal. App. 4th 224, 243 (2005).

104 *TRW, Inc. v. Superior Court*, 25 Cal. App. 4th 1834 (1994) (defense contractor could fire employee for refusing, in absence of counsel, to cooperate in investigation of possible security breaches; no Fifth Amendment right against self-incrimination applied as there was no government action and no "custodial investigation by law enforcement"), *cert. denied,* 513 U.S. 1151 (1995); *Robinson v. Hewlett Packard*, 183 Cal. App. 3d 1108 (1986) (employer could fire employee for refusing to meet alone, without his lawyer, to attend performance evaluation).

105 Lab. Code § 1102.5; *Holmes v. General Dynamics Corp.*, 17 Cal. App. 4th 1418, 1433 (1993) (affirming jury verdict for plaintiff fired for reporting company violations of federal False Statements Act); *Collier v. Superior Court*, 228 Cal. App. 3d 1117, 1124-25 (1991) (plaintiff allegedly fired for telling upper

management that other employees might be engaged in embezzlement and violations of federal antitrust laws).

[106] *McVeigh v. Recology San Francisco*, 213 Cal. App. 4th 443, 471 (2013) (Section 1102.5 "protects employee reports of unlawful activity by third parties such as contractors and employees, as well unlawful activity by an employer").

[107] *Id. at* 469 ("employee's report of illegal activity can … constitute protected conduct under [Section 1102.5(b)] even if she 'was simply doing her job' in making the report").

[108] Lab. Code § 1102.5(a),(b) (law protects not only reports to "a government or law enforcement agency," but also reports "to a person with authority over the employee, or to another employee who has authority to investigate, discover, or correct the violation or noncompliance").

[109] Lab. Code § 1102.5(b).

[110] See Lab. Code § 244(a) (plaintiffs need not exhaust administrative remedies or procedures to sue under a Labor Code Section, unless the section expressly requires exhaustion—and Section 1102.5 does not).

[111] Lab. Code § 1102.6.

[112] Lab. Code § 1102.5(f).

[113] Bus. & Prof. Code § 2056. This statute probably does not create a direct right of action but could support an action for breach of contract and, like any explicit statement of public policy, would support an employee's tort action for dismissal or demotion in violation of public policy. *See generally Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167 (1980) (employee could bring tort for wrongful termination where dismissed for refusing to engage in illegal price-fixing).

[114] Health & Safety Code § 1278.5(b) (providing for civil penalties of up to $25,000 and remedies for employees or medical staff suffering retaliation).

[115] Health & Safety Code § 1278.5(d)(1).

[116] Lab. Code § 1024.6.

[117] Lab. Code § 244. "Family member" includes a spouse, parent, sibling, child, uncle, aunt, nice, nephew, cousin, grandparent or grandchild related by blood, adoption, marriage or domestic partnership.

[118] *Pettus v. Cole*, 49 Cal. App. 4th 402, 452-61 (1996).

[119] *Gerawan Farming, Inc. v. Lyons*, 24 Cal. 4th 468, 489-90 (2000).

[120] *Compare Smith v. Fresno Irrigation Dist.*, 72 Cal. App. 4th 147, 165-66 (1999) (reversing judgment for plaintiff in lawsuit alleging wrongful termination when he was dismissed after testing positive for amphetamines, methamphetamines, and marijuana; random drug test was justified by hazards inherent in his employment) *with Luck v. Southern Pacific Transp. Co.*, 218 Cal. App. 3d 1 (1990) (mandatory drug testing of computer programmer was breach of implied covenant of good faith and fair dealing as it was an unwarranted intrusion under California Constitution's privacy provisions; plaintiff was not a safety employee and no other compelling interests justified the testing). *Luck*'s "compelling interest" test for non-safety-related private sector drug testing was disapproved in *Hill v. National Collegiate Athletic Ass'n*, 7 Cal. 4th 1, 56-57 (1994).

[121] *Loder v. City of Glendale*, 14 Cal. 4th 846 (1997) (upholding applicant testing as part of generally applicable pre-employment exam, where employer's "substantial interest" overcame "relatively minor" intrusion on expectation of privacy, but disallowing testing of current employees seeking promotion), *cert. denied,* 522 U.S. 807 (1997); *see generally Hill v. NCAA*, 7 Cal. 4th 1 (1994) (privacy rights depend in part on reasonable expectation of privacy, and invasion of privacy can be justified by "countervailing interests" or by consent). *See also Pilkington Barnes Hind v. Superior Court*, 66 Cal. App. 4th 28 (1998) (upholding suspicionless applicant testing).

[122] *Lopez v. Pacific Maritime Ass'n*, 657 F. 3d 762 (9th Cir. 2011) (amended opinion issued on denial of rehearing and petition for rehearing *en banc*) (policy challenged not on privacy grounds but rather on the theory that "one strike" rule discriminated against former addicts on the basis of disability).

[123] San Francisco, CA Municipal Code Pt. II, Police Code, ch. VII, article 33A, §§ 3300A.1-3300A.11 (Prohibition of Employer Interference with Employee Relationships and Activities and Regulations of Employer Drug Testing of Employees).

[124] The EEOC tried to nudge federal law in California's direction law in 2012, in releasing its Enforcement Guidance on Consideration of Arrest and Conviction Records Under Title VII of the Civil Rights Act of 1964. See http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm. The EEOC argues that pre-employment inquiries about arrests not resulting in convictions have had a disparate impact on applicants in protected classifications (e.g., national origin, race) and that use of arrest records "is not job related and consistent with business necessity." This approach still leaves the employer free, of course, to consider the underlying facts that led to the arrest.

[125] Lab. Code §§ 432.7, 432.8.

[126] Lab. Code § 432.7.

[127] Lab. Code § 432.7 (as amended by SB 530). By special exception, community youth athletic programs may request state and federal criminal history information from the Department of Justice for both volunteer coaches and hired coach candidates. Penal Code § 11105.3.

[128] *Starbucks Corp. v. Superior Court (Lords)*, 168 Cal. App. 4th 1436 (2008) (*Starbucks I*). But the mischief did not end there. The trial court then permitted class counsel to conduct further discovery to find a "suitable" class representative, and ordered Starbucks to review job applications to find former job applicants with prior marijuana convictions to reveal to class counsel, unless the applicants affirmatively opted out to a neutral administrator. In *Starbucks Corp. v. Superior Court*, 194 Cal. App. 4th 820 (2011) (*Starbucks II*), the Court of Appeal granted a writ of mandate against this discovery, noting that by providing for the disclosure of job applicants with minor marijuana convictions, the lower court ironically was violating the very privacy rights contained in "marijuana reform legislation" that the class action purported to enforce.

[129] 49 S.F. Police Code §§ 4901-4920.

[130] Lab. Code § 432.2.

[131] Health & Safety Code § 120980(f) ("Except as [used for insurance risk purposes], the results of an HIV test, as defined in Section 120775, that identifies or provides identifying characteristics of the person to whom the test results apply, shall not be used in any instance for the determination of insurability or suitability for employment.").

[132] Gov't Code § 12940(o).

[133] Pen. Code § 632.

[134] Pen. Code § 637.2.

[135] Pen. Code § 632(d).

[136] Lab. Code § 435.

[137] *Sanders v. American Broadcasting Co.*, 20 Cal. 4th 907 (1999) (employees talking around a cubicle could sue ABC news crew for surreptitiously videotaping).

[138] *Hernandez v. Hillsides, Inc.*, 47 Cal. 4th 272 (2009).

[139] Civ. Code § 56.20(a).

[140] Civ. Code § 56.20(c).

[141] Civ. Code § 56.20(b).

[142] Civ. Code §§ 56.11, 56.21.

[143] Lab. Code § 3762(c).

[144] Civ. Code § 1798.85.

[145] Civ. Code § 1798.85(a)(3).

[146] Civ. Code § 1798.81.5(b).

[147] Civ. Code § 1798.81.5(c).

[148] Lab. Code § 980(b)(1)-(3).

[149] Lab. Code § 980(e).

[150] Lab. Code § 980(c).

[151] Lab. Code § 980(d).

[152] Civ. Code § 1798.82.

[153] Civ. Code § 1798.82(e)(4), (5).

[154] See Code Civ. Proc. §§ 1985.6, 2020(d)(2) (requiring notice to individual when individual's employment records are being subpoenaed).

[155] One exception occurred when an appellate decision struck down a discovery order that an employer identify the applicants who had reported marijuana convictions on their job applications. *Starbucks Corp. v. Superior Court*, 194 Cal. App. 4th 820 (2011). In another victory for privacy, an appellate court in a wrongful-termination case protected from disclosure, via interrogatory answers, personal information that the plaintiff had sought regarding the age, contact information, date of termination, and reason for termination of the defendant employer's former employees. *Life Technologies Corp. v. Superior Court,* 197 Cal. App. 4th 640, 655-56 (2011) (trial court abused discretion in ordering answers to interrogatories without evaluating whether a compelling need for information outweighed third-party privacy and whether less intrusive means would yield the information sought, without giving sufficient notice affording former employees a simple, reasonable means of objecting to disclosure of personal information, and without providing for protection of any information ultimately disclosed).

[156] *Belaire-West Landscape, Inc. v. Superior Court*, 149 Cal. App. 4th 554 (2007).

[157] *Id.* at 561-62.

[158] *Id.* at 562.

[159] *Id.* (quoting *Phillips v. Gemini Moving Specialists*, 63 Cal. App. 4th 563, 571 (1998)).

[160] *Crab Addison, Inc. v. Superior Court (Martinez)*, 169 Cal. App. 4th 958 (2008) (employees' execution of release forms objecting to employer's disclosure of contact information to third parties did not preclude discovery of contact information in class action against employer for violation of wage and labor laws).

[161] *Stone v. Advance Am.*, 2010 U.S. Dist. LEXIS 99754 (S.D. Cal. 2010) (distinguishing *Belaire-West Landscape* and ordering contact information to be produced for former employees employed during the class period, without prior notice to them, where plaintiff claimed former employees during class period were percipient witnesses).

[162] 15 U.S.C. § 1681 *et seq.*

[163] Civ. Code § 1785.1 *et seq.*

[164] Civ. Code § 1785.20.5(a).

[165] Civ. Code § 1785.20.5(a).

[166] Lab. Code § 1024.5.

[167] Lab. Code § 1024.5(a)(1)-(8). There is an exemption for financial institutions subject to the Gramm-Leach-Bliley Financial Services Modernization Act of 1999. Under Civil Code section 1785.20.5(a), the disclosure to the consumer when a credit report is ordered for employment purposes must identify the applicable exception under Labor Code Section 1024.5.

[168] Civ. Code § 1786 *et seq*.

[169] Civ. Code § 1786.2(c).

[170] Civ. Code § 1786.50(a)(1).

[171] *Moran v. The Screening Pros, LLC*, 2012 U.S. Dist. LEXIS 158598 (C.D. Cal. Sept. 28, 2012), *appeal pending*, No. 12-57246 (9th Cir.).

[172] Civ. Code § 1786.16(b)(1),(c).

[173] Civ. Code § 1786.16(a)(2).

[174] As of 2012, a California employer procuring a report must also disclose the Internet website of the investigative consumer reporting agency. Civ. Code § 1786.16(a)(2)(B)(vi). If the investigative consumer agency does not have a website, then the consumer must receive a telephone number to learn about the investigative consumer agency's privacy practices, including whether the consumer's personal information will be sent outside the United States or its territories. Civ. Code § 1786.16(a)(2)(B)(vi).

[175] Civ. Code § 1786.18(a)(7) (investigative consumer reporting agency may not report records of convictions that from date of disposition, release, or parole antedate report by more than seven years). Section 1786.18(b)(2) exempts reports for employers explicitly required by government regulatory agencies to check for certain records.

[176] Civ. Code § 1786.16(c).

[177] Civ. Code § 1786.53(a)(3).

[178] Civ. Code § 1786.53(b)(4).

[179] *Moran v. Murtaugh, Miller, Meyer & Nelson*, 126 Cal. App. 4th 323 (2005), *aff'd on other grounds,* 40 Cal. 4th 780 (2007) (holding—in opinion that superseded the lower court decision and that did not reach the ICRRA issues—that trial court could look beyond the pleadings and weigh evidence when deciding how likely a "vexatious litigant" was to prevail).

[180] Civ. Code § 1786.53(b)(1)-(3).

[181] *Moran v. The Screening Pros, LLC*, 2012 U.S. Dist. LEXIS 158598 (C.D. Cal. Sept. 28, 2012), *appeal pending*, No. 12-57246 (9th Cir.). The plaintiff sued Screening Pros for issuing a background check report on him that contained his criminal history, in violation of the ICRAA. Screening Pros moved to dismiss, successfully arguing that ICRAA is unconstitutionally vague as to criminal history information, leaving persons of reasonable intelligence unable to tell whether that information is "character" information that the ICRAA governs or "creditworthiness" information that the CCRAA governs. This distinction matters because the ICRAA imposes stricter duties and more severe penalties—such as the option to seek $10,000 in statutory damages in lieu of damages.

[182] *Soroka v. Dayton Hudson Corp.*, 235 Cal. App. 3d 654 (1991) (decision not officially published), *rev. dismissed,* 6 Cal. 4th 124 (1993).

[183] Lab. Code § 1051.

[184] *Id.*

[185] Lab. Code § 401.

[186] Civ. Code § 52.7.

[187] Civ. Code § 52.7(h)(3).

[188] See *City of Ontario v. Quon*, 560 U.S. 746 (2010) (assuming that a police officer sending personal text messages while using a police-issued pager had a reasonable expectation of privacy in their content)..

[189] *Holmes v. Petrovich Development Co.*, 191 Cal. App. 4th 1047, 1068 (2011).

[190] 9 U.S.C. § 1 et seq.

[191] *Southland Corp. v. Keating*, 465 U.S. 110 (1984).

[192] *Perry v. Thomas*, 482 U.S. 483, 490-91 (1987) (FAA preempts California Labor Code Section 229, banning arbitration of wage claims, so plaintiff must abide by agreement to arbitrate pursuant to a Form U-4 agreement). Section 229 remains in the Labor Code.

[193] *Preston v. Ferrer*, 552 U.S. 346, 353-54 (2008).

[194] *AT&T Mobility LLC v. Concepcion*, 563 U.S. __, 131 S. Ct. 1740, 1747 (2011).

[195] See *Discover Bank v. Superior Court,* 36 Cal. 4th 148 (2005) (in contract of adhesion, arbitration provisions that waive class actions are void as against public policy).

196 *Sonic-Calabasas A, Inc. v. Moreno*, 51 Cal. 4th 659 (2011) ("*Sonic I*").

197 *Sonic-Calabasas A, Inc. v. Moreno,* 132 S. Ct. 496 (2011) (remanding to Supreme Court of California for further consideration in light of *AT&T Mobility LLC v. Concepcion,* 563 U.S. __, 131 S. Ct. 1740 (2011)).

198 *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109 (2013) ("*Sonic II*") (unconscionability remains a valid defense against enforcement of arbitration agreements).

199 *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp*., 559 U.S. __, 130 S. Ct. 1758, 1774 (2010).

200 *Grafton Partners v. Superior Court (PricewaterhouseCoopers)*, 36 Cal. 4th 944 (2005). But see *Woodside Homes of California, Inc. v. Superior Court (Wheeler)*, 142 Cal. App. 4th 99 (2006) (enforcing contract clause that any controversy arising under contract shall be submitted to general judicial reference).

201 *Id*. at 968 (Chin, J., concurring).

202 *Id*. at 970.

203 24 Cal. 4th 83 (2000).

204 See*, e.g., Ontiveros v. DHL Express*, 164 Cal. App. 4th 494 (2008) (upholding denial of motion to compel arbitration of suit for employment discrimination; arbitration agreement was unconscionable, and therefore unenforceable, because employee had to sign it to be hired, and because agreement gave arbitrator sole authority to determine arbitrability, required employee to pay costs unique to arbitration, deprived employees of right to recover statutory costs and reasonable attorney fees if employee prevailed, and limited employee to one deposition; trial court could declare entire agreement unconscionable rather than severing unconscionable provisions where unconscionable provisions governing arbitrability, discovery, and costs permeated entire agreement).

205 42 Cal. 4th 443 (2007).

206 *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 1108 (9th Cir. 2002); *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 1198-1200 (9th Cir. 2002).

207 42 Cal. 4th at 471-72.

208 *Id.* at 480-81 (Baxter, J., dissenting).

209 *Trivedi v. Curexo Technology Corp.*, 189 Cal. App. 4th 387 (2010). See also *Mayers v. Volt Management Corp.,* 203 Cal. App. 4th 1194, 1208 (2012) ("By failing to even identify the set of arbitration rules that would apply to the parties' final and binding arbitration of employment disputes, the arbitration provisions subjected plaintiff to unreasonable surprise and oppression.").

210 *Wherry v. Award, Inc.*, 192 Cal. App. 4th 1242 (2011).

211 *Chavarria v. Ralphs Grocery Co*., 733 F.3d 916 (9th Cir. 2013) (employer arbitration policy deemed so one-sided it "shocked the conscience" and was unenforceable under California law).

212 Thus, in *Trivedi v. Curexo Technology Corp.*, 189 Cal. App. 4th 387, 396-97 (2010), the court disapproved of a provision permitting the parties to seek judicial injunctive relief while arbitration proceeded, because the court viewed the employer as more likely to seek injunctive relief than the employee. What makes this conclusion particularly peculiar, even for California, is that the California Arbitration Act itself authorizes precisely this sort of interim judicial injunctive relief. Code Civ. Proc. § 1281.8(b) (party to arbitration agreement may seek provisional judicial relief, if arbitral award "may be rendered ineffectual without provisional relief," without thereby waiving the right to arbitrate).

A sensible 2012 decision declined to follow *Trivedi*: "We fail to see how the Agreement's express incorporation of section 1281.8 is unconscionable given that, if the statute were not expressly incorporated, it would be read into the Agreement." *Baltazar v. Forever 21, Inc.*, 212 Cal. App. 4th 221 (2012), *rev. granted*, No. S208345, 154 Cal. Rptr. 3d 73 (2013).

213 *Trivedi*, 189 Cal. App. 4th at 394-95 (arbitration agreement cannot serve to waive statutory rights, and so arbitration clause calling for prevailing-party attorney fees was "substantively unconscionable" because it put the suing employee "at greater risk than if he brought his FEHA claims in court"); see also *Wherry v. Award, Inc.*, 192 Cal. App. 4th at 1248-49.

[214] See *Chavarria v. Ralphs Grocery Co*., 733 F.3d 916, 923-26 (9th Cir. 2013).

[215] *Little v. Auto Steigler, Inc.*, 29 Cal. 4th 1064 (2003) (special *Armendariz* rules apply to claim for dismissal in violation of public policy); *see also Mercuro v. Superior Court*, 96 Cal. App. 4th 167, 180 (2002) (special rules cover claim under statute enacted for "public reason," such as Labor Code Sections 280.8 [protecting employee-parent for taking time off to visit school] and 970 [prohibiting false job promises to induce people to move]).

[216] *Brown v. Ralphs Grocery Co.*, 197 Cal. App. 4th 489, 502-03 (2011). The *Brown* court relied on *Broughton v. Cigna Healthplans,* 21 Cal. 4th 1066 (1999) (claims for injunctive relief under the California Consumers Legal Remedies Act are not arbitrable), *Cruz v. PacifCare Health Systems, Inc.*, 30 Cal. 4th 303 (2003) (claims for injunctive relief under the UCL are not arbitrable), and *Franco v. Athens Disposal Co.*, 171 Cal. App. 4th 1277, 1303 (2009) (PAGA waiver in arbitration agreement invalid because it impedes comprehensive enforcement of the Labor Code). But see *Iskanian v. CLS Transp.*, 206 Cal. App. 4th 949 (2012) (disagreeing with *Brown*: "[W]e disagree with the majority's holding in *Brown*. We recognize that the PAGA serves to benefit the public and that private attorney general laws may be severely undercut by application of the FAA. But we believe that the United States Supreme Court has spoken on the issue, and we are required to follow its binding authority."), *rev. granted*, No. S204032 (Cal. Sept. 19, 2012).

[217] A dissenting justice pointed out that U.S. Supreme Court's decisions have made clear that the FAA preempts state law that precludes enforcement of arbitration agreements. *Id.* at 508 (Kriegler, J., dissenting).

[218] *Iskanian v. CLS Transporation Los Angeles, LLC*, 206 Cal. App. 4th 949, 964-66 (2012), *rev. granted,* No. S204032 (Sept. 19 2012), *rev. granted*, No. S204032 (Cal. Sept. 19, 2012).

[219] *Green Tree Financial v. Bazzle*, 539 U.S. 444 (2003).

[220] *Edelist v. MBNA America Bank*, 790 A.2d 1249, 1261 (Del. Super. Ct. 2001).

[221] *Discover Bank v. Superior Court (Boehr),* 36 Cal. 4th 148, 165-72 (2005).

[222] *Id.* at 161.

[223] *Konig v. U-Haul Co. California*, 145 Cal. App. 4th 1243 (2006) (class-action waiver in employment contract's arbitration clause not unconscionable where class action would have involved more than "predictably ... small amounts" of damages to individual class members).

[224] *Gentry v. Superior Court (Circuit City Stores, Inc.)*, 42 Cal. 4th 443, 450 (2007).

[225] The *Gentry* court interpreted this factor such that it will almost always favor class actions. Although individual wage claimants can recover tens of thousands of dollars, the court called these amounts only "modest." 42 Cal. 4th at 457. The court cited *Bell v. Farmers Exchange*, 115 Cal. App. 4th 715, 745 (2004), to indicate that even an award as large as $37,000 would not be "ample incentive" for an individual lawsuit, and suggested that the larger awards recoverable in age discrimination suits, with a median value of $269,000, would sufficiently incentivize individual lawsuits. 42 Cal. 4th at 458-59. *Gentry* further deprived this factor of any meaning by stating that "class actions may be needed to assure the effective enforcement of statutory policies even though some claims are large enough to provide an incentive for individual action." *Id.* at 462.

[226] *Id.* at 463.

[227] A 2011 decision, *Brown v. Ralphs Grocery Co.*, 197 Cal. App. 4th 489 (2011), upheld a class-action waiver in an arbitration agreement against a challenge based on *Gentry*, where the plaintiff failed to make any factual showing that class arbitration would likely be a significantly more practical means of vindicating employee rights. *Id.* at 497. The *Brown* decision nonetheless found another potential reason to invalidate the arbitration agreement in question—the waiver of a PAGA action. The Court of Appeal remanded for determination on whether that unenforceable waiver would warrant denial of enforcement of entire arbitration agreement. *Id.* at 504.

[228] *Murphy v. Check 'N Go of California, Inc.*, 156 Cal. App. 4th 138, 148 (2007).

[229] *Id.* at 145.

[230] In *Brown v. Ralphs Grocery Co.*, 197 Cal. App. 4th 489 (2011), the court found it unnecessary to determine whether the *Gentry* rule "concerning the invalidity of class action waivers in employee-employer contract arbitration clauses is preempted by the FAA." *Id.* at 498.

[231] *Truly Nolen of America v. Superior Court*, 208 Cal. App. 4th 487, 493 (2012) ("Although *Concepcion*'s reasoning strongly suggests that *Gentry*'s holding is preempted by federal law, the United States Supreme Court did not directly rule on the class arbitration issue in the context of unwaivable statutory rights and the California Supreme Court has not yet revisited *Gentry*. Thus, we continue to be bound by *Gentry* under California's stare decisis principles.").

[232] *Franco v. Arakelian Enterprises, Inc.*, 211 Cal. App. 4th 314, 325 (2012).

[233] *Iskanian v. CLS Transporation Los Angeles, LLC*, 206 Cal. App. 4th 949, 959-61 (2012), *rev. granted,* .

[234] *Fowler v. Carmax, Inc.*, No. B238426, slip op. at 14 (Cal. Ct. App. March 26, 2013).

[235] *Carmax Auto Superstores v. Fowler,* No. 13-439 (U.S. Feb. 25, 2014) ("The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the Court of Appeal of California, Second Appellate District for further consideration in light of *American Express Co. v. Italian Colors Restaurant*, 570 U. S. ___ (2013).").

[236] *Armendariz*, 24 Cal. 4th at 93. *See also Wherry v. Award, Inc.*, 192 Cal. App. 4th 1242, 1250 (2011).

[237] Code Civ. Proc. § 1281.12.

[238] *E.g., Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1175 (9th Cir. 2003) (one-year limitations period set forth in arbitration agreement is unconscionable, as it would bar suits on continuing violations); *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 894 (9th Cir. 2002) (same); *Stirlen v. Supercuts, Inc.,* 51 Cal. App. 4th 1519, 1542 (1997) (criticizing one-year limitations provision in arbitration agreement that would not permit tolling). See also the *Pellegrino* decision, cited in § 5.10.3.1.

[239] *Soltani v. Western & Southern Life Ins. Co.*, 258 F.3d 1038, 1043-47 (9th Cir. 2001) (upholding provision in job application creating post-termination limitations period of six months, but striking down 10-day deadline to give written notice of intent to sue).

[240] *Pellegrino v. Robert Half International, Inc.*, 182 Cal. App. 4th 87, 107-110 (2010). The California Supreme Court granted review of this case, albeit on other grounds, so it has been officially depublished.

[241] *Pearson Dental Supplies, Inc. v. Superior Court (Turcios)*, 166 Cal. App. 4th 71 (2008), *rev. granted*, No. S167169 (Cal. Aug. 21, 2008) (raising these issues: (1) What standard of judicial review applies to an arbitrator's decision on a FEHA claim? (2) Can a mandatory arbitration agreement restrict an employee from seeking administrative remedies for violations of the Act?).

[242] *Pearson Dental Supplies, Inc. v. Superior Court (Turcios),* 48 Cal. 4th 665 (2010). The court declined to address whether the one-year statute of limitations provided in the arbitration agreement was unlawful and independently rendered the agreement invalid, because the issue was not presented in the petition for review. *Id.* at 682 n.5.

[243] *Sparks v. Vista Del Mar Child & Family Services*, 207 Cal. App. 4th 1511 (2012). See also *Gorlach v. Sports Club Co.,* 209 Cal. App. 4th 1497, 1509 (2012) (declining to enforce handbook arbitration clause because handbook told employees they must sign an arbitration agreement, "implying that it was not effective until (and unless) they did so. Because Gorlach never signed the arbitration agreement, we cannot imply the existence of such an agreement between the parties.").

[244] Section 10(a) of the FAA empowers courts to vacate an arbitral award only where (1) the award was procured through corruption, fraud, or undue means, (2) the arbitrator was corrupt or evidently partial, (3) the arbitrator committed prejudicial misconduct such as refusing to hear material evidence, or (4) the arbitrator exceeded powers or so imperfectly executed them that a definite award on the subject matter submitted was not made. 9 U.S.C. § 10(a).

[245] The Supreme Court decision is *Hall Street Associates v. Mattel, Inc.*, 552 U.S. 576 (2008). A case holding that the "manifest disregard" doctrine remains viable after *Hall Street* is *Kashner Davidson Securities*

Corp. v. Mscisz, 531 F.3d 68 (1st Cir. 2008) (vacating arbitration award based on manifest disregard of the law).

246 *Siegel v. Prudential Ins. Co.*, 67 Cal. App. 4th 1270 (1998).

247 *Pearson Dental Supplies, Inc. v. Superior Court*, 48 Cal. 4th 665, 669-70 (2010) (trial court properly vacated arbitrator's award that "clearly erred in ruling that the employee's claim was time-barred," because award would have deprived the employee of "a hearing on the merits of an unwaivable statutory employment claim").

248 See Code Civ. Proc. §§ 1286.2 (ground for vacating arbitration award), 1286.6 (grounds for correcting arbitration award).

249 *Crowell v. Downey Community Hospital Foundation*, 95 Cal. App. 4th 730 (2002) (parties cannot agree to expand jurisdiction of court to provide judicial review of arbitration awards beyond that provided by statute).

250 *Cummings v. Future Nissan*, 128 Cal. App. 4th 321 (2005).

251 *Cable Connections v. DirectTV*, 44 Cal. 4th 1334 (2008). The court's reasoning suggests that the parties could also contract to vacate an award that lacks substantial evidence to support it.

252 *Hall Street Associates v. Mattel, Inc.*, 128 S. Ct. 1396, 1404-05 (2008).

253 Code. Civ. Proc. §§ 1286(a)(4), 1286.6(b).

254 *Gantt v. Sentry Ins.*, 1 Cal. 4th 1083, 1094 (1992). The high court has given at least good lip service to the idea that the Legislature, not the judiciary, makes public policy in the employment arena: "public policy as a concept is notoriously resistant to precise definition, and … courts should venture into this area, if at all, with great care and due deference to the judgment of the legislative branch, lest they mistake their own predilections for public policy which deserves recognition at law. … [C]ourts should proceed cautiously if called upon to declare public policy absent some prior legislative expression on the subject." *Id.* at 1095 (internal quotations and citations omitted).

255 *See, e.g., Stevenson v. Superior Court*, 16 Cal. 4th 880, 889-90 (1997) (public policy must have support in constitutional or statutory provision, inure to public benefit rather than merely individual interest, be articulated at the time of employee's dismissal, and be fundamental and substantial); *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 670 n.12 (1988) (no public policy implicated where plaintiff told management that co-worker was suspected of embezzlement at his prior place of employment, as the parties, consistent with public policy, could have expressly agreed that plaintiff was not to reveal co-worker's background).

256 *Green v. Ralee Engineering Co*., 19 Cal. 4th 66, 79 (1988); *Turner v. Anheuser-Busch, Inc*., 7 Cal. 4th 1238, 1256 n.9 (1994).

257 *Lagatree v. Luce, Forward, Hamilton & Scripps*, 74 Cal. App. 4th 1105 (1999).

258 *See, e.g., Jersey v. John Muir Medical Center*, 97 Cal. App. 4th 814, 824-27 (2002) (employee sued abusive client; case did not implicate any anti-retaliation provision such as exists in employment discrimination statutes). See *Becket v. Welton Becket & Assocs.,* 39 Cal. App. 3d 815, 822 (1974) (no clearly identified constitutional or statutory provision supports public policy favoring free access to courts without fear of retaliation).

259 *Carter v. Escondido Union High Sch. Dist.*, 148 Cal. App. 4th 922 (2007).

260 *Dutra v. Mercy Medical Center, Mount Shasta*, 209 Cal. App. 4th 750, 756 (2012).

261 *See Green v. Ralee Engineering Co.*, 19 Cal. 4th 66, 76 (1998).

262 *Kouff v. Bethlehem-Alameda Shipyard*, 90 Cal. App. 2d 322, 324-25 (1949).

263 *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167 (1980) (employee could bring tort claim for wrongful termination where dismissed for refusing to engage in illegal price-fixing).

264 *Haney v. Aramark*, 121 Cal. App. 4th 623 (2004) (public policy of discouraging fraud constitutes fundamental California public policy sufficient to support wrongful discharge claim).

[265] *Petermann v. Teamsters*, 174 Cal. App. 2d 184, 188-89 (1959).

[266] *Barbosa v. IMPCO Technologies, Inc.,* 179 Cal. App. 4th 1116 (2009) (reversing trial court's nonsuit where employee had dismissed plaintiff for falsifying time records, after plaintiff offered to repay two hours of claimed overtime pay with excuse that he had been "confused" in claiming the pay in the first place).

[267] *Semore v. Pool*, 217 Cal. App. 3d 1087 (1990) (employee fired for refusing, under constitutional privacy rights, to submit to test for illegal drugs).

[268] *Pettus v. Cole*, 49 Cal. App. 4th 402 (1996) (California Constitution and Civil Code section 56).

[269] *Rojo v. Kliger*, 52 Cal. 3d 65 (1990).

[270] *Gelini v. Tishgart*, 77 Cal. App. 4th 219 (1999) (where plaintiff's lawyer wrote employer to request better hours and parental leave, jury could find that the employer, in then firing the plaintiff, violated Labor Code Section 923, which entitles employees to select their own bargaining representatives).

[271] *Ali v. L.A. Focus Publication*, 112 Cal. App. 4th 1477 (2003) (employee's activities privileged under Labor Code Section 1101, which forbids employers to prevent employees from engaging in politics and to discriminate because of political affiliation).

[272] *Nelson v. United Technologies*, 74 Cal. App. 4th 597 (1999) (dismissing employee for taking CFRA leave supports tort claim for wrongful discharge).

[273] *Grant-Burton v. Covenant Care, Inc.*, 99 Cal. App. 4th 1361 (2002) (employee privileged under Labor Code Section 232 to disclose wages, a concept that includes bonuses).

[274] *Hentzel v. Singer Co.*, 138 Cal. App. 3d 290 (1982) (Labor Code Section 6310, forbidding any person to discriminate against any employee for complaining to governmental agency with respect to employee safety or health, also protects complaint to employer regarding same); *see also* Lab. Code § 1102.5.

[275] *Franklin v. The Monadnock Co.*, 151 Cal. App. 4th 252 (2007) (employers must provide "safe and secure workplace and encourage employees to report credible threats of violence in the workplace").

[276] *Green v. Ralee Engineering*, 19 Cal. 4th 66 (1998) (upholding public-policy claim where quality control inspector was fired after complaining about employer's shipment of defective aircraft parts, even though public policy appears in regulation, not statute).

[277] *McVeigh v. Recology San Francisco*, 213 Cal. App. 443, 448, 471 (2013) (Labor Code "protects employee reports of unlawful activity by third parties such as contractors and employees, as well [as] unlawful activity by an employer").

[278] *Jie v. Liang Tai Knitwear Co.*, 89 Cal. App. 4th 654, 660-61 (2001) (public policy forbids firing employees for complaining to the authorities that the employer was employing undocumented workers in violation of the federal Immigration Reform and Control Act of 1986).

[279] *Phillips v. Gemini Moving Specialists*, 63 Cal. App. 4th 563 (1998) (public policy forbids firing employee for complaining about deduction of wages from paycheck for a towing charge).

[280] *Steele v. Youthful Offender Parole Board*, 162 Cal. App. 4th 1241, 1255 (2008) (upholding judgment for employee constructively discharged because she was a potential witness in a claim for sexual harassment; "Employer retaliation against employees who are believed to be prospective complainants or witnesses for complainants undermines [FEHA's] purpose just as effectively as retaliation after the filing of a complaint."); *Lujan v. Minagar*, 124 Cal. App. 4th 1040 (2004) (firing employee who did not personally report suspected workplace safety violations but who was fired in fear she might do so violated Labor Code Section 6310, which prohibits dismissal in retaliation for reporting OSHA violations).

[281] *Steele v. Youthful Offender Parole Board,* 162 Cal. App. 4th 1241, 76 Cal. Rptr. 3d 632, 644 (2008).

[282] *Stevenson v. Superior Court*, 16 Cal. 4th 880 (1997) (employee can assert common law tort for age discrimination, without DFEH exhaustion); *Nelson v. United Technologies*, 74 Cal. App. 4th 597 (1999) (discharge for taking CFRA leave supports tort claim for wrongful dismissal).

[283] *Gould v. Maryland Sound Industries, Inc.*, 31 Cal. App. 4th 1137, 1146-47 (1995) (Labor Code Section 216 expresses fundamental public policy for prompt payment of wages and forbids firing employee to avoid paying commissions earned).

[284] *Vasquez v. Franklin Management Real Estate Fund, Inc.*, 222 Cal. App. 4th 819 (2013.).

[285] *Garcia v. Rockwell International Corp.*, 187 Cal. App. 3d 1556 (1986) (wrongful demotion is actionable as breach of public policy).

[286] *Touchstone Television Prod. v. Superior Court (Sheridan)*, 208 Cal. App. 4th 676, 680-81 (2012) (rejecting tort claim by *Desperate Housewives* actress that the television producer refused to renew her contract in retaliation for her raising safety concerns); *see also Daly v. Exxon Corp.*, 55 Cal. App. 4th 39, 45 (1997) (rejecting claim of wrongful termination for failure to renew contract that expired by its terms; use of "wrongful termination" is a "misnomer" where "employment contract is for a fixed term and expires").

[287] *Touchstone*, 208 Cal. App. 4th at 682; *Daly*, 55 Cal. App. 4th at 45.

[288] Pen. Code § 290.46.

[289] See www.meganslaw.ca.gov (visited on February 20, 2014).

[290] Pen. Code § 290.46(j)(1),(2).

[291] Pen. Code § 290.4(d)(4)(A), (B).

[292] See Edu. Code § 45122.1 ("no person who has been convicted of a violent or serious felony shall be employed by a school district").

[293] Lab. Code § 2922: "An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means an employment for a period greater than one month."

[294] See generally *Guz v. Bechtel Nat'l Inc.*, 24 Cal. 4th 317, 336-37 (2000).

[295] *Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317, 340 (2000) ("disclaimer language in an employee manual or policy manual does not necessarily mean an employee is employed at will"); *Stillwell v. Salvation Army*, 167 Cal. App. 4th 360 (2008) (employer not entitled to reversal of judgment for breach of implied-in-fact contract of continued employment even though several employee handbooks during plaintiff's tenure recited that employment was at will).

[296] *Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317, 368 n.10 (2000) (collecting cases holding that an express at-will agreement signed by the employee cannot be overcome by proof of a contrary implied contrary understanding).

[297] *Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317, 340 (2000) (handbook disclaimer language is not controlling, but may be considered as evidence of at-will employment: "the more clear, prominent, complete, consistent, and all-encompassing the disclaimer language," the greater the likelihood that the parties intended the employment to be at will).

[298] *Nelson v. United Technologies*, 74 Cal. App. 4th 597 (1999) (affirming finding of implied contract notwithstanding at-will language in job application that by its terms was not "intended in any way to create an employment contract"). See generally *Sparks v. Vista Del Mar Child & Family Services*, 207 Cal. App. 4th 1511, 1522 (2012) (declining to enforce arbitration clause contained within a handbook that stated, "This Handbook is not intended to create a contract of employment … .").

[299] *Scott v. Pacific Gas & Elec. Co.*, 11 Cal. 4th 454 (1995).

[300] *Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317, 345-46 (2000) (triable issue exists that dismissed employees could rely on RIF guidelines as part of implied contract, even though guidelines not distributed to employees generally).

[301] CACI 2404 - Breach of Employment Contract -- Unspecified Term -- "Good Cause" Defined.

[302] *Cotran v. Rollins Hudig Hall*, 17 Cal. 4th 94 (1998).

[303] *Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317, 353 n.18 (2000) ("the covenant prevents a party from acting in bad faith to frustrate the contract's actual benefits. Thus, for example, the covenant might be violated if termination of an at-will employee was a mere pretext to cheat the worker out of another contract benefit to which the employee was clearly entitled, such as compensation already earned.") (internal quotation marks omitted).

[304] See, *e.g., Comeaux v. Brown & Williamson Tobacco Co.,* 915 F.2d 1264, 1272-73 n.9 (9th Cir. 1990) (breach of implied covenant may occur where employer made an offer of employment of at-will employment, without stating that the offer was contingent on a credit check, and then, relying on a background check, revoked the offer before the new hire started work)*; Sheppard v. Morgan Keegan & Co.*, 218 Cal. App. 3d 61 (1990) (reversing summary judgment against contractual wrongful termination claim of individual who, in reliance on job offer, moved from California to Tennessee to take the job, only to be denied employment because he made pre-employment visit to office dressed in blue jeans and T-shirt; claim sustainable notwithstanding at-will employment status: doctrine of promissory estoppel gave plaintiff right to assume he would have chance to perform job to the good-faith satisfaction of his employer).

[305] *Guz v. Bechtel Nat'l Corp., Inc.*, 24 Cal. 4th 317, 352-53 (2000) (summary judgment affirmed as to implied covenant claim: "To the extent Guz's implied covenant cause of action seeks to impose limits on Bechtel's termination rights beyond those to which the parties actually agreed, the claim is invalid. To the extent the implied covenant claim seeks simply to invoke terms to which the parties did agree, it is superfluous.").

[306] *E.g.*, *Cabesuela v. Browning-Ferris Industries*, 68 Cal. App. 4th 101 (1998) (emotional distress claim based on violation of fundamental public policy not preempted by WCA); *Leibert v. Transworld Systems*, 32 Cal. App. 4th 1693 (1995) (emotional distress claim based on same conduct as public policy claim lies outside exclusive remedy provision); *Accardi v. Superior Court*, 17 Cal. App. 4th 341 (1993) (WCA does not bar claim for infliction of emotional distress based on conduct that violates public policy).

[307] See, *e.g.*, *Miklosy v. Regents of University of California*, 44 Cal. 4th 876 (2008) (WCA preempts emotional distress claims arising from "risks inherent" in the normal employment relationship; "whistle blower retaliation" is risk inhering in normal employment relationship); *Ferretti v. Pfizer, Inc*., 2012 WL 3638541, at *11 (N.D. Cal. Aug. 22, 2012) (wrongful termination plaintiff cannot use *Cabesuela* to support claim for intentional infliction of emotional distress claim, in view of *Miklosy*); *Vasquez v. Franklin Management Real Estate Fund, Inc.*, 222 Cal. App. 4th 819 (2013) (*Cabesuela* and *Leibert* have been limited); *Singh v. Southland Stone, U.S.A., Inc.*, 186 Cal. App. 4th 338, 366–67 (2010) (WCA exclusivity barred claim for intentional infliction of emotional distress claim where employer "berated and humiliated [plaintiff], criticized his job performance, and insulted him with profanities on a regular basis"; "employer's intentional misconduct in connection with actions that are a normal part of the employment relationship ... resulting in emotional injury is considered to be encompassed within the compensation bargain, even if the misconduct could be characterized as 'manifestly unfair, outrageous, harassment, or intended to cause emotional disturbance.' ").

[308] *Stevenson v. Superior Court*, 16 Cal. 4th 880, 885 (1997) (FEHA does not preempt any common law tort claims, so that employee may bring claim for wrongful termination in violation of the public policy against age discrimination even though the FEHA already provides a statutory remedy for age discrimination); see also *Nelson v. United Technologies*, 74 Cal. App. 4th 597 (1999) (fired employee may sue for wrongful termination in violation of public policy expressed in California Family Rights Act, even though CFRA itself provides remedies for violations).

[309] Code Civ. Proc. § 437c.

[310] *Nazir v. United Airlines, Inc.,* 178 Cal. App. 4th 243 (2009).

[311] *Id.* at 248.

[312] *Id.*

[313] *Id.* at 286 (citing law review article by Chief Judge Wald of the United States Court of Appeals for the D.C. Circuit).

[314] *Davis v. Kiewit Pacific Co*., 220 Cal. App. 4th 358 (2013).

[315] *Id*. at 369 (emphasis in original).

[316] *Id*. at 370.

[317] *Id*.

[318] *Coate v. Superior Court*, 81 Cal. App. 3d 113 (1978) (court may not compel disclosure of joint federal or joint state income tax returns, or information contained therein; privilege of tax returns "facilitate[s] tax enforcement by encouraging a taxpayer to make full and truthful declarations in his return, without fear that his statements will be revealed or used against him for other purposes").

[319] *Delaware State College v. Ricks*, 449 U.S. 250, 257-58 (1980) (statute of limitations for Title VII action began to run when adverse employment decision was communicated to employee, not when it took effect); but see Lilly Ledbetter Fair Pay Act of 2009 (180-day statute of limitations for filing equal-pay suit reset with each new discriminatory paycheck).

[320] *Romano v. Rockwell International*, 14 Cal. 4th 479 (1996). Similarly, under Ninth Circuit authority that would probably apply to a California claim, a plaintiff suing for constructive discharge can start the time in which to sue with the date of resignation, not the day of the last event prompting the resignation. *Fielder v. UAL Corp.*, 218 F.3d 973, 988 (9th Cir. 2000) (date of resignation, not date of last intolerable act, triggers limitations period for constructive discharge claim), vacated and remanded for reconsideration in light of *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101 (2002) by *UAL Corp. v. Fielder*, 536 U.S. 919 (2002).

[321] *McCaskey v. CSAA*, 189 Cal. App. 4th 947, 957-62 (2010).

[322] *Richards v. CHWM Hill, Inc.*, 26 Cal. 4th 798 (2001). For more on the continuing violation doctrine in California, see § 6.11.3.

[323] See, *e.g.*, Civ. Code § 1624(a).

[324] *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 673 (1988) (citing *White Lighting Co. v. Wolfson*, 68 Cal. 2d 336, 343-44 (1968)).

[325] See, *e.g.*,*Sciborski v. Pacific Bell Directory*, 205 Cal. App. 4th 1152 (2012) (to invoke LMRA preemption, defendant must show claim "cannot be resolved on the merits without choosing among competing interpretations of a collective bargaining agreement and its application to the claim"; CBA interpretation not needed to resolve claim that employer unlawfully used self-help to deduct funds from wages already paid, upon the employer's unilateral declaration that a commission was unearned)

[326] Code Civ. Proc. § 425.16(b)(1)(3),(c)(2). SLAPP stands for Strategic Lawsuit Against Public Participation. For cases granting plaintiffs' anti-SLAPP motions, see *Aber v. Comstcock,* 212 Cal. App. 4th 931 (2013) (upholding anti-SLAPP order against alleged sexual harasser who sued plaintiff for defamation and IIED); *cf. Cho v. Chang,* 219 Cal. App. 4th 521 (2013) (striking in part alleged harasser's cross-complaint for defamation and IIED).

[327] *Aber v. Comstcock,* 212 Cal. App. 4th 931 (2013).

[328] See *Davis v. Consolidated Freightways*, 29 Cal. App. 4th 354 (1994) (no self-compelled publication because former employer would not have revealed reason for discharge in any event).

[329] Civ. Code § 47(c).

[330] *McQuirk v. Donnelley*, 189 F.3d 793 (9th Cir. 1999) (release signed by applicant authorizing former employer to provide information could not, under California law, release future intentional acts of defamation). *But see Bardin v. Lockheed Aeronautical Systems Co.*, 70 Cal. App. 4th 494 (1999) (release barred defamation claims against former employer).

[331] *Toscano v. Greene Music,* 124 Cal. App. 4th 685 (2004) (plaintiff, suing for promissory estoppel stemming from defendant's unfulfilled alleged promise of employment, causing plaintiff to resign from at-will job at former employer, can recover what wages he would have earned from former employer through retirement, to extent damages not speculative).

[332] *Helmer v. Bingham Toyota Isuzu*, 129 Cal. App. 4th 1121 (2005) (plaintiff can recover damages for lost income suffered from leaving secure job due to false promises about monthly compensation he would earn at defendant). See also § 5.4 (implied covenant of good faith and fair dealing).

[333] *Helmer v. Bingham Toyota Isuzu*, 129 Cal. App. 4th 1121 (2005).

[334] *Randi W. v. Muroc Joint Unified School District*, 14 Cal. 4th 1066 (1997).

[335] *Cf. Doe v. Capital Cities*, 50 Cal. App. 4th 1038 (1996) (no liability for negligent retention of alleged sexual harasser where employer had no prior knowledge of relevant propensities).

[336] Health & Safety Code § 1799.102.

[337] *Van Horn v. Watson*, 45 Cal. 4th 322 (2008).

[338] Section 1799.102(a), as amended, now reads: "No person who in good faith, and not for compensation, renders emergency medical *or nonmedical care* at the scene of an emergency shall be liable for any civil damages resulting from any act or omission." (Emphasis added.)

[339] *Flores v. Autozone West*, 161 Cal. App. 4th 373 (2008).

[340] *Moradi v. Marsh USA, Inc.*, 219 Cal. App. 4th 866, 890 (2013).

[341] *Id.* at 891. Another 2013 appellate decision went the other way, affirming a summary judgment for an employer whose employee, driving a company vehicle, hit another vehicle. In this case the Court of Appeal held that the employee's trip was "entirely personal" in that it involved a 140-mile detour from his normal commute, and in that it was not taken for the benefit of the company. The risk of this accident was thus not even broadly incident to the company's enterprise. *Halliburton Energy Servs., Inc. v. Department of Transportation,* 220 Cal. App. 4th 87 (2013).

[342] See *Commodore Homes v. Superior Court*, 32 Cal. 3d 211 (1982) (tort-like remedies available under the FEHA); Gov't Code § 12965(b) (attorney fees and expert witness costs awardable to prevailing party).

[343] *Stamps v. Superior Court,* 136 Cal. App. 4th 1441 (2006) (Ralph Civil Rights Act of 1976 and Tom Bane Civil Rights Act, codified in Civil Code sections 51.7 and 52.1, provide separate claims for employee suffering employer's discriminatory violence and intimidation; while the Unruh Act does not apply to employment discrimination, neither section here is part of the Unruh Act, and both statutes authorize a private right of action in employment cases—Section 51.7 making wrongdoer liable for "actual damages suffered by any person denied that right" and Section 52.1 providing that person whose rights have been interfered with "may institute and prosecute in his or her own name and on his or her own behalf a civil action for damages").

[344] Lab. Code § 1194 (employee suing for statutory minimum wages entitled to attorney fees); *Earley v. Superior Court*, 79 Cal. App. 4th 1420 (2000) (written notice to class members deciding whether to opt out is not to advise that they could be liable for defendant's attorney fees if the defendant prevails; the policy stated in section 1194 overrides the general language of section 218.5; court harmonizes the two sections to hold that a prevailing defendant can obtain attorney fees in wage claims generally but not in claims for minimum wages or overtime premium pay). Section 218.5 does not apply "to any action for which attorney's fees are recoverable under Section 1194." Lab. Code § 218.5(b).

[345] Lab. Code § 218.5(a) ("[I]f the prevailing party in the court action is not an employee, attorney's fees and costs shall be awarded pursuant to this section only if the court finds that the employee brought the court action in bad faith."). Although "bad faith" is not defined, it is likely that an employer must show that the employee's claim was brought with knowledge that it was baseless.

[346] *Murphy v. Kenneth Cole Productions*, 40 Cal. 4th 1094, 1099 (2007). The result of this pro-employee holding was that the statute of limitations for claims seeking meal and rest pay was four years instead of just one.

[347] *Kirby v. Immoos Fire Protection*, 53 Cal. 4th 1244, 1255, 1257 (2012) ("[The] question here is whether a section 226.7 claim, which concerns an employer's alleged failure to provide statutorily mandated meal and rest periods, constitutes an 'action brought for the nonpayment of wages' within the meaning of section 218.5. We conclude it does not."; "[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."). The Supreme Court in *Kirby* distinguished its prior decision holding that the pay owed for meal-break violations is a "wage." *Id.* at 1257 (discussing *Murphy v. Kenneth Cole Productions*, 40 Cal. 4th 1094 (2007) ("To say that a section 226.7 remedy is a wage, however, is not to say that the legal violation triggering the remedy is nonpayment of wages. As explained above, the legal violation is nonprovision of meal or rest breaks, and the object that follows the phrase 'action brought for' in section 218.5 is the alleged legal violation, not the desired remedy.").

348 SB 462, amending Lab. Code § 218.5.

349 Lab. Code § 218.5(a) (described above).

350 Lab. Code § 1194(a).

351 *Aleman v. AirTouch Cellular,* 209 Cal. App. 4th 556, 579-84 (2012) (a split-shift claim seeks the minimum wage and is thus subject to Section 1194 provision permitting only employee to recover attorney fees; a reporting-time claim seeks unpaid wages at the regular rate and thus is subject to Section 218.5). See § 7.1.5.

352 *E.g., Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 58-59 (2008); *Haro v. City of Rosemead*, 174 Cal. App. 4th 1067, 1077-76 (2009); *Hypertouch, Inc. v. Superior Court (Perry Johnson, Inc.)*, 128 Cal. App. 4th 1527 (2005).

353 *Harris v. Investor's Business Daily, Inc.*, 138 Cal. App. 4th 28 (2006) (differences in FLSA opt-out provisions and California unfair competition law, which permits opt-out classes, do not preclude workers from predicating UCL class action on FLSA violation).

354 *Wang v. Chinese Daily News,* 623 F.3d 743 (9th Cir. 2010); *vacated on other grounds*, 132 S. Ct. 74 (2001); see also *Takacs v. A.G. Edwards & Sons, Inc.*, 444 F. Supp. 2d 1100, 1118 (S.D. Cal. 2006) (FLSA does not preempt California Business & Professions Code section 17200).

355 See *Parris v. Superior Court (Lowe's HI W, Inc.)*, 109 Cal. App. 4th 285 (2003) (pre-certification communication by plaintiff's counsel to individuals in potential class is constitutionally protected; trial court erred in denying motion for approval of content of such proposed communication, as motion was unnecessary; court also erred in denying motion to compel discovery of names and addresses of potential class members, where court did not expressly balance potential abuse of class action procedure against rights of parties). See also § 5.10.4.2 (broad pre-certification class recovery).

356 See, *e.g.*, Lab. Code §§ 218.5 (wage claims), 2699 (penalty claims).

357 Bus. & Prof. Code § 17200 *et seq*.

358 *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134 (2003) (UCL not an all-purpose substitute for tort or contract claim; disgorgement of profits allegedly obtained by unfair business practice not an authorized UCL remedy where profits are neither money taken from plaintiff nor funds in which plaintiff has ownership interest); *Feitelberg v. Credit Suisse First Boston, LLC*, 134 Cal. App. 4th 997 (2005) (extending *Korea Supply* to class-action context: affirming dismissal of claim for nonrestitutionary disgorgement in class action brought under UCL, as UCL authorizes only restitutionary disgorgement; "class action status does not alter the parties' underlying substantive rights"). See also *Pineda v. Bank of America, N.A.,* 50 Cal. 4th 1389, 1401 (2010) (Labor Code § 203 penalties are not recoverable as restitution under the UCL, because employees have no ownership interest in those penalties).

359 *Pineda v. Bank of America*, 50 Cal. 4th 1389 (2010). For a discussion of waiting-time penalties due under Labor Code Section 203, see § 7.5.3.2.

360 *Cortez v. Purolator Air Filtration Products Co.*, 23 Cal. 4th 163 (2000).

361 *Pellegrino v. Robert Half International, Inc.*, 181 Cal. App. 4th 713 (2010), *rev. granted*, No. S180849 (Cal. Apr. 28, 2010). The *Pellegrino* decision is also notable for holding that the employer could not enforce a provision in its employment contract that shortened the deadline to sue. The court reasoned that shortening the limitations period was inconsistent with the fact that wage and hour laws protect unwaivable statutory rights supported by strong public policy.

[362] See *Kraus v. Trinity Management Services, Inc.*, 23 Cal. 4th 116 (2000). But see *Arias v. Superior Court*, 46 Cal. 4th 969 (2009) (recognizing the effect of Proposition 64, discussed below).

[363] Bus. & Prof. Code §§ 17203, 17204.

[364] *Californians for Disability Rights v. Mervyns*, 39 Cal. 4th 223, 227 (2006) ("This case requires us to decide whether the amended standing provisions apply to cases already pending when Proposition 64 took effect. We hold the new provisions do apply to pending cases."); *Branick v. Downey Savings & Loan Ass'n*, 39 Cal. 4th 235, 241 (2006) (UCL plaintiff who lacks standing to sue as result of Proposition 64 may seek leave to amend complaint to add plaintiff who does have standing).

[365] *Richmond v. Dart Industries, Inc.*, 29 Cal. 3d 462, 470 (1981).

[366] *Gutierrez v. California Commerce Club,* 187 Cal. App. 4th 969, 972 (2010). See also *Jamiez v. DAIOHS USA, Inc.,* 181 Cal. App. 4th 1286 (2010) (reversing denial of class certification and directing trial court to certify class of drivers who had been classified as exempt as commissioned employees or outside salespersons).

[367] *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319 (2004).

[368] *Id.* at 331; *accord Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004, 1026 (2012).

[369] *Id.* at 326-27; *accord Brinker Restaurant Corp.*, 53 Cal. 4th at 1022 (presuming "in favor of the certification order … the existence of every fact the trial court could reasonably deduce from the record").

[370] *Id.* at 340.

[371] *Id.* at 327, 329 n.4.

[372] *Id.* at 327, 332.

[373] *Id.* at 327.

[374] *Id.* at 339.

[375] *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004, 1025 (2012) ("trial court does not abuse its discretion if it certifies (or denies certification of) a class without deciding one or more issues affecting the nature of a given element if resolution of such issues would not affect the ultimate certification decision").

[376] *Faulkinbury v. Boyd & Associates,* 216 Cal. App. 4th 220, 232-235 (2013), held that unlawful break policies provided sufficient basis to find predominating common issues for purposes of class certification, even if the policy was not uniformly applied. The court suggested that whether an employee was actually denied breaks was a damages question that did not preclude class certification. *Id.* at 235. (This decision is distinguishable where employers have legally compliant policies and practices.)

Benton v. Telecom Network Specialists, Inc., 220 Cal App. 4th 701, 726 (2013), held that an alleged joint employer's lack of a lawful written policy on meal and rest breaks was a sufficient basis for certifying a class of technicians, even though many knew they could take breaks, and did so. The court held that the class could be certified on a theory that the defendant violated the law by failing to adopt a policy authorizing and permitting breaks. The theory was that the defendant, as an alleged co-employer, had to ensure that the technicians knew of their break rights. This suggestion that certification can rest on a theory that the defendant failed to adopt a formal break policy, even where the employees knew their rights and exercised them, is another example of a court liberally interpreting *Brinker* to the plaintiff's advantage.

[377] *E.g., Tien v. Tenet Healthcare*, 209 Cal. App. 4th 1077 (2012), *rev. denied and ordered not to be officially published* (Jan. 16, 2013); *Flores v. Lamps Plus*, 209 Cal. App. 4th 35 (2012), *rev. denied and ordered not to be officially published* (Dec. 12, 2013); *Hernandez v. Chipotle Mexican Grill*, 208 Cal. App. 4th 1487 (2012), *rev. denied and ordered not to be officially published* (Dec. 12, 2013).

[378] 203 Cal. App. 4th 212, *rev. granted*, No. S200923, 140 Cal. Rptr. 3d 795 (2012).

[379] *CashCall, Inc. v. Superior Court (Cole)*, 159 Cal. App. 4th 273 (2008).

[380] The named plaintiffs, debtors of the defendant, were suing for surreptitious telephone monitoring but discovered that they themselves were never monitored; only others were. *Id.* at 279.

[381] *Id.* at 292. For discussion of how California favors the interests of class actions, as represented by plaintiffs' lawyers, over the privacy interests of employees, see § 4.10.

[382] Lab. Code §§ 2698-2699.

[383] PAGA establishes civil penalties for all Labor Code provisions "except those for which a civil penalty is specifically provided." Lab. Code § 2699(f). It is uncertain whether PAGA applies to provisions enacted after PAGA's own enactment.

[384] An "aggrieved employee" is one whom the alleged violator employed and against whom an alleged violation was committed. Lab. Code. § 2699(c).

[385] The money collected is split three ways: 50% to the California General Fund, 25% to the LWDA (see § 1.2), and 25% to the aggrieved workers. Section 2699 does not affect exclusive remedies for workers' compensation injuries.

[386] Lab. Code § 2699(f).

[387] Lab. Code § 2699(g).

[388] *Arias v. Superior Court*, 46 Cal. 4th 969, 986 (2009).

[389] *Brown v. Ralphs Grocery*, 197 Cal. App. 4th 489 (2011). Federal courts have reached the opposite conclusions. *See, e.g., Quevedo v. Macy's, Inc.,* 2001 WL 3135052 (C.D. Cal. June 16, 2001) (rationale of U.S. Supreme Court's decision in *Concepcion* compels enforcement of arbitration agreement even where agreement would bar representative PAGA claim). *Accord Nelson v. AT&T Mobility,* 2001 WL 3651153 (N.D. Cal. August 18, 2011); *Grabowski v. Robinson*, 2001 WL 4353998 (S.D. Cal. September 19, 2011). For further discussion, see § 5.1.

[390] Lab. Code §§ 2699(a), 2699(g)(1), 2699.3.

[391] Lab. Code §§ 2699(d), 2699.3(c)(2)(A).

[392] *Archila v. KFC U.S. Properties, Inc*., 420 Fed. Appx. 667, 669 (9th Cir. 2011) (letter that "merely lists" Labor Code provisions lacks sufficient "facts and theories"); *Ovieda v. Sodexo Operations, LLC,* 2013 WL 3887873, at *4-5 (C.D. Cal. July 3, 2013) (dismissing PAGA claims where letter to DLSE failed to include requisite "facts and theories").

[393] *Caliber Bodyworks, Inc. v. Superior Court*, 134 Cal. App. 4th 365 (2005). See also *Dunlap v. Superior Court (Bank of America)*, 142 Cal. App. 4th 330 (2006) (statutory penalties recoverable by employee before adoption of Private Attorneys General Act are not subject to its requirement to exhaust administrative remedies).

[394] *Amaral v. Cintas Corp*., 163 Cal. App. 4th 1157 (2008).

[395] Lab. Code § 2699(e)(2).

[396] *Chu v. Wells Fargo Investments, LLC*, 2011 WL 672645, at *1 (N.D. Cal. Feb. 16, 2011) (approving PAGA settlement payment of $7,500 to LWDA, 0.1% of $6.9 million settlement); *Gong-Chun v. Aetna, Inc*., 2012 WL 2872788, at *4 (E.D. Cal. July 12, 2012) (approving PAGA settlement payment of $15,000 to LWDA, 2.1% of settlement).

[397] *Guifi Li v. A Perfect Day Franchise, Inc*., 2012 WL 2236752, at *18, 21 (awarding $2,764,896 in penalties in connection with default judgment of $11,141,452.83).

[398] Lab. Code § 2699.3 (b)(4).

[399] Lab. Code § 98.6(a).

[400] Lab. Code § 2699(g)(2) ("No action shall be brought under this part for any violation of a posting, notice, agency reporting, or filing requirement of this code, except where the filing or reporting requirement involves mandatory payroll or workplace injury reporting.").

[401] *Bright v. 99 Cents Only Stores, Inc.,* 189 Cal. App. 4th 1472 (2010); *Home Depot USA v. Superior Court,* 191 Cal. App. 4th 210 (2010) (same).

[402] *Arias v. Superior Court*, 46 Cal. 4th 969 (2009).

[403] *Ramirez v. Ghilotti Bros. Inc.*, 941 F. Supp. 2d 1197, 1210 (N.D. Cal. 2013) (permitting recovery of Labor Code Section 558 penalties under PAGA); *Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal. App. 4th 1112 (2012) (considering whether plaintiffs could recover meal and rest premium pay as "underpaid wages" under Labor Code Section 558). Although the Supreme Court's later decision in *Kirby v. Immoos*, 53 Cal. 4th 1255 (2012), makes it uncertain whether meal and rest pay constitutes "underpaid wages," *Thurman* opens the door for aggrieved employees to seek other wages as civil penalties under Section 558.

[404] *Rojo v. Kliger*, 52 Cal. 3d 65, 74 (1990).

[405] *Janik v. Rudy, Exelrod & Zieff*, 119 Cal. App. 4th 930, 934 (2004) ("While we may share the attorneys' dismay that their efforts have been rewarded with this lawsuit rather than with the kudos they no doubt expected, and perhaps deserve, we are nonetheless constrained to hold that plaintiff's claim cannot be rejected out of hand. While it may well be that the attorneys did not breach their duty of care in failing to proceed under an alternative theory that would have produced a greater recovery, we cannot say, as did the trial court, that there simply was no duty for the attorneys to breach.").

[406] *Seever v. Copley Press, Inc.*, 141 Cal. App. 4th 1550 (2006) (defendant's statutory offer of compromise for sum certain, plus costs and attorney fees "incurred to the date of this offer in the amount determined by court according to proof," was sufficiently definite to constitute valid offer, but trial court abused discretion by awarding defendant more than $60,000 in costs without considering plaintiff's ability to pay).

[407] *Formal Opinion No. 517: Indemnification of Client's Litigation Costs* (September 2006) (re Rule 4-210(A)(3)). See also *Ripley v. Pappadopolous*, 23 Cal. App. 4th 1616, 1626 n.17 (1994) ("It was formerly considered unethical for an attorney to agree to advance the costs of litigation if reimbursement was made contingent upon the outcome. … Rule 4-210 of the California Rules of Professional Conduct now permits an attorney to advance the costs of prosecuting or defending a claim and also permits repayment to be made contingent on the outcome of the matter."). *See generally Ramona Unified School District v. Tsiknas*, 135 Cal. App. 4th 510 (2006) (mere filing of meritless lawsuit could not give rise to cause of action for abuse of process).

[408] *Earley v. Superior Court*, 79 Cal. App. 4th 1420, 1435 (2000) (written notice to class members is not to tell the workers deciding whether to opt out that they might be liable for defendant's attorney fees or costs: "Defense fees and costs could easily dwarf the potential overtime compensation recovery each worker might obtain. With potential risks far outweighing potential benefits, workers may well forego asserting their statutory wage and hour rights.").

[409] *City of Burlington v. Dague*, 505 U.S. 557 (1992) (rejecting use of enhancements in calculating attorney fees under fee-shifting provisions of two federal statutes).

[410] *Ketchum v. Moses,* 24 Cal. 4th 1122, 1130 (2001) (quoting lower court opinion).

[411] *Id*. at 1137-39 (trial court can include fee enhancement to basic lodestar figure for contingent risk, exceptional skill, or other factors).

[412] *Amaral v. Cintas Corp.*, 163 Cal. App. 4th 1157 (2008).

[413] *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001) (rejecting "catalyst theory" because it would allow an award of attorney fees where there is no judicially sanctioned change in the legal relationship of the parties, would discourage defendants to voluntarily change conduct that may not be illegal, and would foment a second major litigation requiring analysis of the defendant's subjective motivations in changing its conduct).

[414] *Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553 (2004). The catalyst theory is available, however, only if the lawsuit had "some merit" and the plaintiff "engaged in a reasonable attempt to settle its dispute with the defendant prior to litigation." *Id.* at 561.

[415] *Id.* at 579-82.

[416] *Id.* at 585 (Chin, J., dissenting).

[417] See*, e.g., Hensley v. Eckerhart*, 461 U.S. 424 (1983) (extent of plaintiff's success a key factor in fee calculation).

[418] *Harman v. City & County of San Francisco,* 158 Cal. App. 4th 407 (2007).

[419] *Chavez v. City of Los Angeles*, 160 Cal. App. 4th 410 (2008) (in ruling on motion for attorney fees by plaintiff who prevailed in FEHA case, trial court erred in denying fees solely because plaintiff's recovery was below the $25,000 threshold for general civil jurisdiction), *rev. granted*, No. S162313 (Cal. April 2, 2008).

[420] *Chavez v. City of Los Angeles*, 47 Cal. 4th 970 (2010).

[421] *Muniz v. United States Parcel Service*, 738 F.3d 214 (9th Cir. 2013) ("although there was a clear disparity between the damages recovered and the fees awarded, California law did not require the district court to reduce the disparity").

[422] *Joaquin v. City of Los Angeles*, 202 Cal. App. 4th 1207 (2012) (CACI fails to include "retaliatory intent" as essential element for claim of unlawful retaliation; rather, CACI instruction here made jury verdict "inevitable" because instruction simply required plaintiff to show (1) he reported sexual harassment, (2) the City terminated his employment, (3) the report was a "motivating reason" to terminate him, (4) he was harmed, and (5) the City's conduct was a motivating factor in causing harm; CACI did not apply here, where termination was not for reporting as such, but for reporting *falsely*; "We urge the Judicial Council to redraft the retaliation instruction and the corresponding special verdict form so as to clearly state that retaliatory intent is a necessary element of a retaliation claim under FEHA.")

[423] *Harris v. City of Santa Monica*, 56 Cal. 4th 203 (2013) (rejecting CACI No. 2500, which made employers liable if a protected status was merely "a motivating reason/factor" for the employer's adverse action, where a "motivating factor" is "something that moves the will and induces action even though other matters may have contributed to the taking of the action.").

[424] *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

[425] Lab. Code § 1171.5(a). See also Civ. Code § 3339; Gov't Code § 7285.

[426] Lab. Code § 1171.5(b).

[427] *Reyes v. Van Elk, Ltd.*, 148 Cal. App. 4th 604, 617 (2007).

[428] *Id.* at 618.

[429] *Id.*

[430] *Farmers Bros. Coffee v. WCAB*, 133 Cal. App. 4th 533 (2005).

[431] *Incalza v. Fendi North America, Inc.*, 479 F.3d 1005 (9th Cir. 2007).

[432] 8 U.S.C. § 1324a(a)(2).

[433] *Incalza,* 479 F.3d at 1010-11.

[434] *Salas v. Sierra Chemical Co.*, 198 Cal. App. 4th 29, 44-45 (2011).

[435] No. S196568, 264 P.3d 33 (Cal. Nov. 16, 2011) (granting review on question, "Did the trial court err in dismissing plaintiff's [FEHA] claims … on grounds of after-acquired evidence and unclean hands, based on plaintiff's use of false documentation to obtain employment in the first instance?").

[436] *Id.*, No. S196568 (Cal. Feb. 27, 2013).

[437] Lab. Code §1024.6 ("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 his or her personal information, unless the changes are directly related to the skill set, qualifications, or knowledge required for the job.").

[438] Lab. Code § 244(b) (employer engages in "adverse employment action" for purposes of establishing a violation of rights if employer, in retaliation for the exercise of California statutory rights, reports to a government agency the "suspected citizenship or immigration status" of either the employee, former employee, or prospective employee, or a member of that individual's family).

[439] *Lisec v. United Air Lines, Inc.*, 10 Cal. App. 4th 1500, 1507 (1992).

[440] *Costco Wholesale Corp. v. Superior Court.*, 47 Cal. 4th 725 (2009).

[441] *Coito v. Superior Court (State of California),* 54 Cal. 4th 480 (2012).

[442] *Id.* at 502 (calling for trial court to conduct camera inspection to see if absolute or qualified work product protection should apply).

[443] *Id.* at 499-500 (remanding matter for finding whether absolute protection applies to all or part of the recorded witness interviews).

[444] Gov't Code §§ 12926(d), 12940(j)(4)(A).

[445] See Gov't Code § 12960(d).

[446] See Gov't Code §§ 12965(b), 12960(d).

[447] *Bagatti v. Department of Rehabilitation,* 97 Cal. App. 4th 344, 360-61 & n.4 (2002). But see *Nadaf-Rahrov v. Neiman Marcus Group, Inc.*, 166 Cal. App. 4th 952 (2008) (disagreeing with *Bagatti*).

[448] 42 U.S.C. § 12112(a),(b)(5)(A).

[449] *Crawford v. Metro. Gov't of Nashville & Davidson County*, 129 S. Ct. 846 (2009). Note, though, that in dictum the Supreme Court said that oppositional activity may consist of standing pat and refusing to implement an unlawful order to discriminate. Extending protection for oppositional activity that far would not differ materially from the California standard.

[450] *McDonald v. Antelope Valley Community College Dist*., 45 Cal. 4th 88 (2008) (plaintiff's voluntary pursuit of internal administrative remedy will toll running of statute of limitations on FEHA claim, even if plaintiff voluntarily abandons the internal proceeding).

[451] See § 6.10.

[452] See § 6.10.

[453] *Harris v. City of Santa Monica,* 56 Cal. 4th 203 (2013) (plaintiff who proves a protected status was a substantial motivating factor for an adverse employment action can thereby obtain declaratory relief, injunctive relief, and reasonable attorney's fees and costs, although the employer who proves it would have reached the same decision even absent that motivating factor can avoid further relief in the form of reinstatement, back pay, front pay, and noneconomic damages). The *Harris* result, while pro-plaintiff, did improve on the standard jury instruction, CACI 2500, which would have made employers liable for adverse employment actions whenever a protected status or activity "was a motivating reason/factor," where a "motivating factor" as "something that moves the will and induces action even though other matters may have contributed to the taking of the action"). The Court of Appeal has held, rather harshly, that an employer had waived the *Harris* defense (not yet announced) when it had failed to plead it in an answer. *Alamo v. Practice Management Information Corp.,* 219 Cal. App. 4th 466, 470 (2013) (defendant "not entitled to an instruction on the mixed-motive or same-decision defense because it failed to plead that defense or any other affirmative defense alleging that it had a legitimate, nondiscriminatory or nonretaliatory reason for its discharge decision in its answer").

[454] *Gross v. FBL Financial Services, Inc.,* 129 S. Ct. 2343, 2350-51 (2009) (under the federal ADEA, plaintiff alleging that adverse action was "because of" his age must "establish that age was the 'but-for' cause of the employer's adverse action"). Title VII has a different standard, because its own "because of" language was amended by the 1991 Civil Rights Act. See 42 U.S.C. § 2000e-5(g)(1)(B)(ii). The California Supreme Court in *Harris* crafted, via creative judicial interpretation, a result that closely resembles the legislative compromise that Congress crafted in the 1991 Title VII amendments.

[455] Gov't Code § 12926(o).

[456] Lab. Code §§ 1101, 1102.

[457] Gov't Code § 12940(a).

[458] Gov't Code § 12940(a). " 'Sexual orientation' means heterosexuality, homosexuality, and bisexuality." *Id.* § 12926(s).

[459] Gov't Code §§ 12920, 12921, 12926(r)(2), 12930(i), 12931, 12940(a)-(d), 12944(a)&(c), 12949, 12955, 12955.8, 12956.1(b)(1), and 12956.2. (For a more thorough discussion, see § 6.9.)

[460] Gov't Code §12926(r)(1)(A) & (B); *see also* §12940. California's Fair Employment and Housing Act defines "sex" to include pregnancy or medical conditions related to pregnancy, childbirth or medical conditions related to childbirth, and breastfeeding or medical conditions related to breastfeeding.

[461] Gov't Code § 12926(r)(1)(C) (protected status of "sex" includes breastfeeding).

[462] Gov't Code §§ 12926(g); 12940(a) & (*l*). "Religious creed," "religion," "religious observance," "religious belief," and "creed" are defined to include all aspects of religious belief, observance, and practice, including religious dress and grooming practices. "Religious dress practice" is construed broadly to include "the wearing or carrying of religious clothing, head or face coverings, jewelry, artifacts, and any other item that is part of the observance by an individual of his or her religious creed." "Religious grooming practice" is also construed broadly to include "all forms of head, facial, and body hair that are part of the observance by an individual of his or her religious creed."

[463] Gov't Code §§ 12926(i), 12940(a)(2). "Genetic characteristics" can be either genes or chromosomes or inherited characteristics, if they are not presently associated with a symptom of disease or disorder but are known to cause or be statistically associated with the risk of causing a disease or disorder in an individual or that individual's offspring. *Id.* § 12926(i)(2)(A),(B).

[464] Gov't Code §§ 11135, 12920, 12921, 12926(g), 12930(i), 12931, 12940(a)-(d), 12944(a) & (c), 12955, 12955.8, 12956.1(b)(1), and 12993. California defines "genetic information" to mean, as to any individual, information about "(A) the individual's genetic tests; (B) The genetic tests of family members of the individual; (C) The manifestation of a disease or disorder in family members of the individual." Gov't Code § 12926(g)(1). This definition includes "any request for, or receipt of, genetic services, or participation in clinical research that includes genetic services, by an individual or any family member of the individual." *Id.* § 12926(g)(2). "Genetic information" does not, however, include information about an individual's gender or age. *Id.* § 12926(g)(3).

[465] Gov't Code § 12940(a); see also Military & Veterans Code § 394.

[466] Health & Safety Code § 120980.

[467] Lab. Code § 230.5. Qualifying crimes include: vehicular manslaughter while intoxicated, felony child abuse likely to produce great bodily harm or a death, assault resulting in the death of a child under eight years of age, felony domestic violence, felony physical abuse of an elder or dependent adult, felony stalking, solicitation for murder, a "serious felony," hit-and-run causing death or injury, felony driving under the influence causing injury, and sexual assault.

[468] Lab. Code § 1102.5.

[469] Lab. Code § 6310.

[470] Lab. Code § 98.6(a).

[471] Lab. Code § 132a. (For a more thorough discussion, see § 17.8.)

[472] 2 Cal. Code Regs § 11065(i).

[473] 42 U.S.C. § 12102(1) & (2) (major life activities).

[474] 42 U.S.C. § 12102(4)(E).

[475] 2. Cal. Code Regs. § 11065(d). California's broadened definition of "disability" came about through enactment of Assembly Bill 2222, which was effective January 1, 2001. The California Supreme Court, however, has opined that California always defined disability broadly, without regard to whether a limitation on a major life activity imposed a "substantial" limitation.

[476] Gov't Code § 12926.1(c); 2 Cal. Code Regs § 11065(d) (adding autism spectrum, obsessive compulsive disorder, palsy, post-traumatic stress disorder, and schizophrenia).

[477] Gov't Code § 12926(i) (mental condition), (m) (physical condition).

[478] 2 Cal. Code Regs § 11065(*l*).

[479] *Rope v. Auto-Chlor Sys. of Washington, Inc.*, 220 Cal. App. 4th 635, 642 (2013).

[480] 2 Cal. Code Regs § 11069.

[481] Gov't Code § 12940(e)(2).

[482] Gov't Code § 12940(e)(3).

[483] The job offer should not be contingent on anything other than the medical examination. See *Leonel v. American Airlines, Inc.*, 400 F.3d 702 (9th Cir. 2005) (unlawful under ADA and FEHA to require medical exam where job offer was also contingent on passing a background check).

[484] Gov't Code § 12940(e).

[485] Gov't Code § 12940(e)(3).

[486] Gov't Code § 12940(f).

[487] *DFEH v. Avis Budget Group, Inc.*, FEHC Dec. No. 10-05-P (Oct. 19, 2010).

[488] Gov't Code § 12940(a).

[489] Gov't Code § 12940(a)(1). See also 2 Cal. Code Regs § 7293.8(b) (inability of employee or applicant to perform the job is a defense that the employer must prove).

[490] *Green v. State of California*, 132 Cal. App. 4th 97, 102 (2005), *rev'd*, 42 Cal. 4th 254 (2007).

[491] *Green v. State of California*, 42 Cal. 4th 254 (2007).

[492] *Id.* at 271-73 (Werdegar, J., dissenting) (citing 2 Cal. Code Regs § 7293.8(b)) (further arguing that the California Legislature had acquiesced in this agency interpretation by leaving it undisturbed when the Legislature amended the FEHA).

[493] Health & Safety Code § 11362.5(d) provides: "Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician." While California led the way, at least nine other states have enacted similar laws. *Gonzales v. Raich*, 545 U.S. 1, 5 n.1 (2005).

[494] The Compassionate Use Act has identified each of these conditions as examples of conditions treated with medicinal marijuana. Health & Safety Code § 11362.5(b)(1)(A).

[495] Health & Safety Code § 11362.785 (emphasis added).

[496] *Ross v. Ragingwire Telecommunications*, 42 Cal. 4th 920 (2008). DFEH disability regulations issued in 2012 confirm that medical marijuana use is not protected. *Ragingwire* was referenced in the regulation's history. 2 Cal. Code Regs § 7294.3(d)(2)(A).

[497] *Id*. (Kennard, J. dissenting).

[498] 2 Cal. Code Regs § 11071(d)(2)(A).

[499] 2 Cal. Code Regs § 11069.

[500] Gov't Code § 12940(n). See, *e.g., DFEH v. Avis Budget Group, Inc.*, FEHC Dec. Case No. 10-05-P (Oct. 19, 2010) (finding employer's repeated delays in requiring the plaintiff to submit to exam by employer's doctor and failure to respond to numerous inquiries by plaintiff, while plaintiff was on unpaid leave of absence, violates § 12940(n)).

[501] *Wysinger v. Automobile Club of Southern California*, 157 Cal. App. 4th 413 (2007) (employer ignored arthritic employee's requests for a transfer that would shorten a long commute; FEHA allows independent cause of action for employees whose employers fail to engage in the interactive process; this provision does not require proof of the elements required by the ADA; federal ADA cases that hold that employers are not liable for refusal to engage in an interactive process are therefore inapposite). But see *Nadaf-Rahrov v. Neiman Marcus Group, Inc.*, 166 Cal. App. 4th 952, 979-81 (2008) (California courts should follow federal rule that employer is liable for failing to engage in good-faith interactive process only if a reasonable accommodation was available). The court in *Scotch v. Art Institute of California,* 173 Cal. App.

4th 986, 995 (2009) reconciled *Wysinger* and *Nadaf-Rahrov* to hold that an employee must identify a reasonable accommodation that was available when the interactive process should have occurred.

502 *Nadaf-Rahrov v. Neiman Marcus Group, Inc.*, 166 Cal. App. 4th 952 (2008) (reviving disability discrimination claim of employee dismissed when her physician said she could not perform "work of any kind," because that information pertained to the current position and not all vacant jobs potentially available in the foreseeable future; substantial physical restrictions did not self-evidently prevent plaintiff from performing vacant desk jobs for which she was otherwise qualified; discovery commissioner erred in limiting request to stores in just two cities, even if plaintiff was not entitled to nationwide discovery); *Prilliman v. United Airlines*, 53 Cal. App. 4th 935, 950-51 (1997) ("employer who knows of the disability of an employee has an affirmative duty to make known to the employee other suitable job opportunities with the employer and to determine whether the employee is interested in, and qualified for, those positions, if the employer can do so without undue hardship").

503 2 Cal. Code Regs § 11068(c).

504 *Sanchez v. Swissport, Inc.* 213 Cal. App. 4th 1331 (2013).

505 2 Cal. Code Regs § 11065(p).

506 *Id.* §§ 11065, 11069.

507 *Id.* § 11068(b).

508 Gov't Code § 12941.

509 *Smith v. City of Jackson*, 544 U.S. 228 (2005).

510 See Gov't Code § 12941. The statute, effective 2000, overruled *Marks v. Loral Corp.*, 57 Cal. App. 4th 30 (1997), a decision holding that a RIF based on salary considerations would not be discriminatory even if it disproportionately affected older workers.

511 *Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317, 354 (2000); *Reno v. Baird,* 18 Cal. 4th 640, 647 (1998).

512 Gov't Code § 12940(j)(4)(A).

513 Gov't Code § 12940(j)(1).

514 Gov't Code § 12940(j)(1) ("person providing services pursuant to a contract").

515 Gov't Code § 12940(j)(3).

516 See Gov't Code § 12940(j)(1); *State Dep't of Health Services v. Superior Court (McGinnis)*, 31 Cal. 4th 1026 (2003) (employer with harassing supervisor cannot assert *Ellerth/Faragher* defense, but can escape liability for damages plaintiff could have avoided by reporting the harassment more promptly if (1) employer took reasonable steps to prevent and correct workplace harassment and (2) plaintiff unreasonably failed to use preventive and corrective measures employer provided).

517 See § 6.5.5.1.

518 Gov't Code § 12940(i).

519 *Miller v. Department of Corrections*, 36 Cal. 4th 446 (2005).

520 Gov't Code § 12940(j)(1), (k). *See Turman v. Turning Point of California, Inc.,* 191 Cal. App. 4th 53 (2010) (employer must take immediate, appropriate corrective action in response to harassment complaints, even when harassment is "inherently part of the job").

521 Gov't Code § 12950(b). For discussion of the California-imposed duty to prevent and correct harassment, see § 6.5.3.

522 Gov't Code § 12950.1.

523 2 Cal. Code Regs §§ 7287.6(b), 7291.1(f)(1).

524 146 Cal. App. 4th 63 (2006), *rev. granted*, 57 Cal. Rptr. 3d 541 (Cal. April 18, 2007).

525 *Id.* at 75.

526 47 Cal. 4th 686 (2009).

[527] 18 Cal. 4th 640 (1998).

[528] Gov't Code § 12940(k).

[529] Gov't Code § 12940(j).

[530] Gov't Code § 12950(b). The fact sheet (DFEH-185) is accessible at www.dfeh.ca.gov (visited on February 20, 2014).

[531] Gov't Code § 12950.1.

[532] 2 Cal. Code Regs § 7288.0, available at http://www.dfeh.ca.gov/.

[533] *Id.* § 7288(a)(1), (3).

[534] *Cf. Clopton v. Global Computer Associates*, 4 AD Cases 360 (C.D. Cal. 1995) (five-employee FEHA jurisdictional threshold means employees within California).

[535] 2 Cal. Code Regs § 7288.0(a)(4), (8).

[536] *Id.* § 7288.0(a)(10).

[537] *Id.* § 7288.0(a)(11).

[538] *Id.* § 7288.0(a)(2)(E). *See also id.* § 7288.0(c)(2), (d)(6).

[539] *Flait v. North Am. Watch Corp.*, 3 Cal. App. 4th 467, 476 (1992).

[540] *Id.* at 475.

[541] *Id.*

[542] *Thompson v. City of Monrovia*, 186 Cal. App. 4th 860, 880 (2010).

[543] *DFEH v. Lyddan Law Group, LLP*, FEHC Dec. No. 10-04-P (Oct. 19, 2010) (respondent had no written anti-harassment policy or employee handbook, conducted no harassment prevention training, and did not independently investigate employee's complaints; FEHC imposed injunctive relief).

[544] *See, e.g., Page v. Superior Court*, 31 Cal. App. 4th 1206, 1212-13 (1995); *Matthews v. Superior Court*, 34 Cal. App. 4th 598, 599 (1995).

[545] Gov't Code § 129400(j)(3). The California Legislature overruled *Carrisales v. Department of Corrections*, 21 Cal. 4th 1132 (1999), in which the California Supreme Court had recognized that the FEHA does not apply to actions between co-workers in the absence of a supervisorial relationship.

[546] *State Department of Health Services v. Superior Court (McGinnis)*, 31 Cal. 4th 1026 (2003).

[547] *Id.* at 1038-39.

[548] *Id.*

[549] *Id.* at 1044.

[550] *Vance v. Ball State University*, 133 S. Ct. 2434, 2443 (2013) (upholding Seventh Circuit decision that had affirmed summary judgment for the employer; the employer is vicariously liable for harassment perpetrated by its employee only when the employer empowered the harasser to take "tangible employment actions against the victim," such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits).

[551] Gov't Code § 12926(t). California's definition of "supervisor," which has no Title VII counterpart, is "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, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment." *Id.* This language mirrors the definition of "supervisor" appearing in the National Labor Relations Act. 29 U.S.C. § 152(11).

The U.S. Supreme Court in *Vance* declined to follow the NLRA definition of "supervisor": "[T]he NLRA may in some instances define 'supervisor' more broadly … . But those differences reflect the NLRA's unique purpose, which is to preserve the balance of power between labor and management … . That

purpose is inapposite in the context of Title VII, which focuses on eradicating discrimination. An employee may have a sufficient degree of authority over subordinates such that … the employee should not participate with lower level employees in the same collective-bargaining unit (because, for example, a higher level employee will pursue his own interests at the expense of lower level employees' interests), but that authority is not necessarily sufficient to merit heightened liability for the purposes of Title VII." 133 S. Ct. at 2445 n.7. Query whether a California court would adopt this reasoning to limit the definition of supervisor under the FEHA, or, instead, choose to justify vicarious employer liability by relying mechanically on the FEHA's literal statutory language.

552 Gov't Code § 129400(j)(1).

553 Civ. Code § 1708.5.

554 See § 5.9.2 (Ralph Civil Rights Act, Tom Bane Civil Rights Act).

555 Civ. Code § 1708.7.

556 Civ. Code § 51.9.

557 *Knoettgen v. Superior Court*, 224 Cal. App. 3d 11 (1990) (prior sexual assault not discoverable in sexual harassment case).

558 *Tylo v. Superior Court*, 55 Cal. App. 4th 1379 (1997).

559 *Rieger v. Arnold*, 104 Cal. App. 4th 451 (2002) (citing Evid. Code § 1106(b)).

560 *Oncale v. Sundower Offshore Services, Inc.*, 523 U.S. 75, 80, 81 (1998).

561 36 Cal. 4th 446 (2005).

562 *Id.* at 451.

563 *Id*. at 464.

564 *Id.* at 469.

565 Gov't Code § 12940(j)(4)(C) ("Sexually harassing conduct need not be motivated by sexual desire.").

566 *Kelley v. Conco Companies*, 196 Cal. App. 4th 191 (2011).

567 Gov't Code § 12951.

568 Lab. Code § 1197.5.

569 Lab. Code § 1199.5.

570 Gov't Code § 12947.5.

571 Gov't Code 12926(r)(2).

572 *Id.*

573 Gov't Code § 12949 (employer can still impose certain dress and appearance standards).

574 *Friedman v. Southern California Permanente Medical Group*, 102 Cal. App. 4th 39 (2002) (veganism does not qualify as a religion for purposes of FEHA).

575 Gov't Code § 12926(p).

576 Gov't Code § 12940(*l*)(2).

577 *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977).

578 2 Cal. Code Regs § 7293.3(b). But see *Soldinger v. Northwest Airlines, Inc.*, 51 Cal. App. 4th 345 (1996) (following federal law on religious accommodation issue with no discussion of the factors enumerated in the FEHC regulations).

579 Gov't Code § 12940(*l*)(1) (citing Gov't Code § 12926(t)).

580 Gov't Code § 12940(*l*)(3).

581 *Westendorf v. W. Coast Contractors of Nevada, Inc.*, 712 F.3d 417, 422 (9th Cir. 2013); *McCoy v. Pacific Maritime Ass'n*, 216 Cal. App. 4th 283 (2013).

[582] Federal law may go further than indicated in text. In *Crawford v. Metro. Gov't of Nashville & Davidson County*, 129 S. Ct. 846 (2009), the Supreme Court held that a witness during a sexual-harassment investigation engaged in protected oppositional activity by telling the company investigator that the alleged harasser had harassed her. In holding that oppositional activity is not limited to activity that the plaintiff initiates, the Court stated in dictum that oppositional activity can even include passive activity such as standing pat and refusing to implement an unlawful order to discriminate.

[583] *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028, 1042-48 (2005).

[584] *Joaquin v. City of Los Angeles*, 202 Cal. App. 4th 1207, 1226 (2012) ("an employer may discipline or terminate an employee for making false charges, even where the subject matter of those charges is an allegation of sexual harassment").

[585] *McGrory v. Applied Signal Tech., Inc.*, 212 Cal. App. 4th 1510, 1528 (2013).

[586] *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028, 1052 (2005).

[587] *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th at 1139-40.

[588] *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002).

[589] *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028, 1058-58 (2005). See also *Dominguez v. Washington Mutual Bank*, 168 Cal. App. 4th 714 (2008) (reversing summary judgment against claim of sexual-orientation harassment, where plaintiff alleged co-worker made homophobic verbal attacks on her, then ceased verbal attacks and began engaging in other conduct to impede plaintiff's ability to do her job; rejecting defendant's argument that the later conduct was different and unrelated in nature to the prior conduct; plaintiff raised triable issues as to whether later conduct constituted continuing FEHA violation).

[590] *Taylor v. City of Los Angeles Department of Water & Power*, 144 Cal. App. 4th 1216 (2006) (supervisor can be held personally liable for retaliation under FEHA); *Winarto v. Toshiba America Electronics Components, Inc.*, 274 F.3d 1276 (9th Cir. 2001) (same); *Walrath v. Sprinkel*, 99 Cal. App. 4th 1237 (2000) (same).

[591] *Reno v. Baird*, 18 Cal. 4th 640 (1998) (FEHA does not create personal liability for supervisors who make discriminatory personnel management decisions); *Khajavi v. Feather River Anesthesia Medical Group*, 84 Cal. App. 4th 32, 38 (2000) (only employer, not supervisor, can be liable for tort of wrongful discharge in violation of public policy).

[592] Gov't Code § 12940(h) (unlawful for "any employer, labor organization, employment agency, **or person** to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part") (emphasis added).

[593] *Jones v. The Lodge at Torrey Pines Partnership*, 42 Cal. 4th 1158 (2008).

[594] *Fitzsimons v. Cal. Emergency Physicians Med. Group*, 205 Cal. App. 4th 1423 (2012).

[595] *University of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013).

[596] *Alamo v. Practice Management Information Corp.*, 219 Cal. App. 4th 466 (2013); see also *Mendoza v. Western Med. Center Santa Ana*, 2014 WL 123417 (Cal. Ct. App. Jan. 14, 2014).

[597] 2 Cal. Code Regs § 11057.

[598] *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). See also *Cummings v. Benco Building Servs.*, 11 Cal. App. 4th 1383, 1387-88 (1992) (defendant's attorney fees available only if plaintiffs' lawsuit is deemed unreasonable, frivolous, meritless, or vexatious).

[599] *Mangano v. Verity, Inc.*, 167 Cal. App. 4th 944 (2008) (affirming denial of defendant's motion for attorney fees even though plaintiff's rejection of Code of Civil Procedure section 998 offer made defendant the prevailing party; section 998 does not trump *Christiansburg* standard: defendant still must show the plaintiff's case was frivolous).

[600] *Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro*, 91 Cal. App. 4th 859, 868 n.42 (2001) ("The trial court should also make findings as to the plaintiff's ability to pay attorney fees, and how

large the award should be in light of the plaintiff's financial situation."). See also *Villanueva v. City of Colton*, 160 Cal. App. 4th 1188, 1202 (2008) (trial court must consider non-prevailing party's ability to pay before assessing attorney fees under FEHA, but where plaintiff offered no evidence that might warrant a reduced fee award, trial court did not abuse discretion in awarding attorney fees to defendant).

601 *Young v. Exxon Mobil Corp.*, 168 Cal. App. 4th 1467 (2008) (employee dismissed for closing down 24-hour service station for several hours, in violation of company policy, yet sued for discrimination and harassment).

602 *Blum v. Superior Court (Copley Press, Inc.)*, 141 Cal. App. 4th 418 (2006) (DFEH complaint may be verified by attorney for complainant).

603 *Rickards v. United Parcel Service, Inc*., 206 Cal. App. 4th 1523 (2012) (reversing summary judgment granted to employer because Rickards had failed to file a verified DFEH complaint; the complaint that his attorney filed through DFEH's online automated system was sufficient).

604 *Wasti v. Superior Court*, 140 Cal. App. 4th 667 (2006) (Gov't Code section 12962, which requires the complainant's attorney to serve the DFEH complaint on the respondent-employer within 60 days, does not create jurisdictional prerequisite to FEHA suit; rather, notice is required only when the DFEH is to investigate, not when plaintiff requests the immediate right to sue).

605 *See* LINDEMANN & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1790-98 (4th ed. 2007).

606 *McDonald v. Antelope Valley Community College Dist*., 45 Cal. 4th 88 (2008) (voluntary pursuit of internal administrative remedy before filing FEHA complaint will toll running of statute of limitations on FEHA claim; nothing in FEHA stands as a bar to the usual rule that limitations periods are tolled while a party pursues an alternate remedy; tolling applies even if the plaintiff voluntarily abandons the internal proceeding).

607 *Alch v. Superior Court (Time Warner Entertainment)*, 122 Cal. App. 4th 339 (2004) (age discrimination that violates FEHA also violates the UCL, Bus & Prof. Code § 17200); *Herr v. Nestle U.S.A., Inc.*, 109 Cal. App. 4th 779, 789-90 (2003) (plaintiff entitled to injunction under section 17200 for age discrimination as it gives unfair competitive advantage; rejecting the employer's contention that the UCL aims to protect consumers and competitors, not employees).

608 *See generally* LINDEMANN & KADUE, AGE DISCRIMINATION IN EMPLOYMENT LAW 538-39 (2003).

609 *Reid v. Google, Inc.*, 155 Cal. App. 4th 1342 (2007), *rev. granted*.

610 *Reid v. Google*, *Inc.*, 50 Cal. 4th 512 (2010).

611 *See, e.g., Bradley v. Harcourt, Brace & Co.,* 104 F.3d 267, 270-71 (9th Cir. 1996).

612 *Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317, 354 (2000); *Horn v. Cushman & Wakefield Western, Inc.*, 72 Cal. App. 4th 798, 809 (1999).

613 *Harvey v. Sybase, Inc*., 161 Cal. App. 4th 1547, 1563 (2008). See also *Nazir v. United Airlines, Inc.,* 178 Cal. App. 4th 243, 272, 273 (2009) ("no California case or statute has created a same actor presumption"; same-actor evidence should not have "some undue importance attached to it, for that could threaten to undermine the right to a jury trial by improperly easing the burden on employers in summary judgment").

614 *Pantoja v. Anton*, 198 Cal. App. 4th 87 (2011).

615 *Id.* at 92.

616 *See, e.g., Aguilar v. Ass'n for Retarded Citizens,* 234 Cal. App. 3d 21, 34-35 (1991).

617 *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 592 (2000); *see generally Ramirez v. Yosemite Water Co.,* 20 Cal. 4th 785, 795 (1999) ("IWC's wage orders, although at times patterned after federal regulations, also sometimes provide greater protection than is provided under federal law in the Fair Labor Standards Act"); see, *e.g., Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal. App. 4th 1524, 1535 n.10 (2008) (noting DLSE's refusal to defer to federal authority analyzing whether on-call time is "hours worked" "because, under California law `the existence of an "agreement" regarding the understanding of

the parties (as to the compensation policy) is of no importance. The ultimate consideration in applying the California law is determining the extent of the "control" exercised.' ").

618 DLSE Opinion Letter 1994.02.03-3 at 2 (contrasting federal and California definitions of “hours worked” and noting that California has not enacted the Portal-to-Portal Act).

619 Lab. Code § 558(a).

620 See Lab. Code § 226.7.

621 Lab. Code § 1194.2(a).

622 Lab. Code § 1194.2(b).

623 Lab. Code § 1197.1(a).

624 Lab. Code § 1199(b).

625 *Armenta v. Osmose, Inc.*, 135 Cal. App. 4th 314, 323 (2005) (California protects “the minimum wage rights of California employees to a great extent than federally”; utility pole workers thus could seek the minimum wage for all hours worked, including nonproductive time such as travel time in company vehicles and time spent completing paperwork).

For federal court cases following *Armenta*, see *Quezada v. Con-Way Freight, Inc.,* 2012 WL 2847609, at *2, 6 (N.D. Cal. 2012) (employer must pay directly for "all hours worked" and thus could not rely on payments per mile driven, plus an hourly rate for work at the plant; employer must also pay separately for vehicle inspections, paperwork completion, etc.); *Cardenas v. McLane FoodServs., Inc.,* 796 F. Supp. 2d 1246, 1249-53 (C.D. Cal. 2011) (employer must pay truck drivers for pre- and post-shift inspections, as that time was not included in the hourly rate); *Ontiveros v. Zamora,* 2009 WL 425962 (E.D. Cal. 2009) (employer cannot just pay mechanics for the number of repairs completed, but must also pay them for hours worked while not performing repairs).

626 *Gonzalez v. Downtown LA Motors*, LP, 215 Cal. App. 4th 36 (2013) (automotive service technicians paid a "piece-rate" basis for repair work must also be paid a separate hourly minimum wage for time they spent during their workshifts waiting for vehicles to repair or performing other nonrepair tasks directed by their employer).

627 *Balasanyan v. Nordstrom, Inc.*, 913 F. Supp. 2d 1001, 1007 (S.D. Cal. 2012) (dismissing FLSA minimum wage claim while permitting California minimum wage claim to continue, because, under California law, “employees must be directly compensated at least minimum wage for all time spent on activities that do not allow them to directly earn wages”; thus store salesperson paid with commissions, with guarantee of being paid, on average, at least the minimum wage, was still separately owed the California minimum wage for non-sales activities such as stocking merchandise).

628 See Lab. Code § 1205(c) (authorizing jurisdictions to impose labor standards through “exercise of local police powers or spending powers”).

629 *Amaral v. Cintas Corp.*, 163 Cal. App. 4th 1157 (2008).

630 See http://sfgsa.org/index.aspx?page=411 (visited on February 18, 2014).

631 IWC Wage Orders § 5(A) (exceptions apply for Acts of God and other cause beyond the employer’s control).

632 IWC Wage Orders § 5(B) (exceptions apply for Acts of God and other cause beyond the employer’s control).

633 *Price v. Starbucks*, 192 Cal. App. 4th 1136, 1147 (2011), *rev. denied*, No. S191090 (May 11, 2011).

634 *Aleman v. AirTouch Cellular,* 209 Cal. App. 4th 556, 569-74 (2012).

635 IWC Wage Orders § 4(C) (an exception applies for employees residing at the place of employment). “Split shift” is defined elsewhere: “Split shift” means a work schedule that the employer has interrupted with non-paid non-working periods, other than “bona fide rest or meal periods.” Wage Orders § 2(Q).

[636] See, *e.g., Galvez v. Federal Express Inc.*, 2011 U.S. Dist. Lexis 46393, at *8-9 (N.D. Cal. 2011) ("The plain language of the split shift regulation reflects an intent to ensure that an employee who works a split shift must be compensated highly enough so that he or she receives more than the minimum wage for the time actually worked plus one hour.").

[637] *Aleman v. AirTouch Cellular,* 209 Cal. App. 4th 556, 574-77 (2012).

[638] Wage Orders § 3.

[639] *Arechiga v. Press,* 192 Cal. App. 4th 567, 574 (2011) ("explicit mutual wage agreements remain valid in California").

[640] Lab. Code § 515(d)(2) ("Payment of a fixed salary to a nonexempt employee shall be deemed to provide compensation only for the employee's regular, nonovertime hours, notwithstanding any private agreement to the contrary.").

[641] *Skyline Homes, Inc. v. Department of Industrial Relations*, 165 Cal. App. 3d 239, 245 (1985).

[642] Lab. Code § 515(d) (regular rate for nonexempt salaried employee is 1/40th of weekly salary). See also *Espinoza v. Classic Pizza, Inc.*, 114 Cal. App. 4th 968 (2003).

[643] *Mitchell v. Yoplait*, 122 Cal. App. 4th Supp. 8 (App. Div. 2004) (upholding, as authorized by Lab. Code § 511(b), alternative workweek schedule by which employees in relevant work unit voted for three twelve-hour shifts and one six-hour shift a week, by which only the last two hours in each twelve-hour shift were considered overtime entitled to time-and-one-half wages, with no overtime premium pay being due for the ninth and tenth hours of work on the twelve-hour shifts).

[644] 57 Cal. 2d 319 (1962).

[645] See Lab. Code § 224 (arguably suggesting that any valid deduction must be authorized by state or federal law or expressly authorized in writing by the employee, or in a collective bargaining agreement, to cover health or pension plan payments). Two cases indirectly support this view: *Hudgins v. Neiman Marcus, Inc.*, 34 Cal. App. 4th 1049 (1995) (suggesting without deciding that Labor Code itself bars deductions for innocently caused business losses); *Quillian v. Lion Oil Co.*, 96 Cal. App. 3d 156 (1979) (applying anti-deduction rule to gas station store manager without addressing whether manager was exempt, on apparent assumption that Labor Code provisions discussed in *Kerr's Catering* directly bar deductions for business losses, rather than simply authorize the IWC to issue wage orders against those deductions).

[646] IWC Wage Orders § 9.

[647] IWC Wage Orders § 9; DLSE Enforcement Policies and Interpretations Manual § 45.5.5 (2002).

[648] See *Department of Industrial Relations v. VI Video*, 55 Cal. App. 4th 1084, 1088 (1997) (Blockbuster Video settled action brought by DLSE alleging that dress code requirements for its 1,914 employees violated Section 9(A) of Wage Order 7).

[649] Lab. Code § 226.7(a).

[650] Lab. Code § 512(a).

[651] DLSE Enforcement Policies and Interpretations Manual § 45.2.2 (2002).

[652] IWC Wage Orders § 7(A)(3).

[653] IWC Wage Orders § 11(A).

[654] DLSE Opinion Letter 2002.09.04, at 3.

[655] IWC Wage Orders § II(B); Lab. Code §512 (wage order explicitly requires a writing but statute does not).

[656] IWC Wage Orders § II(B); Lab. Code § 512 (neither wage order nor statute requires a writing).

[657] No. S166350 (Cal. Oct. 22, 2008) (granting review in *Brinker*).

[658] *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012).

[659] Lab. Code § 512(a).

660 *Cicairos v. Summit Logistics, Inc.*, 133 Cal. App. 4th 949, 963 (2005) ("employers have an 'affirmative obligation to ensure that workers are actually relieved of all duty'") (citing DLSE Opinion Letter 2002.01.28, at 1).

661 DLSE Enforcement Policies and Interpretations Manual § 45.2.1 (2002) ("It is the employer's burden to compel the worker to cease work during the meal period.").

662 The California Supreme Court joined the overwhelming weight of federal court decisional authority on this point of California law. See*, e.g., Brown v. Federal Express Corp.*, 249 F.R.D. 580, 585 (C.D. Cal. 2008) (Fischer, J.) (denying class certification and rejecting argument that employers must ensure that employees take breaks); *Gabriella v. Wells Fargo Financial, Inc.*, 2008 WL 3200190 (N.D. Cal. Aug. 28, 2008) (denying motion for class certification while applying standard that employers need only make break periods available to its employees); *Perez v. Safety-Kleen Sys., Inc.,* 253 F.R.D. 508, 514 (N.D. Cal. 2008) (granting motion for summary judgment in part, denying plaintiffs' motion for class certification and applying the "make available" standard); *Salazar v. Avis Budget Group*, 251 F.R.D. 529 (S.D. Cal. 2008) (denying motion for class certification because class members could not show they were forced to miss breaks); *Kenny v. Supercuts*, 252 F.R.D. 641, 645 (N.D. Cal. 2008) (same).

663 29 C.F.R. § 785.19(a).

664 29 C.F.R. § 785.19(b).

665 See, *e.g., Bono v. Enterprises, Inc. v. Bradshaw*, 32 Cal. App. 4th 968, 975-77 (1995) (affirming judgment denying employer's request for injunctive relief against DLSE enforcement position that employers must pay employee for their meal time if the employer requires the employee to remain on employer premises during lunch).

666 *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004, 1036 (2012) ("the DLSE argues … the wage order's meal period requirement is satisfied if the employee (1) has at least 30 minutes uninterrupted, (2) is free to leave the premises, and (3) is relieved of all duty for the entire period [citing DLSE Opinion Letter Nos. 1988.01.05, 1996.07.12]. We agree with this DLSE interpretation of the wage order.").

667 IWC Wage Orders § 12(A).

668 IWC Wage Orders § 12(A).

669 DLSE Enforcement Policies and Interpretations Manual § 45.3.1 (2002) (any time exceeding two hours is a "major fraction").

670 *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004, 1028-32 (2012).

671 *Cicairos v. Summit Logistics, Inc.*, 133 Cal. App. 4th 949, 963 (2005).

672 IWC Wage Orders § 7(A)(3).

673 See DLSE Opinion Letter 2002.02.22, at 1.

674 See DLSE Opinion Letter 1986.01.03.

675 IWC Wage Orders § 13(B).

676 Lab. Code § 226.7(a).

677 Lab. Code § 226.7(b).

678 Lab. Code § 226.7(c). See IWC Wage Orders § 11(B) (meal periods), § 12(B) (rest periods). See also Lab. Code § 558(a) (civil penalty for violating IWC wage order).

679 *United Parcel Service, Inc v. Superior Court (Allen)*, 192 Cal. App. 4th 1043 (2011).

680 Lab. Code § 226.7(d).

681 See, *e.g.*, *Mills v. Superior Court*, 135 Cal. App. 4th 1547 (2006) (recognizing penal nature of meal-period pay); *Murphy v. Kenneth Cole Productions, Inc.*, 134 Cal. App. 4th 728 (2005) (same), *rev'd*, 40 Cal. 4th 1094 (2007); *Caliber Bodyworks, Inc. v. Superior Court*, 134 Cal. App. 4th 365, 380 n.16 (2005) (same).

[682] *Hartwig v. Orchard Commercial, Inc.* (June 17, 2005), effectively overruled by the California Supreme Court's *Murphy*'s decision, discussed in text. The Labor Commissioner on occasion has designated an Order, Decision or Award as a Precedent Decision. See Gov't Code § 11425.60. The *Hartwig* decision was the first to receive that special status. The *Hartwig* opinion fully reviewed the wage v. penalty issue and concluded that the additional hour of pay is indeed a penalty. The *Murphy* decision, however, makes *Hartwig* a dead letter. And now the Labor Commissioner has concluded that it is inappropriate to designate ODAs as precedent decisions. See www.dir.ca.gov/dlse (March 7, 2008 Memorandum of Robert Roginson, Chief Counsel) (visited on February 20, 2014).

[683] *Murphy v. Kenneth Cole Productions*, 40 Cal. 4th 1094 (2007).

[684] *E.g.*, 56 Cal. Rptr. 3d 880, 886.

[685] Lab. Code § 218.5.

[686] Lab. Code § 218.6.

[687] Lab. Code § 203.

[688] Bus. & Prof. Code §17200.

[689] DLSE Enforcement Policies and Interpretations Manual § 49.1.3 (2002) (extra hour of pay for a meal-period or rest-break violation is in the nature of legally required premium pay and thus is not included in computing the regular rate of pay).

[690] *Murphy v. Kenneth Cole Productions*, 40 Cal. 4th 1094, 56 Cal. Rptr. 3d 880, 886 (2007).

[691] Wage Orders § 14 ("(A) All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats. (B) When employees are not engaged in the active duties of their employment and the nature of the work requires standing, an adequate number of suitable seats shall be placed in reasonable proximity to the work area and employees shall be permitted to use such seats when it does not interfere with the performance of their duties.").

[692] Lab. Code § 1198.

[693] No. 04-431310 (S.F. Sup. Ct. 2005).

[694] *Currie-White v. Blockbuster Inc.*, 2009 U.S. Dist. LEXIS 68438 (N.D. Cal. Aug. 15, 2009),

[695] *Bright v. 99 Cents Only Stores, Inc.*, 189 Cal. App. 4th 1472 (2010); *Home Depot USA v. Superior Court*, 191 Cal. App. 4th 210 (2010).

[696] *Green v. Bank of America NA, No.* 11-56365 (9th Cir. Feb. 13, 2013) (reversing order dismissing the complaint for failing to allege that the plaintiff had requested a seat)..

[697] *Kilby v. CVS Pharmacy*, *Inc.*, No. 12-56130 (9th Cir. Dec. 31, 2013); *Henderson v. JP Morgan Chase Bank*, No. 13-56095 (9th Cir. Dec. 31, 2013).

[698] The California Supreme Court did accept such a referral in *Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191, 1206 (2011), and issued an opinion adverse to employers. See § 7.13.1.

[699] Lab. Code § 515(a).

[700] *Conley v. PG&E Co.*, 131 Cal. App. 4th 260, 271 (2005) ("nothing in California law precludes an employers from following the federal law that permits them to require the use of vacation leave for partial-day absence without causing exempt employees to become nonexempt under the salary basis test").

[701] DLSE Opinion Letter 2009.11.23.

[702] See IWC Wage Orders § 1(A)(1).

[703] 29 C.F.R. § 541.106(b).

[704] *Henley v. Safeway Inc.*, 216 Cal. App. 4th 795, 827 & n.8 (2013) (noting that California Legislature has not elected to follow the federal regulation).

[705] See IWC Wage Orders § 1(A)(3).

[706] An employee who merely applies knowledge in following prescribed procedures or in determining which procedure to follow does not exercise "discretion and independent judgment," but rather is simply applying skill and knowledge. "Discretion and independent judgment" consists of comparing and evaluating possible courses of conduct, and making a decision after considering the various possibilities.

[707] See IWC Wage Orders § 1(A)(2).

[708] 87 Cal. App. 4th 805 (2001).

[709] *Id.* at 812.

[710] See, *e.g., Dalheim v. KDFW-TV*, 918 F.2d 1220, 1230 (5th Cir. 1990) ("The distinction § 541.205(a) draws is between those employees whose primary duty is administering the business affairs of the enterprise from those whose primary duty is producing the commodity or commodities, whether goods or services, that the enterprise exists to produce and market.").

[711] *Bell*, 87 Cal. App. 4th at 823-28.

[712] 29 C.F.R. §§ 541.2(a), 541.205(a).

[713] *Bell*, 87 Cal. App. 4th at 826.

[714] *E.g.*, *Miller v. Farmers Ins. Exch.*, 481 F.3d 1119 (9th Cir. 2007) (criticizing *Bell's* interpretation of the administrative/professional dichotomy and finding insurance adjusters categorically to qualify as exempt employees); *In re Farmers Ins. Exch.*, 336 F. Supp. 2d 1077, 1087-88, 1091 (D. Or. 2004) (refusing to apply *Bell* and rejecting notion that Farmers' adjusters were nonexempt "production" workers regardless of whether they met the other requirements of the administrative exemption).

[715] 29 C.F.R. § 541.203(a). *See also* old C.F.R. § 541.205(c)(5) (identifying insurance adjusters within the universe of employees often covered by the administrative exemption). The current regulations still require an adjuster to meet the duties test to qualify as exempt, which requires the adjuster to perform such activities as "interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damages estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation."

[716] See, *e.g.*, *Munizza v. State Farm Mut. Auto. Ins. Co.*, 103 F.3d 139 (9th Cir. 1996) (memorandum); *Blinston v. Hartford Accident & Indemn. Co.*, 20 Wage & Hour Cas. (BNA) 6 (W.D. Mo. 1970).

[717] *Miller v. Farmers Ins. Exch.*, 481 F.3d 1119 (9th Cir. 2007).

[718] 481 F.3d at 1124, 1132.

[719] 154 Cal. App. 4th 164 (2007), *rev. granted*, No. S156555 (Cal. Sept. 21, 2007).

[720] *Id*. at 177.

[721] But see *Combs v. Skyriver Communications, Inc.*, 159 Cal. App. 4th 1242 (2008) (upholding trial court finding that manager of capacity planning and director of network operations was exempt as administrative employee, focusing on "salary" and "duties" tests set forth in IWC Wage Order No. 4-2001 rather than administrative/production worker dichotomy set forth in *Bell v. Farmers Ins. Exchange*, 87 Cal. App. 4th 805 (2001), where plaintiff primarily engaged in work "directly related to management policies or general business operations" that involved customary and regular exercise of discretion and independent judgment).

[722] 53 Cal. 4th 170 (2011).

[723] *Harris v. Superior Court*, 53 Cal. 4th 170 (2011).

[724] 29 C.F.R. § 541.1(a).

[725] 29 C.F.R. § 541.103.

[726] *Ramirez v. Yosemite Water Co.*, 20 Cal. 4th 785 (1999).

[727] 20 Cal. 4th at 852.

[728] See old 29 C.F.R. § 541.113.

[729] Lab. Code § 515.5. Because the California Consumer Price Index has not increased, the California Division of Labor Statistics and Research will maintain for 2010 the computer software employee's minimum hourly rate for overtime pay exemption at $37.94, the monthly salary exemption at $6,587.50, and the minimum annual salary exemption at $79,050.

[730] See IWC Wage Orders § 1(A)(3)(g).

[731] 29 C.F.R. § 541.5.

[732] 29 C.F.R. § 541.505(b).

[733] Lab. Code § 1171.

[734] IWC Wage Order No. 4, §§ 1(C), 2(M).

[735] *Ramirez v. Yosemite Water Co.*, 20 Cal. 4th 785, 798 (1999).

[736] 8 Cal. Code Regs § 11160(2)(J). *See also Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 588 (2000) (federal labor law differs substantially from state law with respect to concept of hours worked).

[737] DLSE Opinion Letter 2002.01.29, at 10-11 (arguing that Labor Code Sections 221-223 provide "a statutory basis "for the enforcement of non-overtime contract based wage claims … . California law explicitly prohibits employers from paying employees less than the wages required under any statute or … contract … ."). See also § 7.1.4.

[738] Lab. Code § 1174(d).

[739] *Seymore v. Metson Marine, Inc.*, 194 Cal. App. 4th 361, 365 (2011) ("We agree with plaintiffs that it is not permissible for Metson to artificially designate the workweek in such a way as to circumvent the statutory requirement to pay overtime rates for the seventh consecutive day worked in a workweek.").

[740] 29 C.F.R. § 785.48(b); DLSE Enforcement and Policies Manual §§ 47.1, 47.2 (2002).

[741] *See's Candy Shops, Inc. v. Superior Court (Silva)*, 210 Cal. App. 4th 889 (2012).

[742] *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 584 (2000) (employer that requires employees to travel to work site on its buses must compensate them for time spent traveling on buses and for time spent waiting for buses after employee has arrived at designated waiting site at designated time; time subject to control of employer is hours worked under definition provided in California wage order). *Cf. Overton v. Walt Disney Co.*, 136 Cal. App. 4th 263 (2006) (where employer provided employees with parking a mile distant from the work site and provided shuttle that employees were permitted *but not required* to take between parking lot and work site, employer need not compensate employees for time spent on shuttle).

[743] *Rutti v. Lojack Corp.*, 596 F.3d 1046 (9th Cir. 2010).

[744] DLSE Enforcement Policies and Interpretations Manual § 46.3 (2002) (California does not distinguish between compulsory travel during "normal" working hours and compulsory travel outside "normal" hours, because these "distinctions, and treatment of some of this time as noncompensable, are purely creatures of the federal regulations, and are inconsistent with state law").

[745] See DLSE Enforcement and Policies Manual § 47.7 (2002); DLSE Opinion Letter 2002.01.29.

[746] *E.g., Balasanyan v. Nordstrom, Inc.*, 913 F. Supp. 2d 1001 (S.D. Cal. 2012) (Labor Code requires employer to directly compensate salespeople at least minimum wage for any time spent on non-commission-producing activity, in addition to paying contractually required commission or guaranteed minimum draw rate for time spent making sales), *mandamus denied*, *In re Nordstrom, Inc.*, 719 F.3d 1129 (9th Cir. 2013). See also *Gonzalez v. Downtown LA Motors, LP*, 215 Cal. App. 4th 36 (2013) (for piece-rate employees, a separate minimum wage applies for non-productive hours worked) (review denied); *Quezada v. Con-Way Freight, Inc.*, 2012 WL 2847609, at *6-7 (N.D. Cal. July 11, 2012) ("California law does not allow an employer to 'build in' time for non-driving tasks into a piece-rate compensation system"; "Labor Code requires employees to be paid an hourly rate for all time performing tasks other than driving"), *mandamus denied*, *In re Con-Way Freight Inc.*. 720 F.3d 1136 (9th Cir. 2013).

[747] *Bluford v. Safeway Stores, Inc.*, 216 Cal. App. 4th 864 (2013).

[748] See, *e.g.*, *Berry v. County of Sonoma*, 30 F.3d 1174, 1180 (9th Cir. 1994). See generally 29 C.F.R. §§ 553.221(d), 785.14-17.

[749] *Seymore v. Metson Marine, Inc.*, 194 Cal. App. 4th 361, 365 (2011) (but the parties could agree to exclude from compensation eight hours of sleep time in each 24-hour period).

[750] *Mendiola v. CPS Security Solutions, Inc.*, 217 Cal. App. 4th 851 (2013), *rev. granted*, No. S212704, 163 Cal. Rptr. 3d 1 (2013).

[751] See, *e.g., Lindow v. United States*, 738 F.2d 1057 (9th Cir. 1984) (approximately 7-8 minutes spent each day, before the shift started, reading log book and exchanging information was *de minimis* because it was irregular and difficult to monitor).

[752] *Kurihara v. Best Buy Co*., 2007 WL 2501698 (N.D. Cal. 2007).

[753] See Lab. Code § 224.

[754] 57 Cal. 2d 319 (1962).

[755] See, *e.g., Hudgins v. Neiman-Marcus Group, Inc.*, 34 Cal. App. 4th 1109 (1995) (unidentifiable returns of merchandise not attributed to sales made by particular employee could not be deducted from commissions); *Quillian v. Lion Oil Co.*, 96 Cal. App. 3d 156 (1979) (unlawful to determine bonus payments by deducting amount of cash shortages for sales). See also *Sciborski v. Pacific Bell Directory*, 205 Cal. App. 4th 1152 (2012) (unlawful to unilaterally declare commission was unearned and use self-help to deduct funds from wages already paid; although employers and employees may agree on certain conditions to a sales commission being earned, permitting an employer to recoup advances if the conditions are not satisfied, those conditions must be clearly expressed, generally in writing, and must relate to the sale and cannot merely serve as a basis to shift the employer's cost of doing business to the employee).

[756] DLSE Enforcement Policies and Interpretations Manual § 10.1.3 (2002).

[757] *Barnhill v. Robert Saunders, Inc.*, 125 Cal. App. 3d 1 (1981) (employers may not seek self-remedies not available to other creditors).

[758] *California State Employees' Ass'n v. State of California*, 198 Cal. App. 3d 374 (1988) (salary deductions to recoup prior overpayments violated attachment and garnishment laws).

[759] DLSE Opinion Letter 2008.11.25, at 4.

[760] Lab. Code § 222.5.

[761] It is a crime for a California employer to willfully refuse to pay wages after demand is made or to falsely dispute the demand in order to coerce an agreement to compromise or delay payment. Lab. Code § 216.

[762] Lab. Code § 204.

[763] Lab. Code § 210.

[764] *On-Line Power, Inc. v. Mazur*, 149 Cal. App. 4th 1079 (2007) (citing Lab. Code § 218.5). See generally *Smith v. Rae-Venter Law Group*, 29 Cal. 4th 345, 350 (2002) (employee denied wages may sue for **both** breach of contract and violation of Labor Code).

[765] Lab. Code § 212.

[766] Lab. Code § 213(d).

[767] *Id.* ("If an employer discharges an employee or the employee quits, the employer may pay the wages earned and unpaid at the time the employee is discharged or quits by making a deposit authorized pursuant to this subdivision, provided that the employer complies with the provisions of this article relating to the payment of wages upon termination or quitting of employment.").

[768] DLSE Opinion Letter 2008.07.07.

[769] Lab. Code § 201.

[770] Lab. Code § 202.

[771] *Smith v. Superior Court (L'Oreal USA)*, 123 Cal. App. 4th 128, 134-35 (2004), *rev'd*, 39 Cal. 4th 77 (2006).

[772] *Smith v. Superior Court (L'Oreal USA)*, 39 Cal. 4th 77 (2006).

[773] Lab. Code § 201.3(b) provides in part:

(1) Except as provided in paragraphs (2) to (5), inclusive, if an employee of a temporary services employer is assigned to work for a client, that employee's wages are due and payable no less frequently than weekly, regardless of when the assignment ends, and wages for work performed during any calendar week shall be due and payable not later than the regular payday of the following calendar week. A temporary services employer shall be deemed to have timely paid wages upon completion of an assignment if wages are paid in compliance with this subdivision.
(2) If an employee of a temporary services employer is assigned to work for a client on a day-to-day basis, that employee's wages are due and payable at the end of each day, regardless of when the assignment ends, if each of the following occurs: (A) The employee reports to or assembles at the office of the temporary services employer or other location. (B) The employee is dispatched to a client's worksite each day and returns to or reports to the office of the temporary services employer or other location upon completion of the assignment. (C) The employee's work is not executive, administrative, or professional, as defined in the wage orders of the Industrial Welfare Commission, and is not clerical.
(3) If an employee of a temporary services employer is assigned to work for a client engaged in a trade dispute, that employee's wages are due and payable at the end of each day, regardless of when the assignment ends.
(4) If an employee of a temporary services employer is assigned to work for a client and is discharged by the temporary services employer or leasing employer, wages are due and payable as provided in Section 201.
(5) If an employee of a temporary services employer is assigned to work for a client and quits his or her employment with the temporary services employer, wages are due and payable as provided in Section 202.

[774] See Lab. Code § 203. See *Mamika v. Barca*, 68 Cal. App. 4th 487, 492-93 (1998) (penalty provided for in section 203 is 30 workdays, not merely 30 calendar days).

[775] *Smith v. Rae-Venter Law Group*, 29 Cal. 4th 345, 354 & nn.2-4 (2002) (citing 8 Cal. Code Regs § 13520: "a good faith dispute that any wages are due will preclude imposition of waiting time penalties under Section 203"). *See also Choate v. Celite Corp.*, 215 Cal. App. 4th 1460, 1468 (2013) (employer not liable when it acted in good faith); *Road Sprinkler Fitters Local Union No. 669 v. G&G Fire Sprinklers, Inc.*, 102 Cal. App. 4th 765 (2002).

[776] *Davis v. Morris*, 37 Cal. App. 2d 269, 274-75 (1940).

[777] *McCoy v. Superior Court (Kimco Staffing Services, Inc.)*, 157 Cal. App. 4th 225 (2007).

[778] *Pineda v. Bank of America, N.A.*, 50 Cal. 4th 1389 (2010).

[779] *Id.* at 1401 (internal citations omitted).

[780] Lab. Code § 227.3.

[781] IWC Wage Orders 4 and 7, § 3(D) (overtime pay requirements do not apply to employees whose earnings exceed one and one-half times the minimum wage if more than one-half of those earnings are commissions).

[782] DLSE Enforcement Policies and Interpretations Manual § 2.5.4 (2002).

[783] *Areso v. CarMax, Inc.*, 195 Cal. App. 4th 996 (2011).

[784] Lab. Code § 204.1.

[785] 195 Cal. App. 4th at 1008.

[786] *Muldrow v. Surrex Solutions Corp.*, 208 Cal. App. 4th 1381, 1392 (2012).

[787] DLSE Opinion Letter 2003.04.30 (noting that sometimes payment of contract price may be required to complete sale and that sometimes post-sale servicing may be part of salesperson's duty to earn commission).

[788] DLSE Opinion Letter 2002.12.09-2, at 2.

[789] *DeLeon v. Verizon Wireless, LLC,* 207 Cal. App. 4th 800, 803 (2012) ("Verizon Wireless may legally advance commission payments to its retail sales representatives before completion of all conditions for payment, and charge back any excess advance over commissions earned against future advances should the conditions not be satisfied.").

[790] DLSE Opinion Letter 2002.06.13, at 2 (permissible to recover from future commissions advances for sales not completed). See also *De Leon v. Verizon Wireless, LLC,* 207 Cal. App. 4th 800 (2012) (upholding employer policy of advancing commissions that were earned only when customer did not discontinue cell phone service during applicable chargeback period of up to one year)*; Steinhebel v. Los Angeles Times,* 126 Cal. App. 4th 696 (2005) (upholding employer policy of advancing commissions to subscription salespeople and charging advance back if subscriber cancels within 28 days).

[791] *Koehl v. Verio*, 142 Cal. App. 4th 1313 (2006) (upholding compensation plan whereby employer could recover unearned commissions if certain conditions were not met, where recovery was authorized in writing by employee and did reduce standard base pay; Labor Code Section 224 creates a broad exception to anti-chargeback rule stated in Labor Code Section 221).

[792] *Hudgins v. Neiman Marcus Group, Inc.*, 34 Cal. App. 4th 1109, 1112 (1995) (commission plan that accounted for returns of merchandise originally sold was not enforceable to extent that plan prorated "unidentified returns" that could not be attributed to individual sales persons).

[793] See DLSE Opinion Letter 1999.01.09, at 2 n.2.

[794] Lab. Code § 2751(a).

[795] Lab. Code § 2751(b).

[796] Lab. Code § 2751(c) ("commissions" for purposes of Labor Code Section 2731 has the meaning set forth in Labor Code Section 204.1).

[797] In *Neisendorf v. Levi Strauss & Co.*, 143 Cal. App. 4th 509 (2006), the California Court of Appeal upheld the denial of a bonus on the ground that the bonus plan expressly restricted payments to those persons employed by the company on the payout date, thus permitting the employer to avoid paying employees dismissed for cause between the end of the period in which the bonus was earned and the payout date, but the court left open the question whether the employer could deny an earned bonus to an employee who was absent by the payout date through no fault of the employee).

[798] *Lucian v. All States Trucking Co.*, 116 Cal. App. 3d 972 (1981).

[799] Lab. Code § 3751(a).

[800] *Ralphs Grocery Co. v. Superior Court*, 110 Cal. App. 4th 694 (2003) (acknowledging that creating incentives for managers to reduce workplace injuries and resulting workers' compensation costs advances goal of workers' compensation system, but reasoning that "plain language" of § 3751 forbade Ralphs Grocery to consider workers' compensation costs in calculating management bonuses).

[801] *Prachasaisoradej v. Ralphs Grocery Co.*, 42 Cal. 4th 217 (2007).

[802] See*, e.g.*, *Quillian v. Lion Oil Co.*, 96 Cal. App. 3d 156 (1970) (manager received bonus calculated as a percentage of store sales minus the dollar value of any cash shortages during the bonus period).

[803] 42 Cal. 4th at 237.

[804] Id. at 228.

[805] *Id.* at 248 (Werdegar, J., dissenting).

[806] *Id.* at 252.

[807] *Ralphs Grocery Co. v. Superior Court*, 110 Cal. App. 4th 694 (2003).

[808] *Prachasaisoradej v. Ralphs Grocery Co.*, 42 Cal. 4th 217, 244 (2007) ("Ralphs' profit-based supplementary ICP, designed to reward employees beyond their normal pay for their collective contribution to store profits, did not violate the wage protection policies of Labor Code Sections 221, 400 through 410, or 3751, or Regulation 11070, insofar as the Plan included store expenses such as workers' compensation costs, cash and merchandise shortages, breakage, and third party tort claims in the profit calculation.").

[809] *Id.* at 248 n.4 (Werdegar, J., dissenting).

[810] *Schachter v. Citigroup, Inc.*, 47 Cal. 4th 610 (2009).

[811] 29 C.F.R. § 778.209(b).

[812] DLSE Enforcement Policies and Interpretations Manual § 49.2.4 (2002) ("Since the bonus was earned during straight time as well as overtime hours, the overtime "premium" on the bonus is half-time or full-time (for double time hours) on the regular bonus rate. The regular bonus rate is found by dividing the bonus by the total hours worked during the period ..., including overtime hours.").

[813] DLSE Enforcement Policies and Interpretations Manual §§ 49.2.4.2 - 49.2.4.3 (2002).

[814] Labor Code Section 227.3 provides: "Unless otherwise provided by a collective bargaining agreement, whenever a contract of employment or employer policy provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages at his final rate in accordance with such contract of employment or employer policy respecting eligibility or time served; provided, however, that an employment contract or employer policy shall not provide for forfeiture of vested vacation time upon termination. The Labor Commissioner or a designated representative, in the resolution of any dispute with regard to vested vacation time, shall apply the principles of equity and fairness."

[815] *Suastez v. Plastic Dress-Up Co.*, 31 Cal. 3d 774 (1982).

[816] Lab. Code § 227.3.

[817] *Henry v. Amrol, Inc.*, 222 Cal. App. 3d Supp. 1 (1990).

[818] *Boothby v. Atlas Mechanical, Inc.*, 6 Cal. App. 4th 1595 (1992).

[819] The withdrawal of the offending opinion—DLSE Opinion Letter 1993.05.17, at 2 ("a worker must have at least nine months after the accrual of the vacation within which to take the vacation before a cap is effective")—is noted at www.dir.ca.gov/dlse/OpinionLetters-Withdrawn.htm (visited on February 20, 2014). See also DLSE Enforcement Policies and Interpretations Manual § 15.1.4.1 (2002) (opining that accrual cap set at one year's allotment is, in effect, a use-it-or-lose-it policy in that many employees will earn no additional vacation in a year if they do not take the vacation during that year).

[820] A 2009 Court of Appeal case expressly recognizes that a California employer can impose a waiting period before any vacation pay begins to accrue. *Owen v. Macy's, Inc.*, 175 Cal. App. 4th 462 (2009).

[821] DLSE Opinion Letter 1998.09.17, at 3 (citing *California State Employees' Ass'n v. State of California*, 198 Cal. App. 3d 374 (1988) (salary deductions to recoup prior overpayments violated attachment and garnishment laws)).

[822] DLSE Opinion Letter 1987.07.13-1, at 1.

[823] 197 Cal. App. 4th 1505 (2011).

[824] *Id.* at 1522 ("we are not persuaded that employers must limit sabbaticals to upper management or professional employees").

[825] The *Paton* court did suggest, however, that an employer can help ensure a leave's sabbatical status by specifying that the leave is for a special employer purpose: the court would "have little trouble concluding" that a leave program is a sabbatical if the leave "is granted for a specified sabbatical project (other than rest and recreation)." *Id.* at 1521.

[826] *Id.*

827 The Court of Appeal explained that the overall critical inquiry was the true purpose of the program, and that it was not necessarily dispositive that employees were expected to return from leave, that the leave exceeded "normal" vacation, that the leave was offered only every five or seven years, that the leave was designed to be competitive with other companies, and that other employees assumed the absent employee's duties during the leave. *Id.* at 1523-24.

828 *Id.* at 1522.

829 See, *e.g., California Hospital Ass'n v. Henning*, 770 F.2d 856, *modified*, 783 F.2d 946 (9th Cir. 1985); *Milan v. Restaurant Enterprises Group, Inc.*, 14 Cal. App. 4th 477 (1993). See also *Bell v. H.F. Cox, Inc.*, 209 Cal. App. 4th 62, 73 (2012) (reversing summary judgment against claim of unlawfully denied termination vacation pay; employer could not win on defense of ERISA preemption on its motion for summary judgment, because plaintiffs raised triable issue of fact that the vacation benefits plan was funded from employer's general assets and not—as ERISA would require—from a separate trust).

830 *Church v. Jamison*, 143 Cal. App. 4th 1568 (2006).

831 *Bell v. H.F. Cox, Inc.*, 209 Cal. App. 4th 62, 75 (2012) ("Neither Labor Code Section 227.3 nor any other authority cited by plaintiffs supports the proposition that, apart from the situation where an employee is terminated with unused vacation time, a vacation benefits policy must provide for payment of vacation time at an employee's regular rate of pay.").

832 See 29 C.F.R. § 531.50(a).

833 Lab. Code § 351 (employer shall not "require an employee to credit the amount, or any part thereof, of a gratuity against and as a part of the wages due the employee from the employer"). See *Henning v. IWC*, 46 Cal. 3d 1262 (1988) ("tip credits" allowed under federal law forbidden under California law). A violation is an unfair business practice, making recovery possible, as a matter of restitution, under California's Unfair Competition Law, B&P Code § 17200. *Application Group, Inc. v. Hunter Group, Inc.*, 61 Cal. App. 4th 881, 907-08 (1998).

834 Lab. Code § 351 ("Every gratuity is hereby declared to be the sole property of the employee or employees to whom it was paid, given, or left for. "). *Cf. Avidor v. Sutter's Place, Inc.,* 212 Cal. App. 4th 1439 (2013) (permitting tip pooling among card dealers, casino hosts, porters, card control employees, and housekeeping employees where dealers allocated 10% of tips to pool and no employee in pool was an "agent" of the employer); *Leighton v. Old Heidelberg, Ltd.*, 219 Cal. App. 3d 1062 (1990) (permitting tip pooling among waiters, buspersons, and bartenders, where all participants gave direct service to customer and the allocation of 15% of waiter's tip to busperson and 5% to bartender accorded with "industry practice").

835 See *Avidor*, 212 Cal. App. 4th at 1451 (citing Lab. Code § 350).

836 Lab. Code § 351.

837 *Lu v. Hawaiian Gardens Casino, Inc.*, 50 Cal. 4th 592 (2010) (Labor Code § 351 does not provide a private right to sue, as violation of a state statute does not necessarily create a private cause of action; instead, right to sue must be conferred by Legislature in either statutory language as shown in legislative history).

838 See, *e.g.*, Lab. Code §§ 1199, 1199.5 (violations of Lab. Code §§ 1171-1205); Lab. Code § 1197.2 (misdemeanor for employer that willfully fails to pay and has the ability to pay a final court judgment or Labor Commissioner order for all wages due to an employee who, within 90 days of the date that the judgment was entered or the order became final, has quit or been discharged).

839 See, *e.g.,* Lab. Code § 1199(c); Lab. Code § 1175 (violation of Labor Code § 1174).

840 A Labor Code section incorporates the provisions of the Wage Orders: "The maximum hours of work and the standard conditions of labor fixed by the commission shall be the maximum hours of work and the standard conditions of labor for employees. The employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the order is unlawful." Lab. Code § 1198.

841 Lab. Code § 1197.1(a)(1)-(2) (amended effective Jan. 1, 2014).

[842] Lab. Code § 2699(e)-(f).

[843] This provision was amended by SB 530, effective January 1, 2014.

[844] This provision was amended by AB 442, effective January 1, 2014. This bill expanded existing law by making the employer also subject to liquidated damages.

[845] Labor Code Section 1197.1 was amended by AB 442, effective January 1, 2014. This bill expanded existing law to permit the DLSE to recover by making the employer also subject to liquidated damages (in addition to civil penalties and restitution), when the DLSE determines, through its investigation and citation process, that the employer has paid less than the minimum wage.

[846] This provision was amended by SB 390, effective January 1, 2014.

[847] This provision was amended by AB 1744, effective January 1, 2013.

[848] This provision was amended by AB 1744, effective January 1, 2013.

[849] This provision was amended by AB 2674, effective January 1, 2013.

[850] This provision was amended by AB 1855, effective January 1, 2013, to add warehouse contractors to existing prohibitions.

[851] This provision was amended by AB 1744, effective January 1, 2013.

[852] This provision was amended by SB 435, effective January 1, 2014.

[853] This provision was amended by SB 400 effective January 1, 2014.

[854] This provision was amended by SB 400, effective January 1, 2014.

[855] This provision was amended by AB 11, effective January 1, 2014.

[856] This provision was amended by AB 263, effective January 1, 2014.

[857] This provision was amended by AB 263, effective January 1, 2014.

[858] *Reynolds v. Bement*, 36 Cal. 4th 1075 (2005), abrogated by *Martinez v. Combs*, 49 Cal. 4th 35, 50 n.12 (2010), to the extent *Reynolds* limited definition of "employer" to the common law definition.

[859] *Id.* at 1087-88, 1090. See also *Bradstreet v. Wong*, 161 Cal. App. 4th 1440 (2008) (where now bankrupt corporations failed to pay earned wages, the corporate shareholders, officers, and managing agents are not personally liable for unpaid wages absent any indication that they were corporate alter egos; absent finding that employees performed labor for individuals rather than for the benefit of corporate employers, or that corporate agents appropriated corporate funds that otherwise would have paid wages, an order requiring those individuals to pay wages would not be "restitutionary," as it would not replace any money or property that individuals took directly from employees). *Bradstreet* was abrogated by *Martinez v. Combs*, 49 Cal. 4th 35, 50 n.12 (2010), to the extent *Bradstreet* followed *Reynolds v. Bement* as to the definition of "employer."

[860] A later Court of Appeal case, *Jones v. Gregory*, 137 Cal. App. 4th 798 (2006), strongly questioned the proposition that the Labor Commissioner has any more authority than a private litigant does to pursue a claim for unpaid wages against individuals in addition to the traditional employer. *Id.* at 805-08. This decision was abrogated by the California Supreme Court in *Martinez v. Combs*, 39 Cal. 4th 35, 50 n.12 (2010).

[861] *Id.* at 1088-89.

[862] *Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191, 1206 (2011). The nonexempt employees at issue in *Sullivan* were Colorado and Arizona residents who, as Instructors, trained customers in California to use Oracle software.

Oracle arose in an usual procedural posture. The Ninth Circuit, hearing an appeal from a federal district court, certified three questions of California law for the California Supreme Court to decide: "First, does the California Labor Code apply to overtime work performed in California for a California-based employer by out-of-state plaintiffs in the circumstances of this case, such that overtime pay is required for work in excess of eight hours per day or in excess of forty hours per week? Second, does [Cal. Bus. & Prof.

Code] § 17200 apply to the overtime work described in question one? Third, does § 17200 apply to overtime work performed outside California for a California-based employer by out-of-state plaintiffs in the circumstances of this case if the employer failed to comply with the overtime provisions of the FLSA?" *Sullivan v. Oracle Corp.,* 557 F.3d 979, 983 (2009).

863 Bus. & Prof. Code § 17200 et seq.

864 *Id*. at 1206.

865 *Id*. at 1207-08.

866 *Id*.

867 *Martinez v. Combs*, 49 Cal. 4th 35 (2010).

868 *Patterson v. Domino's Pizza, LLC*, 207 Cal. App. 4th 385 (2012) (reversing a summary judgment that the trial court had granted for Domino's, the franchisor), *rev. granted*, No. S204543 (Cal. Oct 10, 2012).

869 No. S204543, 148 Cal. Rptr. 3d 297 (2012) (granting review on "whether the defendant franchisor is entitled to summary judgment on plaintiff's claim that it is vicariously liable for tortious conduct by a supervising employee of a franchisee").

870 Family Code § 297. An under-age person who otherwise meets the requirements for a domestic partnership may also register upon obtaining a court order and parental consent. Family Code § 297.1.

871 *Koebke v. Bernardo Heights Country Club*, 36 Cal. 4th 824 (2005).

872 Family Code § 297.5(a) ("Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.").

873 Ins. Code § 10121.7(f).

874 Health & Safety Code §§ 1374.58, 1367.30; Ins. Code §§ 10112.5 & 10121.7. The new provisions appear within the Knox-Keene law, which makes violations a crime.

875 133 S. Ct. 2675 (2013).

876 Health & Safety Code § 1374.73-1374.74; Ins. Code §§ 10144.51-10144.52.

877 Ins. Code §§ 10123.865 & 10123.866.

878 Gov't Code § 12945(a)(2).

879 29 U.S.C. § 1162.

880 Health & Safety Code § 1366.20 *et seq.*; Ins. Code § 10128.50 *et seq.* (California Continuation Benefits Replacement Act, or "Cal-COBRA").

881 Ins. Code § 10128.59.

882 Lab. Code § 2807. See http://www.dhcs.ca.gov/provgovpart/Documents/DHCS%209061%20(Notice%20to%20Terminating%20Employees)%202-11.pdf (visited on February 21, 2014).

883 Health & Safety Code § 1373.6.

884 SAN FRANCISCO CA ADMIN. CODE ch. 14, §§ 14.1-14.8.

885 *Golden State Restaurant Ass'n v. City & County of San Francisco*, 546 F.3d 639, 648-61 (9th Cir. 2008), *cert. denied*, 130 S. Ct. 3487 (2009).

886 Lab. Code § 2806.

887 Lab. Code § 2808.

888 Lab. Code § 2809.

889 2 Cal. Code Regs §§ 7291.16; 7297.9.

890 8 Cal. Code Regs § 9881.

[891] Lab. Code § 3550.
[892] Civ. Code § 52.6.
[893] Lab. Code § 1102.8.
[894] Lab. Code § 6404.5(c)(1).
[895] Gov't Code § 12950.
[896] Lab. Code § 3551.
[897] Lab. Code § 3551.
[898] Lab. Code § 3553.
[899] Lab. Code § 2809.
[900] Unempl. Ins. Code § 1089.
[901] Lab. Code § 2807.
[902] Lab. Code § 1198.5(a), (b).
[903] Lab. Code § 1198.5(b)(2).
[904] Lab. Code § 1198.5(c).
[905] Lab. Code § 1198.5(c)(1).
[906] Lab. Code § 1198.5(c)(3). This last provision enables employers to keep away from the premises those former employees who are deemed threatening or who otherwise pose a liability risk.
[907] Lab. Code § 1198.5(d), (p).
[908] Lab. Code § 1198.5(n), (q)(1)-(4).
[909] Lab. Code § 1198.5(d).
[910] Lab. Code § 1198.5(g).
[911] Lab. Code § 1198.5(k)-(m).
[912] Lab. Code § 432.
[913] Lab. Code § 2930.
[914] Lab. Code § 226(c).
[915] Lab. Code § 226(f),(g).
[916] Lab. Code § 226(a). Labor Code Section 226.6 imposes criminal liability on "any employer ... or any officer, agent, employee, fiduciary, or other person" who violates this requirement.
[917] Lab. Code § 1174. Section 1175 imposes criminal liability on "[a]ny person, or officer or agent thereof" who violates this requirement.
[918] Lab. Code § 226(a) (effective Jan. 1, 2012).
[919] 2 Cal. Code Regs § 7287.0(b),(c) (FEHC regulations on recordkeeping and applicant data).
[920] Lab. Code § 1198.5(c)(1) (three years); 2 Cal. Code Regs §§ 7287.0(c); 22 Cal. Code Regs § 70725 (two years).
[921] 22 Cal. Code Regs §§ 70723(c), 70725.
[922] Bus. & Prof. Code § 16600.
[923] *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937 (2008) (invalidating provision in employer's proposed separation agreement that would have prohibited former employee from performing services for certain clients, because that restraint—even though narrow and leaving a substantial portion of the market open to the former employee—exceeded statutory protections for trade secrets, and rejecting "narrow restraint" exception articulated by Ninth Circuit as a misreading of California law).
[924] Bus. & Prof. Code §§ 16601 (corporations), 16602 (partnerships), 16602.5 (limited liability corporations).

[925] *Kolani v. Gluska*, 64 Cal. App. 4th 402 (1998) (broad covenant not to compete cannot be saved from illegality by giving it a narrowed construction).

[926] *Dowell v. Biosense Webster, Inc.*, 179 Cal. App. 4th 564 (2009).

[927] *The Retirement Group v. Galante*, 176 Cal. App. 4th 1226, 1238 (2009) (relying on Bus. & Prof. Code § 16600).

[928] *Id.*

[929] *Application Group Inc. v. Hunter Group Inc.*, 61 Cal. App. 4th 881, 885 (1998) (permitting employee signing covenant in Maryland to challenge the covenant upon moving to California while working for same employer, because California's strong policy in protecting movement of employees invalidates noncompete covenant even though it was valid under Maryland law).

[930] See *Advanced Bionics Corp. v. Medtronic, Inc.*, 29 Cal. 4th 697 (2002) (former employee moved to California to work for California employer and sued in California court one day before former employer sued in Minnesota).

[931] *Application Group, Inc. v. Hunter Group, Inc.*, 61 Cal. App. 4th 881 (1998) (California and Maryland litigators disputing whether covenant not to compete was valid).

[932] See, *e.g., Harstein v. Rembrandt IP Solutions*, 2012 WL 3075084 (N.D. Cal. 2012) (granting defendant's motion to dismiss for improper venue, even if the Pennsylvania forum called for in the employment agreement could cause a different legal outcome in the plaintiff's action for declaratory relief to invalidate a covenant to compete); *AJZN, Inc. v. Yu*, 2013 WL 97916 (N.D. Cal. 2013).

[933] *Meras Engineering, Inc., v. CH20, Inc.*, 2013 WL 146341 (N.D. Cal. 2013) (locating the forum in the state of Washington would not dictate that Washington's substantive law would apply).

[934] *Atlantic Marine Construction Co. v. U.S. District Court for Western District of Texas*, 134 S. Ct. 568 (2013).

[935] *Id*. at 583.

[936] Bus. & Prof. Code § 16601 ("sale of a business" exception).

[937] *Fillpoint, LLC v. Maas*, 208 Cal. App. 4th 1170 (2012).

[938] *Wanke, Industrial, Commercial, Residential, Inc. v. Superior Court (Keck)*, 209 Cal. App. 4th 1151 (2012).

[939] *VL Sys., Inc. v. Unisen, Inc.*, 152 Cal. App. 4th 708, 714 (2007).

[940] *Id.* at 716.

[941] *Id.* at 718.

[942] *Walia v. Aetna, Inc.,* 93 Cal. App. 4th 1213 (2001) (upholding $1.26 million award for salesperson dismissed for refusing to sign agreement with non-compete provision; "California public policy condemns non-compete agreements. Walia was presented with one, she refused to sign it and, as a consequence of this refusal, she was fired. A *Tameny* claim [for tortious dismissal in breach of public policy] occurs when an employer discharges an employee for refusing to do something that public policy condemns."); see *also Thompson v. Impaxx, Inc.*, 113 Cal. App. 4th 1425 (2003); *D'Sa v. Playhut, Inc.*, 85 Cal. App. 4th 927 (2000) (non-solicitation clauses are allowable only when they protect trade secrets or confidential proprietary information).

[943] *Silguero v. Creteguard, Inc.*, 187 Cal. App. 4th 60, 70 (2010).

[944] See *id.*

[945] See www.justice.gov/atr/public/press_releases/2010/262648.htm (visited on February 20, 2014); www.googleopoly.net/Proposed_Final_Judgment.pdf (visited on February 20, 2014).

[946] Tech Giants Face Antitrust Action Over Workers' Pay, *Law360* (May 04, 2011)

[947] *Bancroft-Whitney v. Glen*, 64 Cal. 2d 327 (1966) (managers may not take steps to set up competing business); *GAB Business Services v. Lindsey & Newsom Claim Services*, 83 Cal. App. 4th 409 (2000)

(company officer liable for breach of fiduciary duty for using inside knowledge of employee skills and salaries to recruit employees for employer's competitor).

948 *Loral v. Moyes*, 174 Cal. App. 3d 268, 275 (1985) (employer could not keep departing employee from competing, but could limit how he can compete).

949 *Thomas Weisel Partners LLC v. BNP Paribas*, 2010 WL 546497, at *8 (N.D. Cal. 2010).

950 *Readylink Healthcare v. Cotton*, 126 Cal. App. 4th 1006, 1022 (2005) ("Misappropriation of trade secrets information constitutes an exception to section 16600.").

951 Civ. Code § 3426 *et seq*.

952 *Reeves v. Hanlon,* 33 Cal. 4th 114 (2004).

953 *Morlife, Inc. v. Perry*, 56 Cal. App. 4th 1514 (1997).

954 *Schlage Lock Co. v. Whyte*, 101 Cal. App. 4th 1443 (2002).

955 Civ. Code § 3426.2(a); *Central Valley General Hospital v. Smith*, 162 Cal. App. 4th 501 (2008).

956 *Courtesy Temp. Serv., Inc. v. Camacho*, 222 Cal. App. 3d 1278, 1292 (1990) ("cases are legion holding that a former employee's use of confidential information obtained from his former employer to compete with him and to solicit the business of his former employer's customers is regarded as unfair competition"); *Bancroft-Whitney Co. v. Glen*, 64 Cal. 2d 327, 351 (1966) (unfair competition and breach of fiduciary duty claims involving disclosure of employee's salary to competitor are actionable "even if the information regarding salaries is not deemed to be confidential").

957 *Silvaco Data Systems v. Intel Corp.*, 184 Cal. App. 4th 210 (2010) (citing Civ. Code § 3426.7(b)); *K.C. Multimedia, Inc. v. Bank of America Tech. & Ops., Inc.*, 171 Cal. App. 4th 939 (2009).

958 *Amron Int'l Diving Supply, Inc. v. Hydrolinx Diving Communication, Inc.*, 2011 WL 5025178 (S.D. Cal. October 21, 2011). See also *Think Village-Kiwi, LLC v. Adobe Systems, Inc.*, 2009 WL 902337, at *2 (N.D. Cal. Apr. 1, 2009) (claims for misappropriation and breach of confidence not superseded to the extent that plaintiff is pleading in the alternative that the stolen information might be proprietary but not a trade secret); *Ali v. Fasteners for Retail, Inc.*, 544 F. Supp. 2d 1064, 1072 (E.D. Cal. 2008).

959 *Amron Int'l Diving Supply, Inc. v. Hydrolinx Diving Communication, Inc.*, 2011 WL 5025178 (S.D. Cal. October 21, 2011) (existence of trade secret is question of fact not subject to motion to dismiss). See also *Leatt Corp. v. Innovative Safety Technology, LLC*, 2010 WL 2803947, at *6 (S.D. Cal. July 15, 2010) ("Plaintiffs' unfair competition and tortious interference claims are not preempted by the UTSA to the extent they depend on the misappropriation of otherwise confidential or proprietary, but not trade secret, information as well as upon knowledge of Plaintiffs' prospective business relationships.").

960 *SunPower Corp. v. Solarcity Corp.*, 2012 WL 6160472 (N.D. Cal. 2012).

961 *Angelica Textile Services, Inc. v. Park*, 220 Cal. App. 4th 495, 507-09 (2013).

962 18 U.S.C. § 1030 et seq.

963 642 F.3d 781, 785, 787-89 (9th Cir. 2011). The defendant was a former employee of an executive search company who left to start a competitor and then convinced former co-workers—still with the company—to log onto the company's confidential database to send him client information. These co-workers had authorized access to the company database, but in forwarding the information were violating a company policy against disclosing confidential information.

964 *United States v. Nosal*, 676 F.3d 854 (2012) (*en banc*).

965 The court stated: "We remain unpersuaded by the decisions of our sister circuits [the Fifth, Seventh, and Eleventh] that interpret the CFAA broadly to cover violations of corporate computer use restrictions or violations of a duty of loyalty."

966 Lab. Code § 1400(d).

967 *MacIsaac v. Waste Management Collection & Recycling, Inc.,* 134 Cal. App. 4th 1076 (2005).

968 29 U.S.C. §§ 2101-2109.

[969] Lab. Code § 1401.

[970] Lab. Code § 2807; *see also* Lab. Code § 2800.2 (employer solely responsible for giving notice of conversion coverage).

[971] Unempl. Ins. Code § 1089; 22 Cal. Code Regs § 1089-1.

[972] Lab. Code § 227.3.

[973] Civ. Code § 1542: "A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him must have materially affected his or her settlement with the debtor."

[974] Lab. Code § 2804 (any express or implied agreement to waive benefits of Section 2802—requiring employer indemnification of expenditures or losses employee incurs in direct consequence of job duties—is "null and void").

[975] *Edwards v. Arthur Andersen LLP*, 142 Cal. App. 4th 603 (2006) (employer's insistence on invalid release was wrongful act supporting former employee's action for intentional interference with prospective economic advantage, consisting here of employee's desire to join a new employer who required employee to obtain a release from the former employee), *rev. granted*, No. S147190 (Cal. Nov. 29, 2006).

[976] *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937 (2008).

[977] Lab. Code § 206.5.

[978] *Chindarah v. Pick Up Stix, Inc.*, 171 Cal. App. 4th 706 (2009). See also *Aleman v. AirTouch Cellular,* 209 Cal. App. 4th 556, 577-78 (2012) (release of claim for wages was enforceable, notwithstanding section 206.5, because a bona fide dispute existed as to whether the wages were owed, and because the plaintiff received extra payment for releasing the disputed claim).

[979] The USERRA prohibits employers from discriminating against employees because of their military service. 38 U.S.C. § 4301(a). Section 4311(a) of the USERRA also forbids employers to deny re-employment or retention in employment based on employees' military service.

[980] *Breletic v. CACI, Inc.*, 413 F. Supp. 2d 1329 (N.D. Ga. 2006).

[981] *Perez v. Uline, Inc.*, 157 Cal. App. 4th 953 (2007).

[982] *Id.* at 957-58 (quoting 38 U.S.C. § 4302(b)).

[983] *California Grocers Ass'n v. City of Los Angeles*, 176 Cal. App. 4th 51 (2009).

[984] *California Grocers Ass'n v. City of Los Angeles*, 52 Cal. 4th 177 (2011).

[985] *California Grocers Ass'n v. City of Los Angeles*, 2012 WL 171152 (U.S. January 23, 2012) (denying petition for writ of certiorari).

[986] Lab. Code § 6401.7.

[987] 8 Cal. Code Regs § 3203(b).

[988] Lab. Code § 6403.5. The employer also must provide trained lift teams or staff trained in safe lifting techniques in each general acute care hospital (except for specified hospitals) as well as specified training to health care workers. *Id.*

[989] Pen. Code § 387(a).

[990] Health & Safety Code § 1278.5.

[991] Lab. Code § 6404.5(d)(13).

[992] Gov't Code § 8350.

[993] .8 Cal. Code Regs § 5110.

[994] Veh. Code § 23123(a): "A person shall not drive a motor vehicle while using a wireless telephone unless that telephone is specifically designed and configured to allow hands-free listening and talking and is used in that manner while driving."

[995] Veh. Code § 23123.5(a): "A person shall not drive a motor vehicle while using an electronic wireless communications device to write, send, or read a text-based communication, unless the electronic wireless communications device is specifically designed and configured to allow voice-operated and hands-free operation to dictate, send, or listen to a text-based communication, and it is used in that manner while driving."

[996] Unempl. Ins. Code § 1253.9.

[997] Unempl. Ins. Code § 1256.

[998] *Amador v. Unemployment Ins. Appeals Bd.*, 35 Cal. 3d 671 (1984).

[999] Unempl. Ins. Code § 1256.2. As of 2005, this section was amended to read:

1256.2. (a) Except as otherwise provided in subdivision (b), an individual who terminates his or her employment shall not be deemed to have left his or her most recent work without good cause if his or her employer deprived the individual of equal employment opportunities on any basis listed in subdivision (a) of Section 12940 of the Government Code, as those bases are defined in Sections 12926 and 12926.1 of the Government Code.

(b) Subdivision (a) does not apply to the following: (1) A deprivation of equal employment opportunities that is based upon a bona fide occupational qualification or applicable security regulations established by the United States or this state, specifically, as provided in Section 12940 of the Government Code. (2) An individual who fails to make reasonable efforts to provide the employer with an opportunity to remove any unintentional deprivation of the individual's equal employment opportunities.

[1000] Unempl. Ins. Code § 1256.7.

[1001] Unempl. Ins. Code § 130(a)(4). See generally Unempl. Ins. Code § 1256 (good cause to quit is real, substantial, compelling factor causing reasonable person genuinely desirous of retaining employment to leave work under same circumstances).

[1002] Unempl. Ins. Code § 1256.

[1003] Unemp. Ins. Code § 1960.

[1004] *See* http://www.edd.ca.gov/payroll_taxes/new_hire_reporting.htm (visited on February 20, 2014).

[1005] Lab. Code § 2810.5.

[1006] *Id.*

[1007] *Id.*

[1008] Lab. Code § 2810.5(a)(3).

[1009] *Id.*

[1010] Unemp. Ins. Code § 1088.8.

[1011] Lab. Code § 226(a).

[1012] Lab. Code § 226(a). A "farm labor contractor" is defined as "any person who, for a fee, employs workers to render personal services in connection with the production of any farm products to, for, or under the direction of a third person, or who recruits, solicits, supplies, or hires workers on behalf of an employer engaged in the growing or producing of farm products, and who, for a fee, provides in connection therewith one or more of the following services: furnishes board, lodging, or transportation for those workers; supervises, times, checks, counts, weighs, or otherwise directs or measures their work; or disburses wage payments to these persons." See *id.*; see also Lab. Code § 1682(b).

[1013] Lab. Code § 226(a)(9).

[1014] *Cicairos v. Summit Logistics, Inc.*, 133 Cal. App. 4th 949, 955 (2005) (quoting with apparent approval DLSE Opinion Letter 2002.05.17, at 3, 6) (emphasis in original).

[1015] *Morgan v. United Retail Inc.*, 186 Cal. App. 4th 1136, 1147, 1149 (2010) (reasoning that the wage statements accurately listed the total number of regular hours and the total number of overtime hours

worked during the pay period, permitting the employee to determine the sum of all hours worked without referring to time records or other documents).

[1016] Lab. Code § 226(e).

[1017] Lab. Code § 226(e); *see also Price v. Starbucks Corp.,* 192 Cal. App. 4th 1136 (2011).

[1018] *Price v. Starbucks Corp*., 192 Cal. App. 4th 1136, 1143 (2011) (upholding dismissal of wage-statement claim where employee challenging inadequate wage statement merely speculated on the "possible underpayment of wages due," which was not evident from the wage statements attached to the complaint).

[1019] *Id.* at 1143.

[1020] *Id.* (distinguishing cases where injury arose from inadequate wage statements that required employees to engage in discovery and mathematical computations to reconstruct time records to see if they were correctly paid); *cf. Wang v. Chinese Daily News, Inc.*, 453 F. Supp. 2d 1042, 1050 (C.D. Cal. 2006), *aff'd on other grounds*, 623 F.3d 743 (9th Cir. 2010) (wage statements inaccurately listed hours worked and omitted hourly wage); *Cicairos v. Summit Logistics, Inc.*, 133 Cal. App. 4th 949, 956 (2005) (inaccurate hours on wage statements).

[1021] Lab. Code § 226(e)(2)(A), (B).

[1022] Lab. Code § 226(e)(3). In reviewing compliance with these provisions, the factfinder can consider whether the employer, before an alleged violation, adopted and complied with a set of policies, procedures, and practices that fully comply with section 226.

[1023] Lab. Code § 226.3.

[1024] *Heritage Residential Care, Inc. v. Division of Labor Standards Enforcement*, 192 Cal. App. 4th 75 (2011) ("inadvertent" is not defined in the statute, it should receive its "plain and commonsense meaning"—unintentional, accidental, or not deliberate).

[1025] Lab. Code § 226(a)(7).

[1026] DLSE Opinion Letter 2006.07.06.

[1027] Lab. Code § 226(a) ("a copy of the [wage] statement and the record of the deductions shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California").

[1028] Lab. Code § 226(a).

[1029] Corp. Code §§ 1502 and 2117.

[1030] Lab. Code § 431.

[1031] Sample language might be:

NOTICE TO EMPLOYEES (Required By California Earned Income Tax Credit Information Act. Your eligibility for EITC depends on your personal circumstances. This notice is not tax advice.)

Based on your annual earnings, you may be eligible to receive the Earned Income Tax Credit from the federal government. EITC is a refundable, federal income tax credit for low-income working individuals and families. EITC has no effect on certain welfare benefits. In most cases, EITC payments will not be used to determine eligibility for Medicaid, supplemental security income, food stamps, low-income housing, or most temporary assistance to needy families payments. Even if you do not owe federal taxes, you must file a tax return to receive EITC. Be sure to complete the EITC form in the federal income tax return booklet. For information regarding your eligibility to receive EITC, including information on how to obtain the Internal Revenue Service Notice 797 or Form W-5, or any other necessary forms and instructions, contact the Internal Revenue Service by calling (800) 829-3676 or through its web site at www.irs.gov (visited on February 20, 2014).

[1032] Lab. Code § 3700 (employer may secure coverage by buying insurance coverage or securing state certificate of consent to self-insure).

[1033] Lab. Code §§ 3751. See also § 7.7.1.

[1034] See generally § 3.4 (interactive process required for worker with job-related injury), § 6.3 (broad definition of "disability").

[1035] Lab. Code §§ 3200-6002.

[1036] Lab. Code § 3208.3(d) (employee must have been employed for at least six months to obtain compensation for psychiatric injury); Lab. Code § 3208.3(h) (no compensation for psychiatric injury payable if injury "substantially caused by a lawful, nondiscriminatory, good faith personnel action), with employer to bear the burden of proof). *See San Francisco Unified School Dist. v. WCAB,* 190 Cal. App. 4th 1 (2010) ("substantially caused" means that the personnel action was responsible for "at least 35 to 40 percent of the causation from all sources combined," and both industrial and nonindustrial causes make up the total causation); *Northrop Grumman Corp. v. WCAB*, 103 Cal. App. 4th 1021 (2002) (reversing award to worker psychiatrically injured by investigation that was lawful, nondiscriminatory, good faith personnel action under Lab. Code § 3208.3(h)).

[1037] Lab. Code § 3602(d).

[1038] Lab. Code § 3357.

[1039] *Judson Steel Corp. v. WCAB*, 22 Cal. 3d 658, 667 (1978).

[1040] *Dutra v. Mercy Medical Center, Mount Shasta*, 209 Cal. App. 4th 750, 754 (2012) (distinguishing *City of Moorpark v. Superior Court*, 18 Cal. 4th 1143, 1158 (1998), which held that Section 132a does not provide an exclusive remedy for employee suing under the FEHA for disability discrimination under the common for wrongful termination; "section 132a does not qualify under case authority as the type of policy that can support a common law action for wrongful termination").

[1041] *Navarro v. A&A Farming & Western Grower Ins. Co.*, 67 Cal. Comp. Cas. 145 (2002).

[1042] *State Department of Rehabilitation v. WCAB and Lauher*, 30 Cal. 4th 1281 (2003) (not unlawful to require injured employees to use sick and vacation leave when away from the workplace seeking medical treatment for workplace injuries, where other, non-injured employees likewise must use leave time to seek medical care).

[1043] Lab. Code § 1164 *et seq*.

[1044] Code Civ. Proc. § 527.3(b).

[1045] Lab. Code § 1138.1.

[1046] *Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8*, 186 Cal. App. 4th 1078 (2010), *rev. granted*, No. S185544 (Cal. Sept. 29, 2010).

[1047] *Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8*, 192 Cal. App. 4th 200 (2011), *rev. granted,* No. S191251 (Cal. April 13, 2011).

[1048] *Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8*, 55 Cal. 4th 1083 (2012).

[1049] *Best Friends Animal Society v. Macerich Westside Pavillion Property LLC*, 193 Cal. App. 4th 168 (2011).

[1050] Lab. Code § 973.

[1051] Gov't Code §§ 16645-16649.

[1052] *Chamber of Commerce of the United States v. Lockyer*, 463 F.3d 1076 (9th Cir. 2006) (*en banc*), *rev'd*, 128 S. Ct. 2408 (2008).

[1053] *Chamber of Commerce of United States v. Brown*, 128 S. Ct. 2408 (2008). But see *California Grocers Ass'n v. City of Los Angeles*, 52 Cal. 4th 177 (2011) (upholding ordinance requiring grocery stores to retain their former staff for 90 days after a change in ownership; ordinance was not preempted by the California Retail Food Code or the NLRA).

[1054] *Fashion Valley Mall v. NLRB (Graphics Communications Int'l Union, Local 432-M)*, 42 Cal. 4th 850 (2007).

[1055] *Id.* at 869.

[1056] *Id.* (Chin, J., dissenting).

[1057] *Van v. Target Corp.*, 155 Cal. App. 4th 1375, 1391 (2007) (given that stores, store apron, and perimeter areas are not designed as public meeting places, any societal interest in using stores for exercising expressive activities did not outweigh stores' interests in maintaining control over use of their property); *Albertson's, Inc. v. Young*, 107 Cal. App. 4th 106 (2003); *Costco Companies v. Gallant*, 96 Cal. App. 4th 740, 745 (2002); *Trader Joe's Co. v. Progressive Campaigns, Inc.*, 73 Cal. App. 4th 425, 434 (1999).

[1058] See, *e.g., Bain v. Tax Reducers, Inc.*, 219 Cal. App. 4th 110 (2013) (employee misclassified as independent contractor entitled to minimum wages, reimbursement business expenses, and waiting-time penalties for failure to pay timely termination wages), *rev. denied and ordered not to be officially published*, No. S213850 (Cal. Dec 11, 2013).

[1059] *Ayala v. Antelope Valley Press*, 210 Cal. App. 4th 77 (2012), *rev. granted*, No. S206874 (Cal. Jan. 30, 2013). *Ayala* conflicts with a better-reasoned decision, *Sotelo v. Medianewsgroup,* 207 Cal. App. 4th 639 (2012), which affirmed a trial court's denial of class certification to another group of newspaper carriers, given variations regarding factors considered in deciding whether an individual is an employee or an independent contractor: "Even though the court found variability among the class in only a few of the factors, the court observed that the multifactor test 'requires that the factors be examined together.' Thus, even if other factors were able to be determined on a classwide basis, those factors would still need to be weighed individually, along with the factors for which individual testimony would be required. We find no failure to use proper criteria or improper legal assumptions in this determination." *Id.* at 660.

[1060] No. S206874 (Cal. Jan. 30, 2013) ("This case presents questions concerning the determination of whether common issues predominate in a proposed class action relating to claims that turn on whether members of the putative class are independent contractors or employees.")

[1061] Lab. Code § 3357 ("Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee.") *See also* Lab. Code § 5705(a) (employer has burden to prove "affirmative defense" that "injured person claiming to be an employee was an independent contractor"); *S.G. Borello & Sons, Inc. v. DIR*, 48 Cal. 3d 341, 349 (1989) ("One seeking to avoid [workers' compensation] liability has the burden of proving that persons whose services he has retained are independent contractors rather than employees."); *Antelope Valley Press v. WCAB*, 162 Cal. 4th 839 (2008) (for purposes of worker's compensation insurance, persons who delivered newspapers to daily subscribers were employees of the publisher, not independent contractors, where publisher maintained significant supervision over the carriers, controlled the price paid by subscribers, based payment for carriers on the number of papers delivered per day, supplied materials and facilities the carriers used, did not hire the carriers to achieve a specific result attainable within a finite period, and was better suited than the carriers were to distribute the cost of on-the-job injuries as a business expense).

[1062] See, *e.g., Grant v. Woods,* 71 Cal. App. 3d 647, 652 (1977) (focusing on whether individual was employee "for purposes of the Unemployment Insurance Act" and demanding "[c]lear evidence … to defeat the beneficent purposes of the legislature established in the [Unemployment Insurance] code").

[1063] See *Santa Cruz Transp., Inc. v. UIAB*, 235 Cal. App. 3d 1363, 1367 (1991).

[1064] Lab. Code § 2750.5 provides in part: "There is a rebuttable presumption affecting the burden of proof that a worker performing services for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, or who is performing such services for a person who is required to obtain such a license is an employee rather than an independent contractor."

[1065] www.dir.ca.gov/dlse/faq_independentcontractor.htm (visited on February 20, 2014) ("In handling a matter where employment status is an issue, that is, employee or independent contractor, DLSE starts with the presumption that the worker is an employee."). For this global proposition the DLSE cites only Labor Code Section 3357, which applies in workers' compensation cases. The Court of Appeal in *Lujan v. Minagar*, 124 Cal. App. 4th 1040 (2004), however, stated more broadly, in a retaliatory dismissal suit alleging a violation of Labor Code Section 6310, that "[t]here is a rebuttable presumption that one who furnishes services for an employer is an employee." *Id.* at 1048.

[1066] In *Narayan v. EGL, Inc.*, 616 F.3d 895 (9th Cir. 2010), where delivery drivers classified as independent contractors sued for Labor Code benefits, the Ninth Circuit reversed a summary judgment that the trial court had granted to the defendant. The Ninth Circuit stated that California law rather than Texas law applied, and that, under California law, "once a plaintiff comes forward with evidence that he provided services for an employer, the employee has established a prima facie case that the relationship was one of employer/employee." Reprising that theme in 2012, the Ninth Circuit, in *Ruiz v. Affinity Logistics Corp.*, 667 F.3d 1318 (9th Cir. 2012), vacated a judgment for a Georgia-based delivery company whose California drivers, subject to written "independent contractor" agreements, were suing for unpaid wages. The trial court had applied Georgia law, which creates a rebuttable presumption that the contracting parties' designation of an independent-contractor relationship is true. The Ninth Circuit held that California law should apply instead, because even though Georgia had a substantial relationship to the parties, California "fundamental policy" was at stake and California had a materially greater interest than Georgia in resolving an employment dispute arising in California. And under California law, the Ninth Circuit stated, "the presumption is that the drivers are employees and the burden in on Affinity to demonstrate that the drivers are independent contractors."

[1067] The Restatement Second of Agency, section 220, identifies these factors: (a) the extent of control that, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business.

[1068] The California Civil Jury Instructions, CACI 3704, provides as follows. The **boldfaced** language suggests that employee status may be found even where the principal's right to control is absent:

> In deciding whether [name of agent] was [name of defendant]'s employee, you must first decide whether [name of defendant] had the right to control how [name of agent] performed the work, rather than just the right to specify the result. It does not matter whether [name of defendant] exercised the right to control. If you decide that the right to control existed, then [name of agent] was [name of defendant]'s employee.
>
> **If you decide that [name of defendant] did not have the right of control, then you must consider all the circumstances in deciding whether [name of agent] was [name of defendant]'s employee. The following factors, if true, may show that [name of agent] was the employee of [name of defendant]:** (a) [Name of defendant] supplied the equipment, tools, and place of work; (b) [Name of agent] was paid by the hour rather than by the job; (c) The work being done by [name of agent] was part of the regular business of [name of defendant]; (d) [Name of defendant] had an unlimited right to end the relationship with [name of agent]; (e) The work being done by [name of agent] was the only occupation or business of [name of agent]; (f) The kind of work performed by [name of agent] is usually done under the direction of a supervisor rather than by a specialist working without supervision; (g) The kind of work performed by [name of agent] does not require specialized or professional skill; (h) The services performed by [name of agent] were to be performed over a long period of time; and (i) [Name of defendant] and [name of agent] acted as if they had an employer-employee relationship.

[1069] *Yellow Cab Cooperative v. WCAB*, 226 Cal. App. 3d 1288 (1991).

[1070] *Arzate v. Bridge Terminal Transport, Inc.*, 192 Cal. App. 4th 419 (2011) (reversing summary judgment for the defendant; secondary factors could sustain finding that plaintiffs were employees even if control factors indicated that plaintiffs were independent contractors).

[1071] The FLSA exemption appears in section 213(d), 29 U.S.C. § 213(d); many states, but not California, adopt this exemption for purposes of state wage and hour law.

[1072] See § 1.5. For the standard that the EDD applies, see www.edd.ca.gov (visited on February 20, 2014) (listing 24 elements to consider: instructions, training, integration, personal services, use of assistants, continuing relationship, hours of work, full-time work, work done on premises, sequence of work, reports, payments, expenses, tools and materials, investment, profit or loss, work for multiple firms, services offered to general public, right to fire, right to quit, custom in industry, level of skill required, beliefs of the parties, and business decisions).

[1073] 22 Cal. Code Regs § 4304-1.

[1074] Lab. Code § 226.8(a)(1).

[1075] Lab. Code § 226.8(a)(2).

[1076] Lab. Code § 226.8(b), (c).

[1077] Lab. Code § 226.8(e)(1).

[1078] Lab. Code § 226.8(e)(2).

[1079] Lab. Code § 2753(a). Liability does not extend to persons who are advising their employer or to licensed attorneys who are providing legal advice to their clients. Lab. Code § 2753(b).

[1080] Lab. Code § 2810(a).

[1081] Lab. Code § 2810(g).

[1082] Lab. Code § 2810(f).

[1083] Lab. Code § 432.5.

[1084] Lab. Code § 2929.

[1085] Family Code § 5290.

[1086] Code Civ. Proc. §§ 706.011, 706.050.

[1087] Lab. Code § 450. Although employees may lack a private right of action under Section 450, *Sanchez v. Aerogroup Retail Holdings, Inc*., 2013 WL 1942166, at *4-5 (N.D. Cal. May 8, 2013) (Section 450 does not create private right of action); *Harris v. Vector Mktg. Corp*., 2010 WL 2077015, at *2 (N.D. Cal. May 20, 2010) (same), employees might still seek civil penalties under PAGA. See § 5.11.

[1088] Lab. Code § 407.

[1089] Lab. Code § 2871.

[1090] Lab. Code § 2870.

[1091] Lab. Code § 2872.

[1092] Lab. Code § 2802.

[1093] Lab. Code § 2802(c).

[1094] BLACKS LAW DICTIONARY 342 (2d pocket ed. 2001).

[1095] See, *e.g., Jacobus v. Krambo*, 78 Cal. App. 4th 1096 (2000) (employee entitled to reimbursement from employer of expenses incurred by employee in successful defense against sex harassment allegations). See also *Devereaux v. Latham & Watkins*, 32 Cal. App. 4th 1571 (1995) (expenses incurred by employee in connection with her depositions in two actions brought by third parties against her employer); *Grissom v. Vons Companies*, 1 Cal. App. 4th 52 (1991) (employer must reimburse employee expenses incurred in defending third party lawsuit arising out of on-the-job auto accident, if retaining separate counsel was necessary because employer had failed to timely provide competent counsel free of any conflict of interest); *Douglas v. Los Angeles Herald-Examiner*, 50 Cal. App. 3d 449 (1975) (expenses incurred by employee in defending lawsuit filed as a result of employee's job-related services). The duty to reimburse for legal expenses does not apply when the employee rejects his employer's offer of free, competent, conflict-free counsel and chooses to hire his own lawyer. *Carter v. Entercom Sacramento, LLC*, 219 Cal.

App. 4th 337, 348-49 (2013) ("dispositive question here is whether the fees and costs Carter incurred for the attorneys he chose were 'necessary' when his employer had arranged, through its insurer, to provide Carter with a different attorney at no cost to him").

[1096] *Machinists Automotive Trades v. Utility Trailers Sales*, 141 Cal. App. 3d 80 (1983) (mechanic entitled to indemnification for loss of his tools from employer's premises in a burglary when employer required that employee have tools and leave them on employer's premises); *cf. Earll v. McCoy*, 116 Cal. App. 2d 44 (1953) (employee not entitled to reimbursement under Section 2802 for tools lost in fire on employer's premises when employee was not required to leave tools at work).

[1097] See, *e.g.*, DLSE Opinion Letter 2001.03.19 (Section 2802 requires reimbursement of client entertainment expenses where entertainment encouraged by employer); DLSE Opinion Letter 1998.11.05 (Section 2802 requires reimbursement of mandated auto insurance premiums above statutory minimum); DLSE Opinion Letter 1993.02.22 (Section 2802 requires reimbursement for actual cost of operating employee's vehicle in the course of employment).

[1098] *Gattuso v. Harte-Hank Shoppers, Inc.*, 35 Cal. Rptr. 3d 260 (2005), *rev. granted*, No. S139555 (Cal. Feb. 22, 2007).

[1099] *Gattuso v. Harte-Hank Shoppers, Inc.*, 42 Cal. 4th 554 (2007).

[1100] *Id.* at 560 n.3 ("In the trial court, Harte-Hanks argued in the alternative that section 2802 did not require employers to reimburse employees 'for routine expenses of employment such as car expenses,' but only for losses caused by third parties. Both the trial court and the Court of Appeal rejected that argument, and Harte-Hanks does not assert it in this court. Accordingly, we do not address it here.").

[1101] 42 Cal. 4th at 568-71, 574.

[1102] *Id.* at 570-71.

[1103] *Id.* at 574 n.6, 575-76.

[1104] See http://www.dir.ca.gov/dlse/2802Regs.htm (visited on February 20, 2014).

[1105] *Estrada v. FedEx Ground Package System, Inc.*, 154 Cal. App. 4th 1 (2007).

[1106] *Stuart v. RadioShack*, 2009 U.S. Dist. LEXIS 57963 (N.D. Cal. June 25, 2009) (Magistrate Judge Edward M. Chen).

[1107] Lab. Code § 1308.10.

[1108] Civ. Code § 1714.43(a), (c).

[1109] Civ. Code § 1714.43(d).

[1110] Civ. Code § 52.6.

[1111] See Pen. Code §§ 631, 637.2.

[1112] Pen Code § 632(d). *Cf. People v. Algire,* No. B244557, 2013 WL 6628235 (Cal. Ct. App. Dec. 17, 2013) (permitting admissibility of audio recording under exception for evidence of a violent felony).

[1113] Code Civ. Proc. § 527.8. See *USS-Posco Industries v. Edwards,* 111 Cal. App. 4th 436 (2003) (affirming three-year injunction against former employee who made generalized threats of workplace violence while still employed; employer may obtain injunction on behalf of employee who is logical target of threats, even if not specifically identified by the harasser).

[1114] *Robinzine v. Vicory,* 143 Cal. App. 4th 1416 (2006) (employer's petition under the Workplace Violence Safety Act, Code of Civil Procedure section 527.8, cannot, as a matter of law, support a claim for malicious prosecution; thus employee's malicious prosecution suit must fail and employee is vulnerable to an anti-SLAPP motion).

[1115] Code Civ. Proc. § 425.16.

[1116] Civ. Code § 3294.

[1117] *Barton v. Alexander Hamilton Life Ins. Co. of Am.*, 110 Cal. App. 4th 1640 (2003).

[1118] *Kelly v. Haag*, 145 Cal. App. 4th 910 (2006) (substantial evidence did not support $75,000 punitive damages award against defendants in fraud action where plaintiff did not present evidence of defendant's net worth or ability to pay; plaintiff on remand is not entitled to a retrial on punitive damages, because plaintiff had full and fair opportunity to establish defendant's financial condition but failed to do so).

[1119] See Civ. Code § 3295.

[1120] *Brewer v. Premier Golf Properties*, 168 Cal. App. 4th 1243 (2008) (plaintiff may not recover punitive damages for Labor Code violations regarding meal and rest breaks, pay stubs, or minimum wage, because (1) the express statutory remedies that are exclusive absent evidence that they are inadequate and (2) the statutory provisions on these subjects arise from the contractual employment relationship, thereby precluding punitive recoveries).

[1121] Code Civ. Proc. § 335.1.

[1122] *Chamber of Commerce v. Whiting*, 563 U.S. __ , 131 S. Ct. 1968 (2011) (federal immigration law does not preempt the Legal Arizona Workers Act, which requires that all Arizona employers use E-Verify to confirm that the workers they employ are legally authorized workers).

[1123] Lab. Code § 2812.

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