USA - California

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STATE SNAPSHOT

Key considerations

1 | Which issues would you most highlight to someone new to your state?

California is infamous for its worker-friendly laws, which provide for greater levels of protection and entitlement than those of other states or at the federal level. The Plaintiff's Bar in California is also among the most active in the nation, and employers there face a 46% higher chance of being sued by an employee than the national average (https://www.insurancejournal.com/news/national/2017/11/16/471266.htm). Employers should be aware of the Private Attorneys' General Act ("PAGA"), as it serves as a popular mechanism for bringing an action on behalf of a workforce and recovering penalties.

New employers should be aware of the state's increasing focus on equal pay issues, which have now been expanded to race and ethnicity and will likely continue to expand to other protected classes. Cities are now increasing requirements at the local level, as major cities now have ordinances on minimum wage, paid sick leave, work scheduling, and laws restricting pre-employment screening and inquiry (ban-the-box). The state also continues to protect the immigrant workforce—which is among the highest in the nation—by criminalizing employers' attempts to harass and exploit such employees.

In addition, California's Assembly Bill 5 has turned the future of the gig economy in California on its head by changing the classification of swaths of workers who were previously independent contractors to be employees. Workers are now presumed to be employees and can only be classified as independent contractors if the hiring entity can demonstrate the worker fits into three stringent categories, known as the "ABC" test.

Finally, new employers should be aware of the changes to arbitration clauses in employment agreements. California's Assembly Bill 51 prohibits employers from requiring employees and applicants to sign arbitration agreements as a condition of employment, continued employment, or the receipt of any employment-related benefit. This law is currently being challenged in light of its interplay with the Federal Arbitration Act, but employers should be aware of its ramifications in case it is upheld.

2 | What do you consider unique to those doing business in your state?

Doing business in the sixth largest economy can be rewarding, but carries a high risk for those who are unprepared when it comes to the state's employment laws. California's anti-discrimination law expands traditional protected classes to also include sexual orientation, gender identity/expression, political activities or affiliations, and military or veteran status, among others.

Wage and hour laws continue to be a difficult area for new employers, and mistakes here are especially unforgiving because of the PAGA. Employers need to be aware of the state's stringent laws regarding daily overtime, meal and rest breaks, paying meal and rest break premiums, "use-it-or-lose-it" paid time-off policies, timely final wage payments, and wage statement reporting. The violation of any of these categories can create a potential minefield for unwary employers.

3 | Is there any general advice you would give in the labor/employment area?

Be ready to adapt to rapid and continuous change. The California legislature has been a key driver of pro-worker rights, so it is important to monitor key legislative developments that may affect employers. California regulations are also subject to enforcement by up to six different state regulatory agencies (far more than in other states), so an understanding of administrative rulemaking and enforcement is crucial.

Emerging issues

4 | What are the emerging trends in employment law in your state, including the interplay with other areas of law, such as firearms legislation, legalization of marijuana and privacy?

California continues to expand its equal pay law, which now prohibits wage disparities due to gender, race, and ethnicity. This expansion is expected to eventually include the remaining California protected classes. An offshoot of these efforts is the recent prohibition of prior salary as the sole justification for pay disparities. In addition, employers are prohibited from even asking job applicants about their prior salary (this prohibition does not bar an employer from asking an applicant about their salary expectations for the applied for position). Moreover, California courts are increasingly certifying classes of employees who allege violations of the Equal Pay Act, holding that common questions predominate (even for large classes of employees who perform different job duties).

Local ordinances in California's major cities have expanded minimum wage and paid sick leave requirements above and beyond state requirements. More local jurisdictions are also joining the "ban the box" movement, which prohibits employers from asking about an applicant's criminal record until after an offer of employment is extended.

In the past two years since the #MeToo movement began, California's employment law space has seen a flurry of activity illustrating the impact of the movement. California law now mandates that employers with more than five employees provide at least two hours of anti-harassment training at least once every two years within six months of hiring (and to new supervisory employees within six months of their assumption of a supervisory position) (Cal. Govt. Code § 12950.1(a)). Although initially limited to sexual harassment, this training requirement has been expanded to cover abusive conduct.

SB 778 was recently passed to amend the timeline for when this training had to occur by, and how often. The law now requires employers with five or more employees to provide supervisors and non-supervisorial employees:

- at least two hours of sexual harassment training for supervisory employees by January 1, 2021;
- at least one hour of training for non-supervisory employees by January 1, 2021; and
- further training once every two years thereafter, as specified.

If an employer already provided this training and education in 2019, they are not required to provide a refresher again until two years thereafter. In addition, as part of its obligation to take all reasonable steps necessary to prevent discrimination and harassment (Cal. Govt. Code § 12940(g)), an employer with five or more employees must develop written policies on the prevention of harassment, discrimination, and retaliation (2 Cal. Code Regs. Tit. 2 § 11023). These policies must also include a complaint process that meets certain minimum requirements, including confidentiality (to the extent possible), a timely response, an impartial and timely investigation by qualified personnel, documentation; appropriate remedial actions; and timely closures.

Employers may not require an employee to sign (in exchange for a raise or bonus, or as a condition of employment or continued employment): (1) a release of a claim or right under the California Fair Employment and Housing Act; or (2) a nondisparagement agreement that denies the employee the right to disclose information about unlawful acts in the workplace, including sexual harassment. (Cal. Govt. Code § 12964.5). Negotiated settlements are exempt from Section 12964.5. In addition, SB 1300 essentially eliminates the standard that the existence of a hostile work environment must be based on conduct that is sufficiency severe or pervasive. In other words, a single incident of harassing conduct is sufficient to create a triable issue on the existence of a hostile work environment if the harassing conduct unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment. Finally, the law makes clear that harassment cases are rarely appropriate for summary judgment disposition.

As is well known race is a protected category under the California Fair Employment and Housing Act (Cal. Govt. Code § 12940(a)). However, on July 3, 2019, California became the first state to prohibit discrimination against natural hair, officially recognizing hair as a protected category under the California Fair Employment and Housing Act.

Under Assembly Bill 5 ("AB5"), effective January 1, 2020, workers will be presumed to be employees unless the employer can prove that the workers are independent contractors under the articulated test which is referred to as the "ABC Test." Under ABC Test, the employer must be able to prove all three parts of the test:

1 the worker is free from the employer's control or direction in performing the work; and
2 the work takes place outside the usual course of the business of the company; and
3 customarily, the worker is engaged in an independent trade, occupation, profession, or business.

AB5 does retain some exemptions for certain occupations with the stated purpose of retaining statutory and case law exemptions already in effect. These exempt professions, include, but are not limited to: physicians, surgeons, dentists, psychologists, veterinarians, lawyers, architects, engineers, private investigators, accountants, securities broker-dealers, investment advisors, direct sales persons, commercial fisherman, and real estate licensees. The exemption will also exist for workers who offer "professional services" defined to include: marketers, human resources administrators, travel agents, graphic designers, fine artists, still photographers, freelance writers, freelance editors, freelance newspaper cartoonists, licensed estheticians, licensed electrologists, licensed manicurists, licensed barbers, and licensed cosmetologists. Notably, AB5 does not provide general exemptions for nurses, programmers, or workers in the entertainment/motion picture industry. However, there are some industries specifically excluded from this legislation, with specific criteria attached to them, including repossession agencies, business to business contracting, subcontracting in the construction industry, referral agency relationships with service providers, and motor clubs contracting with individuals. California expanded the scope of these exemptions under AB5 when it recently passed Assembly Bill 2257 ("AB2257"), now allowing sole proprietors to qualify as well. Other professions were also added. The referral agency exemption now includes a non-exhaustive list of services that may qualify, including consulting, interpreting services, and caddying. The professional services exemption adds translators, copy editors, illustrators, content contributors, advisors, producers, narrators, and cartographers. AB2257 also added exemptions for recording artists, songwriters, lyricists, composers, proofers, managers of recording artists, record producers and directors, musical engineer and mixers, musicians engaged in the creation of sound recordings, vocalists, photographers working on recording photo shoots and related content, independent radio promotors, and any other individual engaged to render any creative, production, marketing, or independent music publicist services related primarily to the creation, marketing, promotion, or distribution of sound recordings or musical compositions. Undoubtedly, the scope and nuances of the exemptions will be an area ripe for litigation.

California also recently passed into law Assembly Bill 51 ("AB51"), with the stated purpose of protecting workers from being forced to sign arbitration agreements. AB51 prohibits employers from conditioning employment, continued employment, or any employment-related benefit on the applicant or employee waiving rights under the Fair Employment and Housing Act ("FEHA") or the Labor Code, including the right to proceed in civil court; and prohibits employers from retaliating against an applicant or employee for refusing to waive employment-related rights.

Sections 226.8 and 2753 of the California Labor Code prohibit the willful misclassification of individuals as independent contractors, and imposes civil penalties of between $5,000 and $25,000 per violation. Criminal penalties are also a possibility.

The California legislature is currently considering a bill (AB 2355) that would prohibit discrimination based on medical marijuana use and require employers to accomodate workers and applicants who use marijuana for medical purposes. Some legislators are even asking that lawmakers ban urine testing for cannabis in random or pre-employment drug screens. The bill is currently in committee, but employers should be aware that this issue being discussed in the country and around the world.

Proposals for reform

5 | Are there any noteworthy proposals for reform in your state?

Due to the high rate of PAGA lawsuits filed in recent years, attempts at reform have been made to curtail the frequency of such suits by private employees. The initiatives were not entirely successful, but are expected to continue in order to provide some relief to the state's overburdened courts.

EMPLOYMENT RELATIONSHIP

State-specific laws

6 | What state-specific laws govern the employment relationship?

The sources of California employment law are numerous, including a number of statutory codes and administrative regulations. California's anti-discrimination and disability accommodation law is the Fair Employment and Housing Act. The California Labor Code contains expansive laws governing wages, working conditions, worker's compensation, employment relations, among others. The Industrial Welfare Commission (IWC) Wage Orders contain additional wage and hour requirements for employees in specific industries. Employee leave laws include the California Family Rights Act and pregnancy disability leave laws. Article 1 Section 1 of the California Constitution provides all citizens with privacy, and this extends to employees. The Cal-WARN Act adds certain protections to employees in the event of mass layoffs, relocations, or plant closings.

7 | Who do these cover, including categories of workers?

The Fair Employment and Housing Act covers an employee, an applicant, or a person providing services pursuant to a contract (Cal. Govt. Code § 12940). The meaning of "person providing services pursuant to a contract" has been interpreted broadly to also include contract workers and employees of an independent contractor (*Hirst v. City of Oceanside*, 236 Cal. App. 4th 774 (2015)). Volunteers and unpaid interns are now also protected under the act from discrimination and harassment (Cal. Govt. Code § 12940). Employers must also reasonably accommodate the religious beliefs of volunteers and unpaid interns (Cal. Govt. Code § 12940 (l)).

Independent contractors may file harassment claims against the employing entity but may not file discrimination or retaliation claims under the act. California independent contractors are not covered by requirements for payment of minimum wage, overtime, meal periods, rest breaks, vacation pay out, reimbursement of work-related expenses, or other similar benefits under wage/hour laws.

The Industrial Welfare Commission (IWC) Wage Orders cover a wide variety of industries, including the manufacturing industry, the personal services industry, the public housekeeping industry, the mercantile industry, the transportation industry, the amusement and recreation industry, the broadcasting industry, the motion picture industry, agricultural operations, household occupations, and miscellaneous employees.

The California Family Rights Act covers employers with 50 or more employees on payroll during each of any 20 or more calendar weeks of the current calendar year. All employees are eligible for its protections, including employees on the payroll who received no compensation and part-time employees.

The California WARN Act applies to "covered establishments" who have employed 75 or more full and part-time employees in the preceding 12 months.

Misclassification

8 | Are there state-specific rules regarding employee/contractor misclassification?

Under the new legislation signed into law in California in September 2019, Assembly Bill 5 ("AB5"), starting January 1, 2020 workers will be presumed to be employees unless the employer can prove that the workers are independent contractors under the articulated test, which is referred to as the "ABC Test." Under the ABC Test, the employer must be able to prove all three parts of the test:

1 the worker is free from the employer's control or direction in performing the work;
2 the work takes place outside the usual course of the business of the company; and
3 customarily, the worker is engaged in an independent trade, occupation, profession, or business.

AB5 does retain some exemptions for certain occupations with the stated purpose of retaining statutory and case law exemptions already in effect. These exempt professions, include, but are not limited to: physicians, surgeons, dentists, psychologists, veterinarians, lawyers, architects, engineers, private investigators, accountants, securities broker-dealers, investment advisors, direct sales persons, commercial fisherman, and real estate licensees. The exemption will also exist for workers who offer "professional services" defined to include: marketers, human resources administrators, travel agents, graphic designers, fine artists, still photographers, freelance writers, freelance editors, freelance newspaper cartoonists, licensed estheticians, licensed electrologists, licensed manicurists, licensed barbers, and licensed cosmetologists. Notably, AB5 does not provide general exemptions for nurses, programmers, or workers in the entertainment/motion picture industry. However, there are some industries specifically excluded from this legislation, with specific criteria attached to them, including repossession agencies, business-to-business contracting, subcontracting in the construction industry, referral agency relationships with service providers, and motor clubs contracting with individuals. AB2257 expanded the scope of these exemptions, now allowing sole proprietors to qualify as well. Other professions were also added. The referral agency exemption now includes a non-exhaustive list of services that may qualify, including consulting, interpreting services, and caddying. The professional services exemption adds translators, copy editors, illustrators, content contributors, advisors, producers, narrators, and cartographers. AB2257 also added exemptions for recording artists, songwriters, lyricists, composers, proofers, managers of recording artists, record producers and directors, musical engineer and mixers, musicians engaged in the creation of sound recordings, vocalists, photographers working on recording photo shoots and related content, independent radio promotors, and any other individual engaged to render any creative, production, marketing, or independent music publicist services related primarily to the creation, marketing, promotion, or distribution of sound recordings or musical compositions. Undoubtedly, the scope and nuances of the exemptions will be an area ripe for litigation.

The ABC test applies for purposes of the California Labor Code, the Unemployment Insurance Code, and the Industrial Welfare Commission (IWC) wage orders. Accordingly, for wage and hour purposes, employers must follow the ABC test.

Sections 226.8 and 2753 of the California Labor Code prohibit the willful misclassification of individuals as independent contractors, and impose civil penalties of between $5,000 and $25,000 per violation. Misclassified employees can also back pay (including overtime), penalties, and fees.

Under the Fair Employment and Housing Act, which protects employees from workplace discrimination, an independent contractor:

- has the right to control the performance of the contract for services and discretion on the manner of performance;
- is customarily engaged in an independent business;
- has control over the time and place the work is performed;
- supplies the tools and instruments used in the work; and
- performs work that requires a particular skill not ordinarily used in the course of the employer's work (Cal. Govt. Code § 12940(j)(5)).

Contracts

9 | Must an employment contract be in writing?

Generally no written agreement is required. However, a commissioned salesperson's agreement must be in writing (Cal. Lab. Code § 2751).

Additionally, California's Wage Theft Protection Act requires employers to provide employees with written notice of their rates of pay, allowances, regular payday, and other information, at their time of hire and within seven days of any changes to such information (Cal. Lab. Code § 2810.5).

10 | Are any terms implied into employment contracts?

There are implied covenants of good faith and fair dealing in employment contracts (*Guz v. Bechtel National, Inc.*, 24 Cal.4th 317 (2000)). Implied contract or implied terms may also be found based on an employer's words or conduct, its personnel policies or practices, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged (*Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 680 (1988)). However, where there is an express at-will agreement signed by the employee, it cannot be overcome by proof of an implied contrary understanding (Guz, 24 Cal. 4th 317, 340 n. 10 (2000)).

11 | Are mandatory arbitration agreements enforceable?

Assembly Bill 51 ("AB51"), which went into effect on January 1, 2020, prohibits employers from conditioning employment, continued employment, or any employment-related benefit on the applicant or employee waiving rights under the Fair Employment and Housing Act or the Labor Code, including the right to proceed in civil court; and prohibits employers from retaliating against an applicant or employee for refusing to waive employment-related rights. Under AB51, therefore, mandatory arbitration agreements are not enforceable. A federal court has temporarily enjoined enforcement of AB51 while it determines whether it is superseded by the Federal Arbitration Act.

Further, arbitration agreements cannot be used to waive an employee's rights under the Private Attorney General Act, which must remain with the court even if the remainder of the case is sent to arbitration.

12 | How can employers make changes to existing employment agreements?

Most employment agreements include express provisions requiring all modifications to be made in writing. Where employment is at will, the employer may unilaterally alter the terms of employment, with the exception of mandatory arbitration agreements. If an employer wants to change the terms of a confidentiality agreement during employment, employers should offer independent consideration.

HIRING

Advertising

13 | What are the requirements relating to advertising open positions?

Advertisements must not suggest a preference against applicants or independent contractors on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition (e.g., cancer-related conditions and genetic characteristics), genetic information, marital status, sex, gender identity, gender expression, age (40 years and older), sexual orientation, or military and veteran status of any person.

Background checks

14 | (a) Criminal records and arrests

As a general matter, employers are prohibited from making any non-job-related inquiries of applicants or employees that directly or indirectly express a limitation, specification, or discrimination about any protected characteristic. In addition to the federal Fair Credit Reporting Act governing the use of background checks in employment, California employers must also comply with certain requirements in the California Investigative Consumer Reporting Agencies Act and the California Consumer Credit Reporting Agencies Act. Class actions alleging violations of these statutes have recently been on the rise in California.

An employer may not ask an applicant about any arrest or detention that did not result in a conviction (Cal. Lab. Code § 432.7). Employers also may not ask about bankruptcies older than 10 years, judgments older than seven years, suits older than seven years, or records older than seven years that contain information about arrests, indictments, criminal information, misdemeanor complaints, or criminal convictions. (Cal. Civ. Code § 1786.18(a)). Employers also cannot ask applicants to disclose information regarding a conviction for certain marijuana-related crimes or possession of certain drug-related paraphernalia when the conviction is more than two years old (Cal. Lab. Code § 432.8). With limited exceptions, employers may not ask for juvenile convictions or inquire or use information about juvenile arrests, detentions, or court dispositions in making an employment determination.

Statewide and local "Ban the Box" laws are prevalent in California. The California Fair Chance Act prohibits a covered employer from asking about or considering criminal history before making a conditional offer of employment. This does not apply to: (1) a position that requires a conviction history background check by law; (2) a position with a criminal justice agency; (3) a position as a Farm Labor Contractor; or (4) a position where an employer is required by law to restrict employment based on criminal history (Cal. Govt. Code § 12952(d)). In addition, Los Angeles and San Francisco have their own "Ban the Box" statutes.

15 | (b) Medical history

As a general matter, employers may not inquire about any mental or physical disability or medical condition but may ask an applicant if they can perform the essential functions of the job.

The Fair Employment and Housing Act prohibits employers from requiring applicants to take a medical or psychological examination prior to the initial job offer (Cal. Govt. Code § 12940(f)). After extending an initial job offer, the employer may ask the applicant to undergo a pre-employment medical exam or laboratory test, so long as it relates specifically to the essential functions of the job.

Background check reports may not include medical information without the employee's or applicant's authorization (Cal. Civ. Code § 1786.12(f)).

16 | (c) Drug screening

There is no specific statute on drug screening, but California courts have generally permitted employers to require employees to pass a drug test as a condition of employment, so long as an employer tests all applicants and does not single out certain applicants due to protected characteristics. Note that employers in certain safety-sensitive industries such as transportation and aviation will be subject to federal drug testing laws and might be allowed to conduct random drug testing.

The California Supreme Court has held that an employer may refuse to hire an applicant who tests positive for marijuana even where it is prescribed for medicinal purposes (Ross v. RagingWire Telecomms., Inc., 42 Cal. 4th 920 (2008)).

17 | (d) Credit checks

Both California and federal law limit the use of credit reports for employment purposes. California's Consumer Credit Reporting Agencies Act prohibits an employer or prospective employer from using a consumer credit report for employment purposes unless the report is sought for certain enumerated positions such as a managerial position or a position that involves access to cash or confidential and proprietary information. (Cal. Lab. Code § 1024.5). However, the prohibition does not apply to reports that both verify income or employment and do not include credit-related information, such as credit history, credit score, or credit record. (Cal. Lab. Code § 1024.5).

If an exception applies and an employer seeks to obtain and use a credit report, California law requires that employers provide written notice to the consumer that addresses the specific exception used for obtaining the report.

18 | (e) Immigration status

The federal Immigration Reform and Control Act sets out certain requirements to establish authorization to work in the United States. California has additional requirements prohibiting employers from engaging in unfair immigration-related practices, such as using E-Verify to check a person's authorization status at a time or in a manner not consistent with federal immigration law, or in retaliation for a person's exercise of their employment rights under the Labor Code. Labor Code § 1019.1 states that employers may not:

- Request more or different documents than required under federal law to verify work authorization status;
- Refuse to honor documents that look genuine;
- Refuse to honor documents or work authorization based on the specific status/term accompanying the authorization to work; or
- Attempt to re-investigate or re-verify an incumbent employee's authorization to work using an unfair immigration-related practice.

A penalty of up to $10,000 per violation may be recovered by the applicant, employee, or by Labor Commissioner.

Employers also may not reverify the employment eligibility of a current employee at a time or in a manner not required under federal law. (Cal. Lab. Code § 1019.2). The Labor Commissioner may recover a penalty of up to $10,000 per violation of this section as well. Violations of Section 1019.2, however, may not form the basis of liability or penalty under Section 1019.1.

19 | (f) Social media

While there is no specific statute prohibiting retrieval or review of applicant or employee social media information, relying on such information to make employment decisions can raise a host of issues under the state's anti-discrimination and privacy laws. For example, an employer may be liable for discrimination if it conducts a social media search that reveals an applicant's protected characteristics and then relies on such information in deciding whether to hire.

In addition, Section 7 of the National Labor Relations Act prohibits employers from discriminating or taking adverse action against employees who engage in protected concerted activity, which may include online discussions of wages, hours, or other working conditions.

California employers must also refrain from asking applicants to access a personal social media account in the presence of the employer and may not require their employees to provide log-in information for their social media account (Cal. Lab. Code § 980(b)). Employers may, however, request an employee's social media information if it is reasonably believed to be relevant to an investigation of allegations of misconduct or violations of laws and regulations, and only if that information is used for limited, permissible purposes. (Cal. Lab. Code § 980(c)).

20 | (g) Other

Employers may not demand or require applicants or employees to take a polygraph test nor request an applicant or employee take a polygraph test without first advising them of their rights under the Labor Code § 432.2. Public agencies are exempt from this requirement.

Likewise, California employers cannot use the results of applicant or employee HIV tests for employment purposes (Cal. Health & Safety Code § 120980(f)).

California also prohibits employers from seeking or relying on an applicant's salary history to determine whether to make an offer of employment or what salary to offer the applicant. (Cal. Lab. Code § 432.2).

WAGE AND HOUR

Pay

21 | What are the main sources of wage and hour laws in your state?

The California Labor Code and the Industrial Welfare Commission (IWC) Wage Orders are the statutory laws dealing with wage and hour issues.

Wage claims can be especially problematic because an employee who prevails on a wage claim is usually entitled to an award of its reasonable attorneys' fees in addition to any damages received. Employee wage claims are typically brought before a state government labor agency or through the federal or state civil judicial system.

22 | What is the minimum hourly wage?

For employers with at least 26 employees, the state minimum wage is $13 per hour starting January 1, 2020 and will increase as follows:

- $14 per hour starting January 1, 2021; and
- $15 per hour starting January 1, 2022 (Cal. Lab. Code § 1182.12).

Note that there are local ordinances with higher minimum wages, including updated minimum wages that went into effect July 1, 2020 (e.g., $15.00 in Los Angeles).

23 | What are the rules applicable to final pay and deductions from wages?

In California, an employee who is terminated by the employer for any reason must receive payment on the date of termination for all wages earned through the final day of employment (including all accrued but unused vacation entitlement) (Cal. Lab. Code § 201). If the employee resigns, the employer has 72 hours after notice is given to provide payment of final wages (Cal. Lab. Code § 202). An employer's willful failure to timely pay an employee's final wages can result in the imposition of a significant waiting time penalty equal to one day of the employee's wages for every day the payment is withheld, up to a maximum of 30 calendar days (Cal. Lab. Code § 203).

Hours and overtime

24 | What are the requirements for meal and rest breaks?

Employees who work five hours or more per day must be provided with a duty-free uninterrupted 30-minute meal period. Meal periods must also be timely, meaning they are taken before the end of the employee's fifth hour of work. If the employee is required to remain at the work site

or facility during the meal period, the meal period is on duty and must be paid. If a meal period is not provided, is interrupted, or otherwise non-compliant, the employer must pay a premium equal to one hour of wages to that employee.

Employers must authorize and permit non-exempt employees to take a duty-free uninterrupted 10-minute paid, off-duty rest break for every four-hour work period or major fraction thereof. Rest breaks should be taken in the middle of the work period insofar as practicable. Employees working less than 3.5 hours are not entitled to a rest period.

25 | What are the maximum hour rules?

Non-exempt employees must generally be paid 1.5 times the regular rate of pay for all hours worked over eight in a day up to and including 12 hours in any workday, as well as the first eight hours worked on the seventh consecutive day of work in a workweek (Cal. Lab. Code § 510). Non-exempt employees must be paid double the regular rate of pay for work performed over 12 hours in any workday and over eight hours on the seventh consecutive day of work in a workweek (Cal. Lab. Code § 510).

26 | How should overtime be calculated?

The California Department of Labor Standards Enforcement (DLSE) relies on the Fair Labor Standards Act regulations to determine the regular rate of pay for the purposes of calculating overtime. The regular rate must include all remuneration for employment paid to or on behalf of an employee (*Huntington Memorial Hosp. v. Sup. Ct.*, 131 Cal. App. 4th 893, 902-05 (Cal. Ct. App. 2005)). This typically includes hourly, salary and piecework earnings, commissions, on-call pay, non-discretionary bonuses (i.e., production and attendance bonuses), shift differentials, the value of certain meals and lodging.

Payments generally not considered to be remuneration and therefore are not included in the regular rate calculation include:

- payments for occasional periods when no work is performed (i.e., holiday and sick pay);
- gifts and rewards for service that are not tied to hours worked;
- production or efficiency (i.e., gifts for holiday/special occasions);
- discretionary bonuses (only if the employer has sole discretion over both the fact and amount of payment and the bonuses are not part of a contract or promise);
- payments under a *bona fide* profit-sharing plan or thrift or savings plan that are not tied to hours worked, production, or efficiency (29 C.F.R. §§ 778.200 - 778.225; Cal. Lab. Code § 200(a); DLSE Enforcement Manual, §§ 35.4.4, 35.7, 49.1 to 49.1.2.4 (2002)).

27 | What exemptions are there from overtime?

Employees may be exempt from overtime in California if they satisfy the salary level test (double minimum wage, currently $49,920) and their duties fall under the executive, administrative, or professional exemptions. Unlike the federal exemption analysis, California employees are subject to a strict duties test, meaning that employees must perform exempt job duties for over 50% of an employee's working time in order to be exempt from overtime. This is a quantitative, not qualitative test and the exemption must be met every week.

- California also recognizes limited exemptions applicable to:computer software professionals (as of January 1, 2020, salary test of $46.55 per hour or at least $96,968.33 annually for full-time work, and primarily conducts systems analysis or designs, develops, documents, analyzes, creates, tests or modifies computer systems or programs);
- licensed physicians and surgeons (as of January 1, 2020, salary test of $84.79 per hour and primarily engaged in duties that require licensure);
- commissioned employees (with earnings which exceed 1.5 times the minimum wage and greater than 50% of earnings represent commissions); and
- outside salespersons (primarily engaged in sales activity and who spend over 50% of their working time away from the employer's place of business).

Record keeping

28 | What payroll and payment records must be maintained?

Employees must keep accurate information related to each employee (e.g., name, address, occupation, social security number and date of birth), as well as:

- time records showing when the employee begins and ends each work period, meal periods, split shift intervals and total daily hours worked (rest periods and meal periods during which operations cease do not have to be recorded);
- payroll records showing total wages paid for each payroll period, including value of any board, lodging or other compensation actually furnished to the employee;
- wage statements should contain all of the information required under Labor Code Section 226(a), including the balance of available paid sick leave available or paid time off/vacation time in lieu thereof;
- total hours worked in the payroll period and the applicable rates of pay; and
- for piece rate or incentive plan employees, employers must list the piece rates or provide an explanation of the incentive plan formula. Employers must also maintain accurate production records (IWC Wage Order No. 15. § 7)).

All required records must be written, in English, properly indicate the month, day and year, and be kept on file for at least three years at the place of employment or at a central location in California (Cal. Lab. Code. § 226).

Records of wage and wage rates, job classifications, and other terms and conditions of employment must be maintained for all employees for at least three years (Cal. Lab. Code § 1197.5(d)).

DISCRIMINATION, HARASSMENT AND FAMILY LEAVE

What is the state law in relation to:

PRIVACY IN THE WORKPLACE

Privacy and monitoring

29 | What are employees' rights with regard to privacy and monitoring?

As of January 1, 2020, California enacted the California Consumer Privacy Act (CCPA), which is a game-changing privacy law applicable to any business (regardless of location) that collects personal information about California residents (including employees and applicants). The CCPA bestows substantial new rights to California residents, as well as high potential fines for businesses that violate it. A business is defined as any entity that collects personal information about California residents and has an annual gross revenue of over $25 million; annually buys, sells, shares, or receives the personal information of 50,000+ California consumers, devices, or households; or derives 50% or more of annual revenue from selling personal information. Non-profit entities

are exempt. Covered businesses under the CCPA must give employers and prospective applicants a "Notice at Collection," which informs the employee of the categories of information that are collected and the purpose of such information. Businesses are also required to implement reasonable security measures to safeguard the personal information of employees. In the event of a data breach resulting from the failure to implement reasonable security measures, an employee can file a lawsuit (or class action) to recover penalties or actual damages, whichever is greater.

Beginning January 1, 2021, employers will have to expand the disclosures given to employees and job applicants. The expanded disclosures must inform the employee of his or her rights under the CCPA (including the right of access, deletion, and receiving a copy of the information), state whether the information is being shared with any third parties, and identify the categories of third parties with whom the employer will share the information.

California employers should also be aware of the restrictions on collecting certain background information about employees, as discussed above. Employers should also be aware that California law restricts the unauthorized recording of conversations without the consent of all parties (which has led to a host of class-action lawsuits) (Cal. Penal Code § 632).

In addition, California maintains an all-purpose right to privacy, which applies in the employment context. For example, unless employers set clear limits on any expectation of privacy on company computers or using company resources, employees may be able to claim a right to privacy over personal emails, social networking, and records. Clear policy language is a requirement for any employer in California. This test also applies in the context of physical searches, such as lockers and desks.

California law also restricts taking adverse action against an employee based on lawful off-duty conduct (Cal. Labor Code § 96(k)).

30 | Are there state rules protecting social media passwords in the employment context and/or on employer monitoring of employee social media accounts?

Yes. California employers are prohibited from requesting the disclosure of a social media username or password, requiring an applicant or employee to access social media, or to divulge any personal social media (subject to a limited exception for investigations of employee misconduct or violations of the law) (Cal. Labor Code § 980). In addition, information learned over social media (even if shared publicly) may give rise to issues concerning discrimination, harassment, retaliation, or protected concerted activity under the National Labor Relations Act.

Bring your own device

31 | What is the latest position in relation to bring your own device?

Bring your own device policies are common in California. However, employers must be aware of their obligation under California Labor Code 2802, which has been interpreted to require reimbursement for costs (e.g., data even if the individual is on an unlimited data plan and there is no marginal increase in cost for the employee if they are doing work on their device) associated with the business use of an employee's personal device. Many employers provide a flat monthly reimbursement rather than attempt to calculate what percentage of an employee's data usage is attributable to work. Employers should be aware of the reimbursement requirement especially in light of covid-19's impact on work from home policies.

Off-duty

32 | To what extent can employers regulate off-duty conduct?

California law restricts taking action against an employee based on lawful off-duty conduct (Cal. Labor Code § 96(k)). However, even though legalized under California law, employers retain the ability to administer drug tests and terminate the employment of individuals who test positive for marijuana (Ross v. Ragingwire Telecommunications, Inc., 42 Cal. 4th 920 (2008)). In addition, employers may of course terminate or take other disciplinary action against an employee who is under the influence of drugs or alcohol at the work site.

Gun rights

33 | Are there state rules protecting gun rights in the employment context?

No.

TRADE SECRETS AND RESTRICTIVE COVENANTS

Intellectual Property

34 | Who owns IP rights created by employees during the course of their employment?

Generally, the IP developed by an employee by virtue of their employment belongs to the employer, although employers would be well advised to have an express IP assignment agreement in place (Cal. Labor Code § 2860).

However, employers cannot require the assignment of an invention that the employee developed entirely on their own time without using the employer's resources, unless that invention either:

- relates to the employer's business or actual or demonstrably anticipated research or development; or
- results from work performed by the employee for the employer (Cal. Labor Code § 2870).

Restrictive covenants

35 | What types of restrictive covenants are recognized and enforceable?

Subject to narrow restrictions in the sale-of-business context, non-competition and non-solicitation of employees provisions are void and unenforceable under California law (Cal. Bus. & Prof. Code § 16600). Indeed, attempting to enforce a non-competition agreement against a California employee, even if lawful in the jurisdiction in which it is entered, is considered an unfair business practice and may give rise to liability (Application Group, Inc. v. Hunter Group, Inc., 61 Cal. App. 4th 881 (1998)).

Non-compete

36 | Are there any special rules on non-competes for particular classes of employee?

No, because non-competes are generally unenforceable except in the sale of business context.

LABOR RELATIONS

Right to work

37 | Is the state a "right to work" state?

No.

Unions and layoffs

38 | Is the state (or a particular area) known to be heavily unionized?

Relative to other states, California could be seen as heavily unionized, as approximately 15.2% of wage and salary workers were unionized as of 2019. Unsurprisingly given its size, California has the largest absolute number of union members.

39 | What rules apply to layoffs? Are there particular rules for plant closures/mass layoffs?

California does have a mini-WARN Act. Its coverage is significantly broader than its federal counterpart (Cal. Labor Code § 1400 *et seq*).

Key differences include:

- Cal-WARN applies to employers with 75 or more employees (as opposed to 100);
- part-time employees are included;
- there is no numerical threshold of affected employees for the purposes of a plant closing (or termination);
- a "mass layoff" includes the layoff of 50 or more employees during any 30-day period regardless of the percentage of the workforce (under federal law it must affect at least 33% of the workforce); and
- additional notice provisions apply.

DISCIPLINE AND TERMINATION

State procedures

40 | Are there state-specific laws on the procedures employers must follow with regard to discipline and grievance procedures?

No, unless employees are covered by a collective bargaining agreement.

At-will or notice

41 | At-will status and/or notice period?

California is an at-will state, meaning that an employee may be terminated with or without cause at any time and for any lawful reason, with or without advance notice.

42 | What restrictions apply to the above?

An employee's at-will status may be modified by a collective bargaining agreement, or an express or implied contract between the employer and employee.

Employers are well advised to include specific at-will disclaimers in their company handbooks and any signed offer letters, and to further provide that at-will status may be changed only through an express, signed, written agreement (to limit implied contract claims).

Of course, an employee cannot be terminated for an unlawful reason, such as membership in a protected class or in retaliation for engaging in protected activity (e.g., complaining about discrimination, complaining about wage issues, or whistleblowing).

Final paychecks

43 | Are there state-specific rules on when final paychecks are due after termination?

Yes. In the case of a termination, the employee must be paid all wages (including accrued but unused vacation) due at the time of discharge (Cal. Labor Code § 201). An employee who resigns must be paid within 72 hours of their resignation (Cal. Labor Code § 202).