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THE CALIFORNIA EMPLOYER

CHAPTER 3

Statutory Rights Under California Law

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Employment & Labor Law Solutions Worldwide®

CHAPTER 3

STATUTORY RIGHTS UNDER CALIFORNIA LAW

§ 3.1

I. CALIFORNIA COMPENSATION LAW UPDATE

§ 3.1.1

A. INTRODUCTION

Legislative changes continued for California private-sector employers through 2013, with new provisions affecting California's minimum wage rate, the criminal and civil liability of employers that fail to comply with wage and hour laws, domestic workers and employee leave time. Significant court decisions were rendered regarding class certification, overtime exemptions, class actions and meal and rest periods.

§ 3.1.2

B. RECENT DEVELOPMENTS

§ 3.1.2(a)

Statutory Developments

The following statutes took effect on January 1, 2014, unless otherwise noted.

§ 3.1.2(a)(i)

Minimum Wage Requirements

Before July 1, 2014, the minimum wage was $8 per hour. Effective July 1, 2014, the minimum wage rate in California is $9 per hour. The minimum wage will increase to $10 per hour on January 1, 2016.[1]

[1] CAL. LAB. CODE § 1182.12 (as amended by A.B. 10 (Sept. 25, 2013)).

§ 3.1.2(a)(ii)

Attorneys' Fees & Costs for Wage, Benefits & Pension Fund Claims

Previously, a court was required to award reasonable attorneys' fees and costs in any action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions if any party made such an award request upon the initiation of the action.[2] California Senate Bill 462, effective January 1, 2014, amended California Labor Code section 218.5 to provide that courts may award reasonable attorneys' fees and costs to the prevailing party in any action brought for the nonpayment of wages, fringe benefits, or health and welfare pension fund contributions. However, if the prevailing party is not the employee—*i.e.*, the employer—attorneys' fees and costs are only awarded if the court finds that the employee brought the court action in bad faith. With this amendment, it will be even more difficult for a prevailing employer to recover attorneys' fees in wage and hour actions in California.

§ 3.1.2(a)(iii)

Criminalization of an Employer's Failure to Remit Wage Withholdings

Existing law makes it a crime for an employer to fail to make agreed-upon payments to health and welfare funds, pension funds or various benefit plans. The crime is punished as a felony or a misdemeanor, as specified, if the amount unpaid exceeds $500, and as a misdemeanor, if the amount is less than $500.[3] California Senate Bill 390, which went into effect January 1, 2014, makes it a crime for an employer to fail to remit withholdings from an employee's wages that were made pursuant to state, local or federal law.

§ 3.1.2(a)(iv)

Liquidated Damages Penalty Added for Unpaid Wages

California Assembly Bill 442, expanding Labor Code sections 98, 1139.6, 1194.2 and 1197.1, requires that employers cited for unpaid wages by a Labor Commissioner citation pay the affected employee liquidated damages in addition to paying a civil penalty and restitution of wages.[4]

§ 3.1.2(a)(v)

Large Employers Must Provide Leave for Emergency Services Volunteers

Existing law requires an employer employing 50 or more employees to permit an employee who is a volunteer firefighter to take temporary leaves of absence, not to exceed an aggregate of 14 days per calendar year, for the purpose of engaging in fire or law enforcement training. California Assembly Bill 11, amending California Labor Code section 230.4, requires these employers to permit an employee who performs emergency duty as a volunteer firefighter, reserve peace office or as emergency rescue personnel to take this leave of absence for the purpose of engaging in fire, law enforcement or emergency rescue training.[5]

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[2] CAL. LAB. CODE § 218.5.

[3] CAL. LAB. CODE § 227.

[4] CAL. LAB. CODE §§ 1194.2, 1197.1 (as amended by A.B. 442 (Oct. 11, 2013)).

[5] CAL. LAB. CODE § 230.4 (as amended by A.B. 11 (Aug. 19, 2013)).

§ 3.1.2(a)(vi)

Required Provision of Recovery Periods to Avoid Heat Illness

California Senate Bill 435 requires employers to provide a one-hour-of-pay premium for each day an employer fails to provide "recovery periods" to avoid heat-related illness for those employees who work outside.[6] A *recovery period* is defined as "a cool down period afforded an employee to prevent heat illness." The new law specifies that an employee cannot be required to work during a recovery, meal or rest period.

§ 3.1.2(a)(vii)

Domestic Worker Bill of Rights Adds Domestic Employees to Overtime Laws

The "Domestic Worker Bill of Rights" adds sections 1450 to 1454 to the California Labor Code.[7] The new law requires that domestic work employees receive overtime compensation for hours worked in excess of nine hours in any workday or 45 hours in a workweek. *Domestic work employees* under the new law include childcare providers, caregivers of people with disabilities, elderly persons, or persons who are sick or convalescing, housekeepers, maids, and persons holding other household occupations.

The law does not apply to *casual babysitters*, defined as any person whose vocation is not babysitting and whose employment is irregular or intermittent. Also excluded from the law's application are personal attendants who provide domestic services to low-income individuals through California's In-Home Support Service, a program that assists qualifying elderly, disabled or blind individuals with housecleaning, meal preparation, laundry and other personal care as an alternative to out-of-home care. The law will "sunset" on January 1, 2018 unless it is extended.

§ 3.1.2(a)(viii)

Prevailing Wages Due to Contractors on Oil Refineries

California Senate Bill 54 requires owners and operators of oil refineries to pay the prevailing hourly wage rate to any contracted workers who perform onsite work within an apprenticeable occupation in the building and construction trades.[8]

§ 3.1.2(a)(ix)

Successorship Liability & Farm Labor Contractors

California Senate Bill 168 adds section 1698.9 to the Labor Code and provides that farm labor contractors succeed to any claim for wages or penalties owed to employees of predecessor farm labor contractors and are liable for those wages and penalties if the successor farm labor contractors meet one or more specified criteria.[9]

§ 3.1.2(b)

Regulatory Developments

The hourly pay exception rates for certain overtime-exempt, white-collar employees have increased from the rates applicable in 2013. Effective July 1, 2014, the minimum annual

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[6] CAL. LAB. CODE § 226.7 (as amended by S.B. 435 (Oct. 10, 2013)).

[7] CAL. LAB. CODE §§ 1450-1454 (as added by A.B. 241 (Sept. 26, 2013)).

[8] CAL. LAB. CODE § 25536.7 (as added by S.B. 54 (Oct. 13, 2013)).

[9] CAL. LAB. CODE § 1698.9 (as added by S.B. 168 (Oct. 10, 2013)).

compensation for those employees covered by California's "white collar" exemptions (professional, administrative and executive) is $37,440; as of January 1, 2016, the minimum annual salary for employees covered by these exemptions will be $41,600.[10]

The increase in minimum wage also impacts the Commission Sales exemption contained in Wage Orders 4 and 7. Effective July 1, 2014, to be exempt from overtime, commissioned sales employees must earn at least $13.50 per hour. As of January 1, 2016, these employees must earn $15.00 per hour.[11]

§ 3.1.2(c)

Case Developments

In 2013, California wage and hour law, fueled by continuing class actions, continued to evolve. Court decisions addressed everything from class certification in independent contractor and meal and rest period claims, to commission and piece-rate payments, to how employers handle damages determinations in wage and hour class actions. The principal decisions are summarized below.

§ 3.1.2(c)(i)

Class Certification of Independent Contractor Claim

On remand after *Brinker Restaurant Corporation v. Superior Court*,[12] a court of appeal in a separate case reversed a trial court decision that refused to certify unpaid overtime, meal period and rest period claims.[13] The court first noted that common evidence would be used to determine whether the class members were independent contractors or employees. The court relied heavily on the fact that the defendant had "consistent companywide policies applicable to all employees regarding work scheduling, payments, and work requirements."[14] Without deciding the ultimate issue of employment status, the court held that the evidence relied on by the parties "would be largely uniform throughout the class."[15]

With regard to the plaintiffs' meal and rest period claims, the court noted that the defendant did not have meal or rest period policies in place during the class period and did not know whether the class members took meal or rest periods. The court held that overtime claims based on records showing unpaid overtime hours should have been certified because questions regarding the amount of time worked by each class member would not predominate; instead, the defendant's time records showed unpaid overtime and it would be a simple matter of the amount owed. Fourth, the court affirmed the trial court's denial to certify off-the-clock claims was appropriate because there was evidence to show that "the off-the-clock claims arose from individual actions of particular supervisors and the extent of the off-the-clock work varied substantially for each worker and for each job."[16]

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[10] CAL. LAB. CODE § 1182.12 (as amended by A.B. 10 (Sept. 25, 2013)).

[11] CAL. LAB. CODE § 1182.12 (as amended by A.B. 10 (Sept. 25, 2013)).

[12] 53 Cal. 4th 1004 (2012).

[13] *Bradley v. Networkers Int'l L.L.C.*, 211 Cal. App. 4th 1129 (2012), *review denied*, 2013 Cal. LEXIS 2164 (Mar. 20, 2013).

[14] 211 Cal. App. 4th at 1147.

[15] 211 Cal. App. 4th at 1147.

[16] 211 Cal. App. 4th at 1156.

§ 3.1.2(c)(ii)

Employer Wage Deductions

In a class action brought by security guards for building construction sites throughout California, the California court of appeal held that the employer was entitled to exclude compensation up to eight hours a day as sleep time during the guards' 24-hour weekend shifts.[17] The guards were required to sign on-call agreements before being hired, requiring them to reside in trailers at the construction site and designating the period from 9:00 p.m. to 5:00 a.m. each day as "on-call time" for which they were generally only paid for time spent responding to any alarms or security concerns.

Among other restrictions, guards could not leave the site during on-call hours unless a reliever was available and even then they were restricted in how far they could go and were required to carry radios and pagers. Guards actively patrolled the construction site on weekdays from 5:00 A.M. to 7:00 A.M. and then from 3:00 P.M. to 9:00 P.M. (eight hours). From 7:00 A.M. to 3:00 P.M. on weekdays, the guards were free to leave and do as they pleased, and on weekends, guards were on active patrol from 5:00 A.M. to 9:00 P.M. (16 hours).

The trial court granted the class's motion for summary adjudication, finding that the employer's on-call policy violated Wage Order No. 4 and California Labor Code section 1194 because the employer's level of control over the guards during the on-call period was sufficient to bring the time within the applicable state law definition of "hours worked." On appeal, the court of appeals considered the hours between 9:00 P.M. and 5:00 A.M. constituted "hours worked," but it found that the employer was entitled to exclude compensation up to eight hours a day as sleep time during the guards' 24-hour weekend shifts. The court applied a seven-factor test to analyze the employer's level of control over the guards during on-call time and supported its decision to exclude the eight hours of sleep time so long as the time is "uninterrupted, a comfortable place is provided, and the parties enter into an agreement covering the period."[18] In this case, the employment agreement manifested the parties' intent that the guards would not be compensated for the eight hours between 9:00 P.M. and 5:00 A.M., although it did not refer to such time as "sleep time."

The California Supreme Court accepted this case for review in October 2013.

§ 3.1.2(c)(iii)

Overtime Exemptions

Managers Performing Both Exempt and Nonexempt Tasks Are Not Exempt When Primary Purpose of Task Is Not Related to Supervision or Operations of Department

An assistant manager of a grocery store regularly spent more than 50% of her work hours doing nonexempt tasks, such as assisting with checkout and stocking shelves.[19] After bringing suit alleging she was not properly classified as exempt, the court of appeal held that the proper question to resolve this issue is whether the reason or purpose for undertaking the nonexempt task was to assist with supervising employees or to contribute to the smooth functioning of the department for which the manager was responsible. Ultimately, the court of

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[17] *Mendiola v. CPS Sec. Solutions, Inc.*, 217 Cal. App. 4th 851 (2013), *review granted, depublished by* 310 P.3d 925 (Cal. 2013).

[18] 217 Cal. App. 4th at 874.

[19] *Heyen v. Safeway Inc.*, 216 Cal. App. 4th 794 (2013).

appeal upheld the jury's finding that the employee was primarily engaged in nonexempt duties for purposes other than supervision or department operations.

Insurance Adjusters Not Overtime Exempt

In *Negri v. Koning & Associates*, the court of appeal held that an insurance claim adjuster was not exempt under the administrative exemption because the insurance adjuster did not receive a salary and instead was paid hourly.[20] The insurance adjuster received an hourly rate of $29 for each hour he billed his clients. The court of appeal found that the trial court erred by not considering the salary basis test of the exemption analysis, which requires the employee to receive a "salary equivalent to no less than two times the state minimum wage."[21] The court held that even though in practice the employee received more than two times the minimum wage for each hour worked, he was not paid a "salary" as defined under the law because, relying on federal regulations implementing the Fair Labor Standards Act (FLSA), the employee must receive a "predetermined amount . . . not subject to reduction because of variations in the quality or quantity of the work performed" to qualify as a "salary."[22] Since the employees' compensation varied based on the hours he billed the client and he was not paid a guaranteed amount, the court found the employee did not meet the first prong of the exemption test (*i.e.*, the "salary basis test") and therefore was not exempt.

§ 3.1.2(c)(iv)

Meal & Rest Periods

Class Certification in Meal & Rest Period Claims

In the aftermath of *Brinker*,[23] the court of appeal in *Faulkinbury v. Boyd & Associates, Inc.* reversed a trial court order denying certification of meal and rest period claims.[24] First, the court of appeal held that a challenge to the employer's policy of requiring employees to sign an on-duty meal period agreement and to take on-duty meal periods was amenable to class treatment because the lawfulness of the policy could be determined on a classwide basis. Second, the court held that the plaintiffs' claim that the employer had no policy to provide rest periods, requiring the putative class members to remain at their posts at all times, was amenable to class treatment because the inquiry focused on the uniform rest break policy, or lack thereof, even though the damages assessment would require a more individualized analysis. The court ultimately found that individual questions of whether a particular employee received a meal or rest period did not defeat class certification.

In contrast, in *Dailey v. Sears, Roebuck & Co.*, the court of appeal affirmed an order denying certification of a manager misclassification action.[25] Plaintiff alleged that the company violated California wage and hour laws by classifying its auto center managers and assistant managers as exempt employees. In support of its decision, the court noted that "highly individualized inquiries would dominate resolution of the key issues in this case."[26] First, common questions did not predominate because the evidence "show[ed] a wide variation in proposed class members' job duties" and thus, plaintiff's theory of liability was not

[20] 216 Cal. App. 4th 392 (2013).

[21] 216 Cal. App. 4th at 394 (citing CAL. LAB. CODE § 515(a)).

[22] 216 Cal. App. 4th at 398.

[23] *Brinker Rest. Corp. v. Superior Ct.*, 53 Cal. 4th 1004 (2012).

[24] 216 Cal. App. 4th 220 (2013), *review denied*, 2013 Cal. LEXIS 7380 (July 24, 2013).

[25] 214 Cal. App. 4th 974 (2013), *review denied*, 2013 Cal. LEXIS 5853 (July 10, 2013).

[26] 214 Cal. App. 4th at 992.

susceptible of common proof at trial.[27] Second, plaintiff failed to present substantial evidence that the company "employed any policy or routine practice to deprive proposed class members of 'off-duty' meal and rest breaks."[28] Evidence that the company had no formal written policy regarding meals and rest periods for the putative class members provided "no evidence of a policy or widespread practice of [the company] to deprive nonexempt employees of uninterrupted meal periods and rest breaks."[29]

§ 3.1.2(c)(v)

Tip Pooling

Section 351 of the California Labor Code generally prohibits employers from keeping any portion of a gratuity "given to" or "left for" employees by a patron. In a case involving this provision, the California appellate court affirmed the trial court's conclusion that the casino's tip pooling policy did not violate section 351.[30] The policy required all dealers to contribute a set amount ($2.50 per dealing period) of the gratuities they received from players to a common account that was distributed to other casino employees each payday. The appellate court noted that section 351 does not invalidate tip pooling in all circumstances, and it rejected that tip pooling is only permissible in the restaurant context. The appellate court further held that the customer's intent is not determinative, as it does not override an employment policy or agreement governing tip pooling.

§ 3.1.2(c)(vi)

Payment of Commissions

Commission pay plans can give rise to minimum wage claims. In *Balasanyan v. Nordstrom, Inc.*, the defendant-retailer paid its sales representatives by commission.[31] The commission compensation was intended to include up to 30 minutes of otherwise uncompensated stocking time and 40 minutes of other uncompensated pre- and post-shift work, such as sending thank-you notes, attending certain meetings, walking the sales floor and the like. The retailer had a procedure to ensure that the commission compensation would equal or exceed a guaranteed minimum rate of $10.85 for all hours worked. The district court deferred to recent state court decisions regarding the minimum wage and concluded that the commission pay plan could only provide compensation for the time spent in activities that generated commissions. As a result, the employer was liable for the minimum wage for the pre- and post-shift work time.

§ 3.1.2(c)(vii)

Vacation Pay

The court of appeal in *Choate v. Celite Corp.* highlighted how unions may waive their members' rights to "vested vacation time."[32] Union employees who worked for a mining and manufacturing company brought a lawsuit seeking unpaid vacation wages and waiting time

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[27] 214 Cal. App. 4th at 997.

[28] 214 Cal. App. 4th at 1000.

[29] 214 Cal. App. 4th at 1001.

[30] *Avidor v. Sutter's Place, Inc.*, 212 Cal. App. 4th 1439 (2013), *review denied*, 2013 Cal. LEXIS 3723 (May 1, 2013).

[31] 913 F. Supp. 2d 1011 (C.D. Cal. 2013), *review denied*, *Nordstrom, Inc. v. United States Dist. Court In re Nordstrom, Inc.*, 719 F.3d 1128 (9th Cir. 2013).

[32] 215 Cal. App. 4th 1460 (2013).

penalties after they were laid off. Under the collective bargaining agreement (CBA), the employees were entitled to a yearly "vacation allotment" based on each employee's length of employment and the number of hours they worked the preceding year. Upon termination, the employer did not pay them the vacation time they had accrued toward the next year's allotment. The employer argued that the union had waived the employee's right to vested vacation in accordance with California Labor Code section 227.3. That section allows a union to waive its members rights to "vested vacation time" by entering into a CBA that "otherwise provide[s]" for such waiver. The court of appeal held that a section 227.3 waiver must be clear and unmistakable, noting that the CBA in question did not reference section 227.3 and did not mention pro rata vacation pay.

§ 3.1.2(c)(viii)

Class Actions

Class Certification on Claims of Unpaid Wages and Related Penalties

A distribution warehouse employee for a medical manufacturing company filed a class action alleging his employer had an illegal rounding policy and improperly excluded discretionary bonuses from the overtime rate in violation of California law. The employee sought unpaid wages, waiting time penalties and wage statement penalties.[33] The trial court denied class certification, holding that the damages inquiry for the putative class was highly individualized. Therefore, class certification was inappropriate because common questions did not predominate. The trial court also held that the class size of 538 employees in total was unmanageable. The Ninth Circuit Court of Appeals reversed, finding that the district court abused its discretion, in part because damages in class actions are always an individualized inquiry and this alone is insufficient to defeat class certification. Further, the circuit court stated that a putative class of 538 members is not unmanageable. Instead, the court found that a class action was not only the superior method of adjudication, given the size of the class, but likely the only one. This is a post-*Comcast Corp. v. Behrend*[34] decision.

Employers Now Entitled to Individualized Damages and Affirmative Defense Determinations in Wage and Hour Class Actions

In *Wang v. Chinese Daily News, Inc.*,[35] the Ninth Circuit Court of Appeals held that employers defending against wage and hour claims are "'entitled to individualized determinations of each employee's eligibility' for monetary relief" and entitled "to litigate any individual affirmative defenses they may have to class members' claims."[36] After plaintiffs filed a class action against their employer—a community newspaper—for wage and hour violations based on the FLSA, California's Labor Code and section 17200 of the California Business and Professions Code, the Ninth Circuit vacated the district court's certification decision under Federal Rule of Civil Procedure 23(b)(2). The court of appeals remanded the case to the district court to consider whether the case should be certified as a

[33] *Leyva v. Medline Indus.*, 716 F.3d 510 (9th Cir. 2013).

[34] 133 S. Ct. 1426 (2013).

[35] 709 F.3d 829 (9th Cir. 2013), *opinion withdrawn, substituted opinion at* 2013 U.S. App. LEXIS 18245 (9th Cir. Sept. 3, 2013) (substituting decision as a result of the U.S. Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), which held that the capacity of classwide proceedings to generate common answers to resolve the litigation matters over whether there are common questions raised).

[36] 709 F.3d at 836.

class action under Rule 23(b)(2), requiring proof that common questions of law and fact predominate over questions affecting individual members.

§ 3.1.2(c)(ix)

Payment of Piece-Rate Workers

Piece Rate Payment is Treated the Same as Hourly Wages

Employers must pay for all hours worked and may not average all paid, productive hours with non-paid, non-productive hours for minimum wage compliance purposes.[37] The employer used a "flag hour" compensation system, in which each employee had a flag rate and each repair job had a set number of flag hours, regardless of the actual time spent doing the job. At the end of each pay period, the employer multiplied the flag rate by the flag hours to compute total compensation; if that amount fell short of the minimum wage for the actual hours works, the company paid minimum wage for the actual hours worked, rather than the flag rate. The court found that such a system results in underpayment of wages because the system failed to compensate the employees at minimum wage rates for hours waiting for repair work or otherwise engaged in non-repair tasks. The court held that the California Wage Orders regarding minimum wage payments apply uniformly regardless of the manner of compensation.

Piece-Rate Compensation Must Include Separate Compensation for Rest Breaks

Truck drivers for a distribution center who received compensation based on a combination of mileage driven and the performance of certain tasks brought a class action alleging their employer violated California's laws regarding meal and rest periods and wage statements.[38] The court of appeal found that common proof demonstrated that the employer's compensation system did not comply with California law because it did not separately compensate the drivers for rest periods, as required in a piece-rate system under the rule of *Armenta v. Osmose, Inc.*[39] Since it was undisputed that the employer failed to separately pay for rest periods, the court found that class certification was appropriate because the only issue to be resolved on remand was the drivers' damages.

§ 3.1.3

C. GENERAL OVERVIEW

California regulates employer wage and hour obligations through the Labor Code and Wage Orders that are issued by the Industrial Welfare Commission (IWC). The state's laws are enforced by the Division of Labor Standards Enforcement (DLSE), which is headed by the Labor Commissioner. The Labor Commissioner has the authority to issue regulations that interpret the state's laws.

In the past, the Labor Commissioner's interpretations of state law have been given substantial weight by the courts. Some years ago, the California Supreme Court concluded that a court should disregard general statements of interpretation that have not been formally promulgated as regulations.[40] However, the court concluded that the Labor Commissioner's opinion with

[37] *Gonzalez v. Downtown LA Motors, L.P.*, 215 Cal. App. 4th 36 (2013).

[38] *Bluford v. Safeway Stores, Inc.*, 216 Cal. App. 4th 864 (2013).

[39] 135 Cal. App. 4th 314, 323 (2005).

[40] *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557 (1996).

respect to the application of the law to particular facts should still be given weight. In June 2002, the Labor Commissioner issued an *Enforcement Policies and Interpretations Manual* that set out the Labor Commissioner's position on a wide range of wage payment obligations.[41] The Labor Commissioner's office also made available a selection of opinion letters. Through this informal process, the Labor Commissioner advises employers and employees of how it will resolve disputes and pursue enforcement of the law and thus may also have some influence over how the courts will resolve the same issues.

§ 3.1.3(a)

Relationship Between State & Federal Wage & Hour Laws

As a general rule, federal wage and hour laws are *less* restrictive than California's laws. However, in some important cases, federal law is more restrictive. The principal circumstances in which federal law is more restrictive are highlighted below. Federal law rarely preempts the state's ability to promulgate its own wage and hour laws. For example, the Federal Aviation Agency Authorization Act, which generally preempts state laws that affect the price, routes or services of motor carriers, does not preempt the state's prevailing wage laws, which set prevailing wages for dump truck drivers.[42] However, the Airline Deregulation Act has been found to have preemptive effect with respect to flight employees.[43] An employer must always consider both state and federal law when resolving any questions about an employee's wages.

§ 3.1.3(b)

Application of California Law to Out-of-State Employees

Exactly when an employment relationship has sufficient contact with California so as to be subject to regulation by the state is not well defined. California does have the authority to regulate the employment of individuals who reside in the state, who pay taxes to the state, and who depart from and return to California ports every day, even though the employees work on boats that travel beyond the federally recognized boundaries of the state.[44] The IWC has been found to have exercised the power to regulate such employees.[45]

Employees who reside and usually work outside of California are entitled to the overtime required by California law when they work in California for a day or week.[46] California laws apply to all employment in the state, regardless of an employee's residence. Furthermore, the interests of the states in which the employees resided would not be impaired by the application of California law to the employees while working in California. The exact limits of California's application of its laws, such as paystub requirements and vacation pay laws, remains uncertain.

§ 3.1.3(c)

Is There an Employment Relationship?

California's compensation laws apply only to employees and do not apply to independent contractors. The difference between an employee and an independent contractor is one of

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[41] The manual is available at http://www.dir.ca.gov/dlse/dlsemanual/dlse_enfcmanual.pdf.

[42] *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184 (9th Cir. 1998).

[43] *Fitz-Gerald v. Skywest, Inc.,* 155 Cal. App. 4th 411 (2007).

[44] *Pacific Merchant Shipping Ass'n v. Aubry*, 918 F.2d 1409 (9th Cir. 1990).

[45] *Tidewater Marine Western*, *Inc*., 14 Cal. 4th 557.

[46] *Sullivan v. Oracle Corp.,* 51 Cal. 4th 1191 (2011).

substance; an employee cannot become an independent contractor merely by agreeing to be considered a contractor. The constant broadening of the definition of an *employee* is discussed in Chapter 5.[47]

§ 3.1.3(d)

When Is a Public Employer Subject to the Constraints of State Law?

The state's Wage Orders generally exclude public employers from all of the provisions of the Wage Orders except those dealing with: the applicability of the Orders; the definitions used in the Orders; the minimum wage; credits against the minimum wage; and the penalty provisions. The following Wage Orders contain no exclusion for public employees:

- Wage Order 17: applies to all employees not otherwise exempted from a Wage Order;
- Wage Order 14: applies to agricultural employees; and
- the Minimum Wage Order.

Whether the Wage Orders and the Labor Code are enforceable against public employees requires a particularized analysis. The provisions of the Labor Code, such as the meal period requirements, do not apply to public employers unless a specific exception is shown.[48] However, the State of California is subject to the provisions of the Labor Code regarding the timing of payments to terminated employees and payment of overtime to white-collar employees, waiting time penalties, the obligation to pay wages concededly due before seeking a release of wage claims, compensatory time off, notice of paydays, place of payment of discharged employees, payment of striking employees, penalties for unpaid wages, limitation on court and other collection costs, misdemeanor penalties for failing to pay wages due, enforcement of wage claims by the DLSE and district attorney, attorneys' fees for collecting unpaid wages and the permissible advance payments of wages.[49] In addition, the Government Code and the Education Code define the obligations of public employers.

Some courts of appeal have found that the burdensome overtime obligations and premiums for missed meal and rest periods imposed by the Labor Code do not apply to charter counties.[50] Likewise, because charter cities enjoy autonomous sovereign control over their "municipal affairs" under article XI, section 5 of the California Constitution, the provisions of

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[47] *Estrada v. FedEx Ground Package Sys.*, 154 Cal. App. 4th 1 (2007) (finding that drivers were employees where they were required to work exclusively for the company, worked full-time, were scheduled by the company, were paid weekly, followed detailed company procedures as to how their work was to be performed, had to use company-approved materials, had to follow the company's appearance guidelines, were highly integrated with the company's main business and the company retained the right to control many aspects of the drivers' activities); *see also Arnold v. Mutual of Omaha Ins. Co.*, 202 Cal. App. 4th 580 (2011) (holding that an insurance agent was an independent contractor when she controlled the manner and means of selling the company's products; the agent determined the manner of her work, the company did not supervise or monitor her work and she had a nonexclusive contract); *Antelope Valley Press v. Poizner*, 162 Cal. App. 4th 839 (2008).

[48] *California Peace Officers Ass'n v. State of Cal.*, 188 Cal. App. 4th 646 (2010).

[49] CAL. LAB. CODE § 220.

[50] *Curcini v. County of Alameda,* 164 Cal. App. 4th 629 (2008); *Dimon v. County of L.A.,* 166 Cal. App. 4th 1276 (2008).

the California Prevailing Wage Law are not binding on charter cities or applicable to public works contracts of charter cities for municipal improvement works.[51]

The FLSA[52] has generally applied to state and local public employees since 1974.[53] As noted in THE NATIONAL EMPLOYER®, the ability of state employees to obtain a remedy for violation of the FLSA has been restricted by the limitations on federal court jurisdiction over claims against states.

§ 3.1.3(e)

When Is a Private Employer Subject to State Law?

Private employers are subject to all of the provisions of the Labor Code and the Wage Orders of the IWC unless specifically exempted from such provisions. Out-of-state employees who work in California for an entire day or week are subject to California's overtime requirements and potentially other requirements as well.[54] The application of the Wage Orders to different types of employers is explained below.

§ 3.1.3(f)

When Is a Private Employer Subject to Local Law?

Local government entities are more and more frequently turning to living wage ordinances to provide higher minimum wages and, sometimes, benefits or the cost of benefits for employees. The California Labor Code now permits local public entities to regulate employees' compensation. Most local entities have used this authority only to establish minimum wage rates for employers doing construction work or providing services to the public entity. Some local governments, such as the Cities of San Francisco and San Jose, have used this authority to establish minimum wage and sick leave requirements of general application.[55] Additionally, at least 20 cities and six counties in California have enacted living wage ordinances that require employers that contract with the city or county to pay a higher minimum wage. The local ordinances regarding construction work are often sponsored by the local construction and service unions. Where the local ordinance is drafted to closely follow local union agreements, the ordinance may be preempted by the National Labor Relations Act or the Employee Retirement Income Security Act.[56]

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[51] *Piledrivers' Local Union v. City of Santa Monica*, 151 Cal. App. 3d 509, 512 (1984); *see also State Bldg. & Constr. Trades Council of Cal., AFL-CIO v. City of Vista*, 54 Cal. 4th 547 (2012) (holding that wage levels of contract workers constructing locally funded public works are a municipal affair exempt from state regulation).

[52] 29 U.S.C. §§ 201 *et seq.*

[53] *See White v. Davis*, 30 Cal. 4th 528 (2003) (to comply with FLSA the state must, during budgetary impasse, pay at least minimum wage to employees not working overtime and must pay full wage including overtime to employees working overtime).

[54] *Sullivan v. Oracle Corp.,* 51 Cal. 4th 1191 (2011), *reversed in part, aff'd in part by* 662 F.2d 1265 (9th Cir. 2011).

[55] *See, e.g.*, San Jose Mun. Code § 4.100.040(B) (instituting a $10 per hour minimum wage for all employees who perform work within the City of San Jose except for those employers who neither have a facility within San Jose nor are subject to the San Jose business tax and except for employees who work less than two hours a week in San Jose).

[56] *Chamber of Commerce of the U.S. v. Bragdon*, 64 F.3d 497 (9th Cir. 1995); *Associated Builders & Contractors, Golden Gate Chapter, Inc. v. Baca*, 769 F. Supp. 1537 (N.D. Cal. 1991), *aff'd sub nom.*, *Chamber of Commerce of U.S. v. Bragdon*, 64 F.3d 497 (9th Cir. 1995); *Martinez v. Combs*, 49 Cal. 4th 35

§ 3.1.3(g)

When Is an Individual Manager Subject to State Law?

In a case of import to every manager, the California Supreme Court held that individual managers are not personally liable for some failures to pay employees correctly.[57] The court concluded that individuals are not liable for a failure to pay wages under the definition of an "employer" in the Wage Orders because that definition exceeded the definition of when an individual could be liable under the Labor Code. The court concluded that the broad definition of an employer used under the FLSA, which includes individuals who act on behalf of an employer, would not apply to the definition of an employer under the Labor Code. The court specifically rejected the finding of individual liability in *Bureerong v. Uvawas*[58] and found an opinion letter of the Labor Commissioner adopting *Bureerong* to be unpersuasive. The court concluded that an individual manager could not be found liable for converting an employee's wages when entitlement to the wages was in significant dispute and there was no allegation that a manager had the power to deliver the wages to an employee. The court further limited the potential claims against employers and managers when it found that a number of recently passed statutes did not create claims that could be pursued by individual employees. However, managers must still be sensitive to those provisions of the Labor Code that make managers specifically liable for certain wage payment practices and liable for the related penalties.[59]

§ 3.1.4

D. MINIMUM WAGE & OVERTIME OBLIGATIONS

§ 3.1.4(a)

Relationship of the Labor Code & Wage Orders

The Wage Orders of the IWC are the principal source of an employer's overtime and minimum wage obligations under state law. Through 1997, the Wage Orders required payment of daily overtime and double time, as well as weekly overtime. In 1998 and 1999, five of the Wage Orders only required the payment of overtime after 40 hours in a week. Effective January 1, 2000, Assembly Bill (A.B.) 60 reinstated those wage orders that had been in effect prior to 1998 and that had required daily overtime. The IWC later extended the daily overtime obligations to several industries that had not previously been regulated in an Interim Wage Order effective March 1, 2000. The Wage Orders were modified in October 2000 and again in January 2001, and a new Wage Order (Wage Order 16) for onsite construction, drilling, logging and mining employees took effect on January 1, 2001. The Interim Wage Order has receded to the background but generally continues in effect as new Wage Order 17.

Generally, all of an employer's operations will be covered by the single Wage Order, as supplemented by the Interim Wage Order, that best describes an employer's business. If an employer's operations are not covered by one of the industry orders listed below, then the

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(2010) (agents of employer acting within scope of agency were not employers); *Futrell v. Payday Cal., Inc.*, 190 Cal. App. 4th 119 (2010), *rev. denied*, 2011 Cal. LEXIS 3210 (Mar. 30, 2011) (payroll processing company not employer).

[57] *Reynolds v. Bement*, 36 Cal. 4th 1075 (2005); *see also Bradstreet v. Wong,* 161 Cal. App. 4th 1440 (2008) (reaffirming the absence of liability on the part of individual shareholders, directors and corporate officers for the failure of corporations to pay all wages due).

[58] 922 F. Supp. 1450 (C.D. Cal. 1996).

[59] CAL. LAB. CODE § 558.

employer's obligations will be controlled by Wage Order 14 for agricultural employees, Wage Order 15 for private household employees, Wage Order 16 for on-site occupations in construction, drilling, logging and mining, Wage Order 4, which covers virtually all remaining private employees in the state, or Wage Order 17, which is intended to cover any remaining employees. The state's Wage Orders are summarized in the following table.

Wage Order	Covers	Includes
1-2001	Manufacturing Industry	Making, processing or packaging of goods and articles
2-2001	Personal Service Industry	Beauty salons, barber shops, massage parlors, health clubs
3-2001	Canning, Freezing, Preserving Industry	Canning or processing fruits, vegetables, fish, fowl
4-2001	Technical, Clerical, Mechanical Employees	All employees not covered by any other Wage Order
5-2002	Public Housekeeping Industry	Food service industry, hotels, office buildings, hospitals, schools
6-2001	Laundry, Dry Cleaning Industry	Commercial and self-service laundries, dry cleaners
7-2001	Mercantile Industry	Renting, purchasing, selling, distributing goods at wholesale or retail
8-2001	Preparing Agricultural Products Off-the-Farm Industry	Grading, processing, slaughtering, preparing agricultural, horticultural, meat, dairy products
9-2001	Transportation Industry	Trucking, railroads, airlines, shipping, warehousing
10-2001	Amusement/ Recreation Industry	Theaters, gymnasiums, bowling alleys, amusement parks, race tracks
11-2001	Broadcasting Industry	Taping or broadcasting programs via radio or television
12-2001	Motion Picture Industry	Production of motion pictures or film for viewing in theaters or television
13-2001	Preparing Agricultural Products On-the-Farm Industry	Preparation or packing on a farm of agricultural, horticultural, meat, dairy products

Wage Order	Covers	Includes
14-2001	Agricultural Employees	Planting, cultivating and harvesting agricultural products; raising of livestock
15-2001	Household Employees	Housekeepers, butlers, cooks, chauffeurs, gardeners, tutors
16-2001	On-Site Employees	On-site construction, drilling, logging and mining employees
17-2001	Miscellaneous Employees	Employees not covered by any other Wage Order

The few occupations that are excluded from the Wage Orders are listed below in the chart of overtime exemptions. See § 3.1.4(e) below.

Wage Order 16 eliminated, effective January 1, 2001, the unwritten exemption from the state's Wage Orders for on-site construction, drilling, logging and mining employees. The provisions of Wage Order 16 will supersede the provisions of any other Wage Order with respect to on-site construction, drilling, logging and mining employees. Wage Order 16 provides the same basic alternative work schedule as the other Wage Orders, but has a more stringent procedure for implementing such a schedule. The Order provides that employer mandated travel after the first location at which an employee is required to report must be paid at the same rate as regular work. The obligation for an employee who is paid two times the minimum wage to provide tools of the craft at the employee's expense is made subject to the statutory obligation to reimburse an employee for expenses and losses. This obligation has also been narrowed in Wage Order 16 (and the other Wage Orders as well) to include only hand tools and personal equipment, and to exclude power tools.

Additional flexibility is provided with respect to the scheduling of rest periods. Employees' hours of work are limited to 72 in a week, except in case of emergencies. The reporting pay and rest period provisions may be varied by the terms of collective bargaining agreements. The ability to vary these obligations by a collective bargaining agreement has been called into question as of January 1, 2002, by the legislature's limitation of the collective bargaining exemption to overtime and alternative work schedule requirements.[60] Employees who are covered by collective bargaining agreements that provide a base wage that is 30% more than the minimum wage and premium pay for overtime are exempt from the generally applicable overtime requirements and may utilize a different schedule of meal periods.[61]

Wage Order 17, which also took effect on January 1, 2001, was intended to apply to all employees not previously covered by and all employees not specifically exempted from the IWC's 1997 Wage Orders except as such employees may be specifically exempted by law. Wage Order 17 is, in somewhat different form, the Interim Wage Order that was promulgated by the IWC effective March 1, 2000.

[60] CAL. LAB. CODE § 514.

[61] This exception to the meal periods required by the Labor Code was found invalid in *Lazarin v. Superior Court*, 188 Cal. App. 4th 1560 (2010) and *Bearden v. United States Borax, Inc.*, 138 Cal. App. 4th 429 (2006).

§ 3.1.4(b)

Work Time for Minimum Wage & Overtime Purposes

Compliance with the state's wage payment obligations is computed on a workweek that consists of seven, consecutive 24-hour workdays. An employer can use a 24-hour period other than the calendar day as a workday. An employer can have the same workday for all employees, or have different workdays for different groups of employees. However, once a workday is established for an employee, it is expected to be of indefinite duration and rarely changed. Employers should specifically advise employees of the workweek that will be used to calculate overtime. A workweek consists of seven consecutive workdays. An employer cannot establish an arbitrary workday, or workweek, to avoid overtime premiums that would be due.[62] If an employer does not designate when a workweek begins and ends, then the default workweek beginning on Sunday and ending on Saturday will apply.

§ 3.1.4(b)(i)

What Is Work Time?

California generally defines *work time* somewhat more broadly than does federal law.[63] While, under federal law, work is that which an employer "suffers or permits," the state defines *work time* to include all that which an employer suffers, permits, or "controls." Set out below are the circumstances in which California's broader definition of *work time* produces a different result than the federal definition. For a discussion of activities not discussed below, such as training time, breaks, and time to change clothes, refer to THE NATIONAL EMPLOYER®. A special exception allows health care employers that are covered by Wage Orders 4 or 5 to define *work time* in accordance with federal law.

California's broader definition of *work*, as that which an employer suffers, permits or "controls," has been construed to make extended commute time on company buses compensable hours of work where the employer requires employees to ride on the buses.[64] Under federal law, travel as a passenger outside of the regular workday on an overnight trip is not considered to be work time. The time spent by employees on employer-provided shuttles from a parking lot to a worksite was found not to be compensable where the employees did not have to ride the shuttles from parking lots to work, but could be dropped off at the worksite.[65] Similarly, requiring employees to drive a company vehicle does not alone require compensation for the employee's commute time.[66]

The state Labor Commissioner has concluded that meal periods are not compensable only if they are at least 30 minutes in length, if the employee is relieved of all duty, and if the

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[62] *Seymour v. Metson Marine, Inc.*, 193 Cal. App. 4th 64 (2011).

[63] In the health care industry, hours worked are defined identically with hours worked under federal law. CAL. CODE REGS. tit. 8, § 11050(2)(K). Only time spent carrying out assigned duties is hours worked for employees who are required to reside on their employer's premises and who are covered by Wage Order 5. CAL. CODE REGS. tit. 8, § 11050(2)(K).

[64] *Morillion v. Royal Packing Co*., 22 Cal. 4th 575 (2000).

[65] *Overton v. Walt Disney Co*., 136 Cal. App. 4th 263 (2006).

[66] *Rutti v. Lojack Corp.*, 578 F.3d 1084 (9th Cir. 2009) (holding that, under federal and California law, an employee required to drive a company vehicle was not entitled to compensation for time spent commuting to and from job sites because he was free to determine when he left, his route, and which assignment he drove to first).

employee is free to leave the premises.[67] Under federal law, an employee need not be able to leave the premises for a meal period to be noncompensable.

On-call time is not compensable if the employee can use the time spent on call primarily for his or her own benefit. Considerations in determining whether on-call time is work time are: geographical restrictions on the employee's movement, required response time, nature of the employment relationship, including industry practice, and any other limitation on the employee's ability to use the time for his or her own benefit.[68] In determining whether on-call time is work time, the state does not give any deference to whether the employer and employee have agreed to consider the on-call time to be noncompensable.

The state does not specifically exclude from work time certain activities that are excluded from work time under federal law. The activities that are excluded from work time under federal law but not state law include preliminary and after-work activities, and clothes changing and washing time under collective bargaining agreements.[69]

§ 3.1.4(c)

The Minimum Wage Obligation

§ 3.1.4(c)(i)

What Is the Minimum Wage Obligation?

Effective July 1, 2014, the minimum wage rate in California increases to $9 per hour.[70] The minimum wage rate will increase again to $10 per hour on January 1, 2016.

The California Labor Commissioner has construed the minimum wage law to require an employee to be paid for each hour of work. As a result, under the Labor Commissioner's view, an employee who is paid $10 per hour for six hours of work, but then paid nothing for a seventh hour of work would still be entitled to an additional hour of compensation at the minimum wage. This is true even though the employee has already been paid $60 for seven hours of work, which works out to an hourly rate higher than the minimum wage. The Labor Commissioner's interpretation has found increasing acceptance by the courts.[71]

California allows certain learners and handicapped workers to be paid less than the full minimum wage. Generally, a certificate of approval must be received from the Labor Commissioner before an employer uses one of these special provisions.

A special formula for calculating the minimum wage applies to employees of licensed commercial passenger fishing boats under Wage Order 10.

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[67] *Bono Enters., Inc. v. Bradshaw*, 32 Cal. App. 4th 968 (1995), *disapproved by Tidewater Marine Western v. Bradshaw*, 14 Cal. 4th 557 (1996).

[68] *Seymour*, 193 Cal. App. 4th 64 (45-minute response time and limitations on sleep location made on-call time into work time).

[69] 29 U.S.C. §§ 203(o), 254.

[70] CAL. LAB. CODE § 1182.12 (as amended by A.B. 10 (Sept. 25, 2013)).

[71] *Compare Armenta v. Osmose, Inc.*, 135 Cal. App. 4th 314 (2005), *and Medranos v. Arrigo Bros. Co. of Cal.*, 125 F. Supp. 2d 1163 (N.D. Cal. 2000), *and Cardenas v. McLane Foodservices, Inc.*, 796 F.Supp.2d 1246, 1252-53 (C.D. Cal. 2011); *see also Fitz-Gerald v. Skywest, Inc.,* 155 Cal. App. 4th 411 (2007) (distinguishing *Armenta* where employees whose employment was regulated by the Railway Labor Act were compensated in accordance with their collective bargaining agreement). In addition, see the discussion at §§ 3.1.2(c)(vi) and 3.1.2(c)(ix).

§ 3.1.4(c)(ii)

What Sources of Income Are Creditable Toward the Minimum Wage?

Employers may count as wages paid to their employees the reasonable cost to the employer of meals and lodging, as long as the employee voluntarily consents in writing to such a credit being taken. The notice required by the Wage Theft Protection Act of credits taken against the minimum wage is not such an agreement. At this time, the Wage Orders[72] limit the maximum credit for meals to:

	Effective January 1, 2008
Breakfast	$2.90
Lunch	$3.97
Dinner	$5.34

The Wage Orders limit the maximum credit for lodging to:

	Effective January 1, 2008
Room occupied alone	$37.63 per week
Room shared	$31.06 per week
Apartment occupied alone	$451.89 per month
Apartment where couple employed	$668.46 per month

The credit for apartments cannot exceed two-thirds of the ordinary rental value up to the limit shown above. The ability to take a credit for lodging is limited if the employee is required to live on the employer's premises. The permissible credits may increase as the minimum wage increases.

An employer generally cannot credit gratuities that an employee receives against the state's minimum wage obligation.[73] Nor can an employer or its representatives acquire any portion of an employee's gratuities.[74] A gratuity includes any payment made by a patron to a dancer employed under Wage Orders 5 or 10. This expansion of the definition of a gratuity prohibits an employer from taking any part of such an employee's gratuity or crediting any part of the gratuity against the employer's wage payment obligations.[75]

An employer must pay an employee the full amount of any gratuity left on a credit card slip, with no reduction for service charges imposed by the credit card company. Any such gratuity must be paid to the employee no later than the next regular payday.[76]

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[72] California Dep't of Industrial Relations, Minimum Wage Order (MW-2007), *available at* https://www.dir.ca.gov/dlse/FAQ_MinimumWage.htm.

[73] *Henning v. Industrial Welfare Comm'n*, 46 Cal. 3d 1262 (1988).

[74] *Compare Jameson v. Five Feet Rest.*, 107 Cal. App. 4th 138 (2003) (floor managers who had authority to supervise employees could not receive any portion of employees' tip pool even though floor managers provided direct services to customers), *with Matoff v. Brinker's Rest. Corp.*, 439 F. Supp. 2d 1035 (2007) (mandatory tip pool valid where no portion of the tip pool went to employer representatives).

[75] CAL. LAB. CODE § 350.

[76] CAL. LAB. CODE § 351.

§ 3.1.4(d)

The Overtime Obligation

§ 3.1.4(d)(i)

How Is the Overtime Obligation Different from the Minimum Wage Obligation?

The resolution of an overtime problem entails fundamentally different concepts from those required to resolve a minimum wage problem. The satisfaction of an employer's overtime obligation is resolved by formalistic concepts and turns not only on the amount paid, but on the labels and conditions attached to the payments that are made. The ultimate objective of overtime legislation is to force an increase in the rate of an employee's compensation to occur after a specified number of hours of work. Inasmuch as the change in compensation can be accomplished (or subverted) by juggling the employee's underlying rate of compensation, the determination of the employee's rate of compensation in fact, the employee's regular rate, is of primary importance.

§ 3.1.4(d)(ii)

What Is the Basic Overtime Obligation?

Assembly Bill 60 reinstated the obligation of an employer to pay overtime for all hours of work in excess of eight in one day, 40 in a single workweek, and for the first eight hours on the seventh day of work in a single workweek. Double-time compensation is generally required for all hours of work in excess of 12 in one day and for all hours of work in excess of eight on the seventh consecutive day of work in a single workweek.

Extra Players in the Motion Picture Industry

Extra players in the motion picture industry who are covered by Wage Order 12 must be paid double time for all hours of work in excess of ten in a day. Minors covered by Wage Order 12 must be paid overtime for a sixth day of work in a workweek.

Agricultural Employees

Agricultural employees who are covered by Wage Order 14 need only pay overtime after ten hours of work in a day and after six days of work in a workweek. Double time must be paid for all hours of work in excess of eight on a seventh consecutive day of work in a single workweek. Care must be taken to distinguish between employees involved in agricultural activities, who are subject to the relaxed overtime standard, and those employees involved in processing agricultural products for market on the farm, who are subject to the eight-hour-per-day and 40-hour-per-week overtime rules. These two groups of employees are covered by different Wage Orders.

Camp Counselors

Under Wage Order 5, camp counselors may work up to 54 hours in a week and six days in a workweek without the payment of overtime.[77] Such employees cannot work more than 54 hours in a workweek or six days in a workweek except in case of a *bona fide* emergency, and must then be paid overtime. A further exemption for camp counselors may be provided by the Labor Code and such employees may be exempt under federal law.[78]

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[77] CAL. CODE REGS. tit. 8, § 11050(3)(E)(1).

[78] CAL. LAB. CODE § 1182.4; 29 U.S.C. § 213(a)(3).

Personal Attendants

Personal attendants who are not employed by private homeowners and managers of small homes for the aged may work up to 40 hours in a week and six days in a week without the payment of overtime. Such employees cannot work more than 40 hours in a workweek or six days in a week except in case of a *bona fide* emergency, and must then be paid overtime. However, federal law may require such employees to be paid overtime after 40 hours of work in a workweek.

Personal attendants who are employed by private homeowners are exempt from all of the provisions of the state's Wage Orders except the provisions regarding the applicability of the Wage Order, the definitions used in the Wage Order, the minimum wage, credits against the minimum wage and penalties for failing to pay wages.[79] Personal attendants are those who supervise and assist individuals who because of youth, age, or disability are unable to care for themselves. An employee who spends more than one-fifth of his or her time in skilled care, general housekeeping, or other unrelated duties cannot qualify as a personal attendant. An employee who spends more than 80% of his or her time doing personal attendant tasks, and also performs some unskilled health care, still falls within the exemption.[80]

Child Care Employees

Employees with direct responsibility for children and others not emancipated from the foster care system who are receiving 24-hour care are entitled to overtime after 40 hours of work in a workweek, double time after 48 hours of work in a workweek and after 16 hours of work in a day.[81]

Employees of Ski Establishments

Employees of ski establishments are to have regularly scheduled workweeks of 48 hours or less during any month of the year during which skiing activities are being conducted. Overtime must be paid for all hours of work in excess of ten in a day or 48 in a workweek.

Employees of Hospitals or Establishments of Residential Care of Sick, Aged

Under state law, an employer that operates a hospital or an establishment that is primarily engaged in the residential care of the sick, aged, mentally ill or defective can pay overtime for hours worked in excess of 80 in a 14-day period of time if the facility pays overtime for all hours of work in excess of eight in one day.[82] A specific agreement or understanding with the employee to use such a pay plan is a prerequisite to its use.

Domestic Work Employees

California's "Domestic Worker Bill of Rights" requires that domestic work employees receive overtime compensation at the employee's regular rate of hours worked in excess of nine hours in any workday or 45 hours in a workweek.[83] Limited exceptions exist for casual babysitters and certain other employees.

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[79] CAL. CODE REGS. tit. 8, § 11150(2)(B).

[80] *Cash v. Winn*, 205 Cal. App. 4th 1285 (2012).

[81] CAL. CODE REGS. tit. 8, § 11050(3)(E)(2).

[82] CAL. CODE REGS. tit. 8, § 11050(3)(D).

[83] CAL. LAB. CODE §§ 1450–1454.

§ 3.1.4(d)(iii)

When Can an Employee Use Compensatory Time Off or Make-Up Time?

The Labor Code provision that allows certain employees to accumulate compensatory time off for use in later pay periods is rendered ineffectual by federal law.[84] This provision is limited by the federal Fair Labor Standards Act, which requires all overtime to be paid on the payday for the pay period in which the overtime was worked.

An employee can use make-up time in order to accommodate the employee's personal obligations.[85] An employee may request to make-up work time that has been or will in the future be lost due to a personal obligation of the employee. If the lost time is made up in the same workweek, the make-up time need not be counted as work time, to the extent that the make-up time, when added to the employee's other hours of work, does not exceed 11 hours in any day or 40 hours in the week.

An employee must make a signed, written request for each use of make-up time. The request need not be submitted before the time is missed, but must be submitted before the make-up time has been worked. An employee may submit a single request to work make-up time for up to four weeks if time will be missed due to a recurring personal obligation. An employer may disapprove any individual request to use make-up time and may have a policy against the use of make-up time.

Make-up time can only be used for the personal obligation of an employee. It is not clear to what extent, if any, the *bona fide* nature of an employee's assertion that such an obligation exists will be subject to scrutiny in any later dispute regarding the payment of overtime. An employer can make an employee aware of the existence of the make-up time provision, but cannot encourage or solicit an employee to make use of the provision.

Health care industry employees who work an "8 + 80" schedule cannot make use of make-up time. State and federal law do allow most health care employers to pay overtime for any hours of work in excess of eight in a day or 80 in a 14-day period of time if they have an agreement with the affected employees to use such a schedule. Because federal law requires overtime on such a schedule after eight hours of work in a day, the state's make-up time provision cannot be used to avoid overtime costs.[86]

§ 3.1.4(d)(iv)

What Is an Employee's Regular Rate?

All overtime is calculated as a multiple of an employee's regular rate of pay. An employee's regular rate is calculated on an hourly basis, which requires converting all monthly salaries, commissions, and noncash wages into an hourly figure. The regular rate is calculated before any deductions are taken from an employee's wages. Thus, deductions for income taxes, payroll taxes, charitable contributions, and the misperformance of work will not affect an employee's regular rate. The basic rules regarding the calculation of the regular rate are described in THE NATIONAL EMPLOYER®.

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[84] CAL. LAB. CODE § 204.3.

[85] CAL. LAB. CODE § 513.

[86] 29 U.S.C. § 207(j).

The regular rate is calculated in the same fashion under both federal and state law, with one important exception. Under state law, a salary provides compensation only for the employee's regular, nonovertime hours, notwithstanding any private agreement to the contrary."[87] Also under the Labor Code and in contrast to federal law requirements, the overtime due a nonexempt salaried employee is calculated as one-fortieth of the employee's weekly salary.[88] Under state law, an employer must pay *one and one-half times* the resulting amount for overtime hours of work. The overtime of an employee who works 50 hours in a week for a $500 weekly salary would be calculated as $500 ÷ 40 hours = $12.50 regular rate × 1½ overtime premium × 10 overtime hours = $187.50. Under federal law, a salary can be divided by the total hours worked in the week and *one-half* of the resulting amount can be paid for hours of work in excess of 40. Under federal law, the overtime of an employee who worked 50 hours in a week for a $500 weekly salary would be calculated as $500 salary ÷ 50 hours = $10 regular rate × ½ overtime premium × 10 overtime hours = $50 overtime.[89] A similar state rule has been applied to employees who were paid, essentially, a daily rate of pay and bonuses that were more akin to additional compensation for additional hours worked than lump-sum bonuses.[90] It is important to realize that the calculation of overtime compensation under California law becomes very involved, especially with respect to employees who are paid by piece rates, commissions, or some combination of these and hourly compensation. An employer can credit the premium pay it voluntarily provides for holidays against the overtime due under state law.[91] The holiday hours of work for which the premium pay is provided need not correspond with the overtime hours worked later in the same workweek. Although a holiday premium is not part of an employee's regular rate of pay, it can be considered a premium that is creditable against the overtime due. The crediting of the holiday premium against the overtime due was not an impermissible collection back of wages paid to the employee under section 221 of the Labor Code.

§ 3.1.4(e)

Is the Employment Relationship at Issue Exempt?

The Wage Orders provide limited exemptions from the state's overtime obligations for white-collar employees and for employees in particular industries and occupations. In A.B. 60, the IWC was charged with the responsibility to review the exemptions that had existed for a variety of occupations and, for the most part, limited or narrowed those exemptions. The changes in the partial overtime exemptions for ski-industry employees, child care employees, managers of small homes for the aged and some personal attendants, among others, are discussed above. The IWC also changed or preserved in modified form some of

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[87] CAL. LAB. CODE § 515(d)(1).

[88] CAL. LAB. CODE § 515(d); *see also Skyline Homes*, *Inc. v. Department of Indus. Relations*, 165 Cal. App. 3d 239 (1985). In 2013, the California legislature amended Labor Code section 515(d) to categorically preclude employers from including overtime in a fixed salary. CAL. LAB. CODE § 515(d)(2) (as amended by A.B. 2103, ch. 820 (Sept. 20, 2012)).

[89] The federal rule for calculating overtime on a salary could be used to compensate employees in California for the two-year period in 1998–1999 when the obligation to pay daily overtime had been suspended for most of the employees in the state. *Espinoza v. Classic Pizza*, *Inc.,* 114 Cal. App. 4th 968 (2004).

[90] *Lujan v. Southern Cal. Gas Co.*, 96 Cal. App. 4th 1200 (2002); *see also Marin v. Costco Wholesale Corp.,* 169 Cal. App. 4th 804 (2008) (lump-sum bonus was more like hourly compensation than salary compensation for the purpose of calculating overtime under state law).

[91] *Advanced-Tech Sec. Servs., Inc. v. Superior Court (Roman)*, 163 Cal. App. 4th 700 (2008).

the exemptions set out below. To the extent that the IWC left unchanged an exemption that existed in 1997, the exemption remains valid.[92]

To avoid the payment of overtime premiums, an employee must be exempt from the overtime requirements of both state and federal law. Unfortunately, the state's overtime exemptions do not correspond with exemptions in federal law. In addition, not all of the state's overtime exemptions are found in every Wage Order. To ascertain whether a particular exemption can be used, an employer must first make sure that the exemption is found in the Wage Order that applies to the employer's business. Set out below is a comparison of the most common overtime exemptions in state law and federal law.

This summary is not a complete list of overtime exemptions or of the requirements for the individual exemptions.

Federal Exemption	State Exemption	State Wage Order(s)
Executive	Executive*	All
Administrative	Administrative*	All
Professional	Professional including nurse midwives, nurse anesthetists and nurse practitioners, but excluding other registered nurses and pharmacists*	All
Professional	Degreed or credentialed teacher in private school	
Outside sales	Outside sales**	All
High-level computer occupations	Similar exemption with higher compensation requirement*	All
None	Individuals participating in national service programs**	All
Commission-paid employees of certain retail and service establishments	Commission-paid inside sales employees	4-2001 and 7-2002
Very limited collective bargaining agreement exemption	Collective bargaining agreements that provide some overtime and a base wage that is 30% more than state's minimum wage	All
No equivalent, not applicable	Alternative work schedules of ten hours per day	All

[92] *Collins v. Overnite Trans. Co*., 105 Cal. App. 4th 171 (2003) (overtime exemption for motor carrier employees remains valid after A.B. 60 was enacted as exemption existed in 1997).

Federal Exemption	State Exemption	State Wage Order(s)
No equivalent, not applicable	Alternative work schedules of up to 12 hours per day	4-2001 and 5-2002 for health care employees
Interstate drivers, helpers, loaders, and mechanics	Certain drivers	All
Taxicab drivers	Taxicab drivers	9-2001
Employees of regulated rail and air transportation companies	Unionized employees of rail and air carriers	9-2001
Trip rate driver	No equivalent	
Agricultural employees	Ten-hour days, six-day weeks except for sheepherders** and some irrigators	14-2001
Other employees of a farmer	No equivalent	
Seamen	Offshore seamen	
Fishermen and some fish-processing employees	Some commercial fishermen	10-2001 and 14-2001
Certain employees of small radio and television stations in small markets	Certain employees of radio and television stations in cities having a population under 25,000	11-2001
Employees primarily engaged in selling automobiles, trucks, farm implements, trailers, boats, or aircraft	Commission-paid inside sales employees	7-2001
Service employees of vehicle dealers	No equivalent	
Live-in domestic employees, baby sitters, and companions	Personal attendants*** in the home, babysitters under the age of 18 for minor children in the employer's home,* partial exemption for other live-in domestic employees	15-2001
Employees of very small forestry companies	No equivalent	
Employees of some seasonal camps, amusement and	Employees of some camps are exempt; partial exemption for	Lab. Code §§ 1182.4 and 52001

Federal Exemption	State Exemption	State Wage Order(s)
conference facilities	other camp counselors	
Employees of motion picture theaters	Motion-picture projectionists	10-2001
No equivalent	Partial exemption for ski establishments	10-2001
Certain family members of agricultural employers	Parent, spouse or child of employer**	All
No equivalent	Forty hour, six-day weeks for resident managers for small homes for the aged	5-2002
No equivalent	Employees with direct responsibility for children receiving 24-hour care where employees are paid overtime after 40 hours in week, and double time after 48 in week and 16 hours in day	5-2002
No equivalent	Student nurses in accredited training programs***	5-2002
No equivalent	Full-time ride operators of traveling carnivals***	10-2001
Probably exempt as professional employees	Professional actors and actresses***	11-2001 and 12-2001

* Executive, administrative and professional employees are exempt from the Wage Orders overtime requirements and the minimum wage, record keeping, uniform and equipment, cash shortage and breakage, meal-period and rest-period provisions of the Wage Orders.

** In addition to being exempt from the overtime provisions of the state's Wage Orders, occupations marked with an * are exempt from all of the provisions of the state's Wage Orders.

*** Are exempt from all of the provisions of the Wage Orders except applicability, definitions, minimum wage, credits against the minimum wage and penalties.

Employees Covered by a Collective Bargaining Agreement

A.B. 60 originally exempted from all of its provisions those employees who were covered by a valid collective bargaining agreement that provided premium rates for all overtime hours worked and a regular hourly rate of pay of 30% or more in excess of the state's minimum wage. In 2002, the exemption for collective bargaining agreements was limited to the overtime and alternative work schedule provisions of A.B. 60.[93] The validity of such overtime exemptions

[93] CAL. LAB. CODE § 514.

has been affirmed.[94] A.B. 60 was unclear as to whether the overtime premiums that are a condition of the exemption had to be for hours of work in excess of eight in a day, or simply for the overtime as defined in the collective bargaining agreement. Similarly, it was not clear whether the premium that must be paid is an additional one half of the regular rate or simply any amount in excess of the regular rate. In *Lujan v. Southern California Gas Co.*,[95] any premium in excess of the employee's regular rate of pay was found sufficient to meet the requirements of the exemption. The restriction of the exemption for collective bargaining agreements to overtime and alternative work schedules has invalidated those provisions of Wage Order 16 that provided greater latitude for scheduling the meal and rest periods of employees who are covered by collective bargaining agreements.[96]

Employees of Horse Racing Facilities

Racing stable employees and other employees of horse racing facilities are subject to the daily overtime requirements of Wage Order 10.[97]

Commercial Fishing Employees

Commercial fishing employees are subject to all of the terms of Wage Orders 10 and 14, except the overtime requirement. Under Wage Order 14, commercial fishing employees are licensed crew members of commercial fishing vessels. Under Wage Order 10, commercial fishing employees are crew members of licensed commercial passenger fishing boats.

Personal Attendants

Prior to the enactment of California's Domestic Workers Bill of Rights, caretakers who are not licensed nurses may have come within the "personal-attendant" exemption even if the caretakers also performed some health-care-related services. In *Cash v. Winn*, the caretaker came within the personal-attendant exemption because she spent more than 80% of her time doing personal-attendant tasks as defined by Wage Order 15.[98] The caretaker's provision of unskilled health care, such as taking temperatures, taking pulses and assisting with over-the-counter blood sugar tests, did not exclude the caretaker from the exemption. The court emphasized that its decision was consistent with the policy underlying the personal-attendant exemption to control costs for in-home elderly care for daily living activities. The caretaker would not have been within the exemption if she had spent less than 80% of her time doing personal-attendant tasks or if she had provided skilled medical care. Notably, however, the *Cash* case was decided before the enactment of California's Domestic Workers' Bill of Rights, which virtually eliminates the "personal-attendant" exemption from overtime pay in Wage Order 15 and requires employers to pay personal attendants overtime compensation. However, the law does not cover casual babysitters or certain personal attendants who provide domestic services to low-income individuals. Despite this development, Wage Order 15 continues to apply to workers employed in household occupations.

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[94] *Firestone v. Southern Cal. Gas Co.*, 219 F.3d 1063 (9th Cir. 2000); *National Broad. Co. v. Bradshaw*, 70 F.3d 69 (9th Cir. 1995).

[95] 96 Cal. App. 4th 1200 (2002).

[96] *Bearden v. United States Borax, Inc.*, 138 Cal. App. 4th 429 (2006).

[97] Wage payment rates, mount fees and exercise fees for jockeys exercising race horses are prescribed by statute. CAL. BUS. & PROF. CODE § 19500.

[98] *Cash v. Winn*, 205 Cal. App. 4th 1285 (2012).

Recruiters

Employee recruiters were found to come within the overtime exemption for commission-paid employees under Wage Order 4-2001.[99] Offering a candidate employee's services to a client in exchange for a payment of money from the client meets the ordinary definition of "sell," and the recruiters were therefore engaged in sales. The recruiters received a percentage of the adjusted gross profit that the employer earned from the clients as payment for their placement of the candidate employee. A percentage of the net profit of a transaction can be a commission; a commission need not be based solely on a percentage of the gross price of the product or service rendered.

National Service Program Attendees

An individual in a national service program carried out using assistance provided by the federal government, under U.S. Code title 42, section 12571 (*e.g.*, AmeriCorps), is excluded from all of the provisions of the Wage Orders if the individual is informed by the nonprofit educational institution or other entity using his or her service in advance of such service of any overtime that may be required. An individual shall then be able to opt out of the program. An individual cannot be discriminated against or be denied continued participation in the program for refusing to work overtime for a legitimate reason.[100]

Sheepherders

Sheepherders, whose working conditions were once virtually unregulated, are now covered by comprehensive wage payment regulations under the Labor Code.[101]

Pharmaceutical Sales Representatives

Pharmaceutical sales representatives qualify as "outside salesman" under the FLSA, and thus are exempt from the FLSA's overtime requirement. Supporting its decision, the U.S. Supreme Court held that the definition of a "sale" includes obtaining a nonbinding commitment from a physician to prescribe a particular pharmaceutical in an appropriate case.[102] The Court's holding relied heavily on the unique regulatory environment for pharmaceutical sales representatives, so it remains to be seen to what extent this ruling will apply in other industries. California employers will also need to ensure that their outside sales employees qualify under California's slightly different test for the "outside sales" position.

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[99] *Muldrow v. Surrex Solutions Corp.*, 202 Cal. App. 4th 1232 (2012), *review granted*, 2012 Cal. LEXIS 3472 (April 11, 2012), *vacated and transferred*, 143 Cal. Rptr. 3d 528 (2012), *substituted opinion*, 208 Cal. App. 4th 1381 (2012). The Supreme Court transferred the case back to the appellate court with directions to vacate the earlier decision and reconsider in light of *Brinker Rest. Corp. v. Superior Ct.*, 53 Cal. 4th 1004 (2012). The appellate court held that *Brinker* did not affect its holding on the commission-paid employees exemption. *See also* Wage Order No. 4-2001; CAL. CODE. REGS. tit. 8, § 11070(3)(D).

[100] CAL. LAB. CODE § 1171.

[101] CAL. LAB. CODE § 2695.1.

[102] *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012).

Private School Teachers

The overtime exemption for teachers in private schools is limited to employees whose primary duty is teaching and who customarily and regularly exercise independent judgment and discretion.[103] The exemption excludes teachers' aides and other nonteaching positions.

Inside Sales Employees

The overtime exemption for inside sales employees under Wage Orders 4 and 7 requires such employees to be primarily engaged in sales, to have total compensation that is at least one and one-half times the minimum wage and have compensation that is comprised at least one half of commissions.[104] A fixed amount per unit sold may compromise a commission.[105] An employer's obligation to pay employees at least the minimum wage will not, in and of itself, affect the proportion of an employee's compensation that comprises commissions.[106] Employers should be aware that the federal overtime exemption for commission-paid employees is, in many regards, narrower than that which is provided by Wage Orders 4 and 7.

§ 3.1.4(e)(i)

The White-Collar Exemptions

The most common overtime exemptions are for white-collar employees—executive, administrative and professional employees, and outside salespersons. The state's white-collar exemptions are fairly similar to the federal white-collar exemptions, but there are some significant differences. An employee will be considered exempt if the employee performs work of an exempt nature, the exempt work constitutes an employee's primary duty and the employee receives specified compensation. Work of an exempt nature includes:

- The *executive exemption* requires that an individual's primary duty consist of management. Management includes the selection, evaluation, payment and discipline of employees, or the ability to effectively recommend such action, the customary and regular direction of the work of two or more employees, being in charge of a customarily recognized subdivision of the business and the customary and regular exercise of independent judgment and discretion.
- The *administrative exemption* requires that an individual's primary duty consist of office or nonmanual work that is directly related to the management policies or general business operations of the employer or its customers or the performance of functions in the administration of a school that are directly related to academic instruction, if the individual acts as an assistant to an exempt executive or administrative employee or performs under only general supervision work along specialized or technical lines that requires special training, experience or knowledge, or executes under only general supervision special assignments and tasks, and such work entails the customary and regular exercise of independent judgment and discretion.

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[103] CAL. LAB. CODE § 515.8.

[104] *Keyes Motors v. Division of Labor Standards Enforcement*, 197 Cal. App. 3d 557 (1987).

[105] *Areso v. Carmax, Inc.*, 195 Cal. App. 4th 996 (2011).

[106] *Erichs v. Venator Group, Inc.*, 128 F. Supp. 2d 1255 (N.D. Cal. 2001).

- The *professional exemption* requires that an individual's primary duty consist of work that falls within certain licensed professions[107] that requires advanced knowledge in a field of science or learning, involves the exercise of creative talent, or entails teaching by a licensed teacher[108] or teaching in an accredited college or university, and requires the customary and regular exercise of independent judgment and discretion.[109] Registered nurses and pharmacists are not considered to be overtime-exempt professionals under state law, but may qualify as executive or administrative employees. Advanced practice nurses—nurses who are certified midwives, anesthetists or practitioners and who are primarily engaged in the work for which certification is required—may qualify as exempt professional employees if they meet all of the requirements of the exemption.[110] The federal exemption for professional employees limits the exemption to those employees who consistently exercise independent judgment and discretion. The Labor Commissioner has taken the position that work that "requires advanced knowledge" is work that can be performed only with a graduate degree.
- The *computer professional exemption* applies to employees who are highly skilled and proficient in the theoretical and practical application of highly specialized information in computer systems analysis, programming or software engineering. These employees are overtime exempt if their work is intellectual and creative, requires the use of independent judgment and discretion and their primary duty is a combination of: the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; the design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; and the documentation, testing, creation or modification of computer programs related to the design of software or hardware for computer operating systems. The computer professional exemption does not include:[111]

    - a trainee or entry-level employee who is learning to become proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming and software engineering;
    - an employee in a computer-related occupation who has not attained the level of skill and expertise necessary to work independently and without close supervision;
    - an employee who is engaged in the operation of computers or in the manufacture, repair or maintenance of computer hardware and related equipment;

[107] An employee may be an exempt learned professional if the job requires advanced knowledge in a field of science or learning, even if the employee is not licensed in that field. *Campbell v. PriceWaterhouseCoopers, L.L.P.*, 642 F. 3d 800 (9th Cir. 2011).

[108] An overtime exemption for teachers in private schools is provided by statute separate from the Wage Orders. CAL. LAB. CODE § 515.8.

[109] Adult education teachers employed by a school district were found to be exempt professional employees because they were state certified, engaged primarily in teaching, exercised independent judgment and discretion, and earned a salary. *Kettenring v. Los Angeles Unified Sch. Dist.*, 167 Cal. App. 4th 507 (2008).

[110] CAL. LAB. CODE § 515(f)(2).

[111] CAL. LAB. CODE § 515.5(b).

- an engineer, drafter, machinist or other professional whose work is highly dependent upon or facilitated by the use of computers and computer software programs and who is skilled in computer-aided design software, including CAD/Cam, but who is not in a computer systems analysis or programming occupation;
- a writer engaged in writing material, including box labels, product descriptions, documentation, promotional material, setup and installation instructions, and other similar written information, either for print or for onscreen media or who writes or provides content material intended to be read by customers, subscribers or visitors to computer-related media such as the World Wide Web or CD-ROMS; and
- an employee who is engaged in any of the activities set forth in any of the listed exempt activities for the purpose of creating imagery effects used in the motion picture, television or theatrical industries.

- The exemption for *outside salespersons* requires that the individual spend more than one-half of his or her time engaged in selling goods or services at locations away from the employer's place of business. The federal exemption for outside salespersons had limited the exemption to individuals who do spend less than 20% of a customary workweek engaged in activities that are unrelated to their own sales, but this requirement was repealed effective August 23, 2004.[112]

"Primary Duty" Test

An employee must perform work of an exempt nature as the employee's primary duty to be an overtime-exempt executive, administrative or professional employee. A.B. 60 specifically defines an employee's *primary duty* as those activities in which an employee spends more than one-half of his or her time. As a result, both the exempt quality of each task that an employee performs and the quantity of time that is spent in such tasks must be appraised in determining whether an individual is an overtime-exempt white-collar employee. The narrow reading of the overtime exemptions under the federal FLSA has been applied to the overtime exemptions that appear in the state's Wage Orders.[113] Where a manager is engaged in an ordinarily nonexempt activity, the time spent can be considered exempt only when the work is done for an exempt purpose, such as training.

The requirement that an exempt employee spend 50% of his or her time in exempt work was specifically affirmed by the California Supreme Court with respect to outside salespersons.[114] In *Ramirez*, an employee sold and delivered bottled water on a route. The Supreme Court concluded that the employee had, by the objective requirements of the job, to spend more than one-half of his or her time engaged specifically in sales in order to be an overtime exempt outside salesperson. The court observed that the same narrow definition of an employee's primary duty appears in the Wage Orders.

"Production Exception" & the Administrative Exemption

The *production exception*, which excludes from the administrative exemption those employees who are engaged in an employer's day-to-day production of goods and services,

[112] 29 C.F.R. § 541.500.

[113] *Nordquist v. McGraw-Hill Broad. Co.*, 32 Cal. App. 4th 555 (1995).

[114] *Ramirez v. Yosemite Water Co.*, 20 Cal. 4th 785 (1999).

has been given varying weight when determining the scope of the exemption for administrative exemption under the state's Wage Orders.[115] In *Bell v. Farmers Insurance Exchange*, insurance adjusters were found to be entitled to overtime where the employer provided only claims adjusting services, the claims adjusters had little settlement authority, and the employer reserved significant decisions to management. Of more significance than the employees' perceived limited decision-making authority was the court's conclusion that employees who are engaged in the day-to-day delivery of services could not be considered to be exempt. With no precise definition of what activities are so closely related to the day-to-day delivery of services or production of goods that the responsible employees cannot be exempt, both employers and the courts will struggle to determine when overtime is due.[116]

When the exempt status of claims adjusters was revisited in *Harris v. Superior Court*, the California Supreme Court gave the "production exception" considerably less weight, admonishing that any attempt to draw a distinction between nonexempt "production" workers who carry out the daily needs of a business and exempt employees who "service" the business as a whole was of modest value.[117] However, on remand, the appellate court appeared to give the distinction decisive weight by holding that the adjusters at issue did not satisfy the requirement that exempt administrative work be "directly related to management policies or general business operations."[118] Ultimately, the appellate court found the adjusters' duties were too focused on the day-to-day tasks of adjusting individual's claims. The court found the many federal cases to the contrary unpersuasive.[119] However, the impact of this decision may be modest because the California Supreme Court ordered the decision be de-published on the subsequent appeal of the employers.[120]

In *Combs v. Skyriver Communications Inc.*,[121] the court reached the opposite conclusion and held that a manager of capacity planning and director of network operations was an overtime exempt administrative employee. The employee claimed he spent 60% to 70% of his time maintaining the well-being of the network, but the employer countered by showing that the employee was engaged in high-level troubleshooting, capacity and expansion planning, planning the integration of different networks, negotiating leases, sourcing and purchasing equipment, and preparing reports to senior management. The court viewed the "administrative/production work dichotomy" as a guideline that need not be applied in every case. It held that the employee, who was actively engaged in running or servicing the business, otherwise met the requirements of the administrative exemption, and therefore the employee was not entitled to overtime compensation.

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[115] *Bell v. Farmers Ins. Exchange*, 87 Cal. App. 4th 805 (2001).

[116] *Eicher v. Advanced Bus. Integrators, Inc*., 151 Cal. App. 4th 1363 (2007) (employee who implemented computer software at customers' sites did not fall into the administrative exemption because he did no more than train customers in the use of the employer's software, troubleshoot software problems, and gather customer data to enter into the employer's software); *Combs v. Skyriver Commc'ns, Inc.,* 159 Cal. App. 4th 1242 (2008) (employee who had broad authority to integrate and manage computer resources was overtime exempt).

[117] 154 Cal. App. 4th 547 (2007), *reversed and remanded*, 53 Cal. 4th 170 (2011), *on remand*, 207 Cal. App. 4th 1225 (2012).

[118] 207 Cal. App. 4th 1225.

[119] 207 Cal. App. 4th 1225.

[120] *Harris v. Superior Ct.*, 2012 Cal. LEXIS 10811 (Oct. 24, 2012).

[121] 159 Cal. App. 4th 1242 (2008).

Licenses & the Learned Professional Exemption

While the absence of a license precludes the application of the arm of the professional exemption for a variety of licensed occupations, including certified public accountants and lawyers, the absence of a license did not preclude the use of the other arm of the learned professional exemption.[122] That arm requires that an employee's primary duty be work that is "predominantly intellectual and varied in character" and requires a "prolonged course" of intellectual instruction and study.[123] Under FLSA regulations, that phrase restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession—*e.g.*, professions for which the possession of an appropriate academic degree is required.[124] For example, in *Solis v. State of Washington*, the Ninth Circuit Court of Appeals found that the education requirements for social workers did not satisfy this requirement.[125] The court based its decision, in part, because the social worker positions did not "plainly and unmistakably" include a specialized course of study directly related to their positions. The court held that the learned professional exemption applies to positions that require a prolonged course of *specialized* instruction, not positions that draw from many varied fields.

"Salary Basis" Test

In most cases, a key element of the white collar overtime exemptions is the "salary basis test." Under that test, if a salaried exempt employee performs any work in a workweek, deductions may not be made from the full weekly salary for absences occasioned by the employer or by the operating requirements of the business.[126] An exempt executive, administrative or professional employee must be paid a salary of at least two times the state's minimum wage for 40 hours of work per week. Based on the increase in the state minimum wage on July 1, 2014, to $9 an hour, an employee must now be paid at least $720 per week ($37,440 per year) to qualify for a white-collar exemption.[127] Note that since 2004, *federal* law requires that most white-collar employees be paid at least $455 per week (the equivalent of $1,970.15 per month) to be exempt.[128]

The only white collar employees who can be paid on an hourly basis and considered to be overtime exempt under state law are computer professionals who are paid $36 per hour[129] and physicians and surgeons (excluding residents and interns) who are paid $55 per hour or more.[130] Both of these hourly wage rates were increased to the amounts shown effective January 1, 2013. The Labor Code requires the Division of Labor Statistics and Research (DLSR) to modify annually the rate for computer software employees, and physicians and surgeons by the "percentage increase" in the California Consumer Price Index for Urban Wage Earners and Clerical Workers.

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[122] *Campbell v. PriceWaterhouseCoopers, L.L.P.*, 642 F.3d 820 (9th Cir. 2011); *Zelasko-Barrett v. Brayton-Purcell, L.L.P.,* 198 Cal. App. 4th 582 (2011).

[123] Wage Order No. 4-2001, para. 1(A)(3)(b); CAL. CODE REGS tit. 8, § 1(A)(3)(b).

[124] 29 C.F.R. § 541.301(d).

[125] *Solis v. State of Washington*, 656 F.3d 1079 (9th Cir. 2011).

[126] 29 C.F.R. § 541.602(a).

[127] Wage Order Nos. 1-2001 to 16-2001, § 1; Wage Order No. 17-2001, § 3.

[128] 29 C.F.R. § 541.602.

[129] Full-time computer professional employees may also receive an annual salary of not less than $83,132.93 for full-time employment and be paid no less than $6,927.75 per month. CAL. LAB. CODE § 515.5(a)(4).

[130] CAL. LAB. CODE § 515.6.

The ambiguous provisions of A.B. 60 regarding the state's salary pay requirement have been a source of substantial controversy. The Labor Code requires a "monthly" salary, but the salary is defined in terms of "weekly" pay. The Chief Counsel to the state's Labor Commissioner concluded that the monthly salary pay requirement would force an employer to pay an employee's full salary for any month in which an employee performs any work, subject to a few exceptions. An employer could only reduce the salary for complete days of absence due to illness or vacation and for incomplete initial and final months of work.[131] The monthly salary could not be reduced for incomplete monthly periods due to a lack of work, even if the employee was laid off for a complete workweek and would, as a result, not be due any salary under federal law. By extension, the monthly salary would preclude an employer from reducing an exempt employee's salary for a partial-month absence due to jury, witness or temporary military duty. The Chief Counsel concluded that the monthly requirement would preclude any reduction in pay as a result of a partial-month suspension due to disciplinary purposes. The substantial controversy triggered by the Chief Counsel's letter resulted in the withdrawal of the letter.

After an unsuccessful effort to resolve the controversy by legislation, the IWC amended the Statement as to the Basis for Wage Order 5 to reflect that the IWC intended the salary pay requirement in the Wage Orders to reflect the federal weekly salary pay requirement. The IWC's action was found to be invalid. However, the Labor Commissioner shortly thereafter issued another letter affirming the use of a week as the basis for paying a salary. Subject to the possibility of further litigation regarding the use of a weekly or monthly standard, the use of a week appears to be settled from an administrative enforcement position for the time being.

Partial Week Furloughs of Overtime Exempt Employees

The DLSE issued an opinion letter acknowledging, contrary to its prior view, that California's approach to furloughing salaried "white collar" exempt employees follows the federal approach.[132] The DLSE clarified that it would now approve an employer's proposal to reduce the number of its exempt employees' scheduled work days from five to four days per week, with a corresponding reduction in salary, to address significant but temporary economic difficulties, with the expectation that as soon as business conditions permit, the employer intends to restore the full five-day work schedule and the full salaries of the exempt employees. Furloughs do not constitute improper "docking" of salary under federal law, so long as the reductions are relatively "fixed" and not the result of week-to-week determinations.[133]

Deductions for Partial-Day Absences of Overtime Exempt Employees

In 2009, the DLSE issued an opinion letter to clarify that employers may deduct from an employee's leave balance for a partial-day absence due to vacation or sickness.[134] The letter partially resolved the tension created when the California Court of Appeal rejected the Labor Commissioner's earlier interpretation of the salary pay requirement.[135] In its letter, the DLSE

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[131] *Sumuel v. Advo Inc.,* 155 Cal. App. 4th 1099 (2007) (employer complied with the requirement that overtime-exempt, white collar employees be paid salaries when the employer docked employees for full-day absences due to illness; occasional late payment of salary did not result in loss of salaried status).

[132] DLSE Opinion Letter 2009.08.19.

[133] *See Caperci v. Rite-Aid Corp.*, 43 F. Supp. 2d 83 (D. Mass. 1999) (upholding employer's furloughs implemented in upcoming pay period, not midway during current payroll period).

[134] DLSE Opinion Letter 2009.11.23.

[135] *Conley v. Pacific Gas & Elec. Co*., 131 Cal. App. 4th 260 (2005) (holding that employer's requirement that employees use vacation in half-day increments for partial days of absence did not violate the salary pay requirement).

explained that "it is impermissible to deduct *from a salary* of an exempt employee for partial day absences." Such a deduction would violate the "salary basis test" requiring exempt employees to receive their full salary for any week in which they perform any work, without regard to the number of days or hours worked.[136] However, an employer may deduct from an employee's *leave balances* for partial-day absences due to vacation or sickness without jeopardizing the employee's overtime exempt status. If the overtime exempt employee has insufficient banked leave, an employer still must compensate the employee with his or her guaranteed salary for partial day. While the court of appeal limited deductions to partial-day absences of four or more hours, the DLSE believes that an employer may deduct from the employee's leave bank on an hour-by-hour basis. An employer seeking to make hour-by-hour deductions from an employee's leave bank for partial-day absences must have express employment policies providing for such deductions so that employees are aware of how partial-day absences will be handled.

§ 3.1.4(f)

Use of Alternative & Flexible Schedules

An *alternative schedule* is any schedule of more than eight hours in a day that does not include the payment of daily overtime premiums. A.B. 60 generally allows employees to work alternative schedules of up to ten hours per day within a 40-hour workweek without the payment of overtime if a particular process is followed to implement such a schedule. An alternative schedule must consist of a regular schedule of so many days and of so many hours of work per week, such as two ten-hour days, and two six-hour days. An alternative schedule arrangement may consist of a menu of more than one alternative work schedule. However, an alternative schedule is *not* a flexible schedule that would allow an employee to work however many hours he or she wishes each day without the payment of daily overtime premiums. It is essential that employees who work under an alternative schedule have a regular schedule of a specified number of days and hours of work per week.

In earlier legislation, frequent changes in the calendar days that employees are scheduled to work or in the number of days or hours actually worked would invalidate the schedule. Employees who adopt a menu of alternative workweek schedules to move from one schedule option to another on a *weekly basis*, with employer consent.[137] The Wage Orders have slightly different limitations on what alternative schedules can be used. Some of the Wage Orders require that an alternative work schedule include two consecutive days off each week. The straight-time portion of an alternative work schedule cannot generally exceed ten hours of work per day. The dispute as to whether an alternative work schedule could include a regular schedule of more than ten hours per day, where the hours in excess of ten are paid at an overtime rate, has been resolved in favor of longer schedules.[138] Health care employees of health care employers under Wage Orders 4 and 5 may implement alternative work schedules of up to 12 hours per day. Special rules limit the work of health care employees in excess of 12 hours per day. Every alternative work schedule, except those implemented under Wage Order 16, must consist of not less than four hours of work per shift.

A summary of the complicated procedures that an employer must follow to implement an alternative schedule appears below:

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[136] DLSE ENFORCEMENT POLICIES AND INTERPRETATIONS MANUAL (June 2002) §§ 51.6.8-51.5.9.

[137] CAL. LAB. CODE § 511.

[138] *Mitchell v. Yoplait*, 122 Cal. App. 4th Supp. 8 (2004).

- Select an identifiable group of employees that constitutes a "work unit," such as a shift, department, or physical location. (The alternative schedules generally cannot be implemented on an employee-by-employee basis, unless the single employee constitutes a "work unit.")
- Make a written disclosure to all of the affected employees of the impact of the schedule on their wages, benefits, hours, and other working conditions. (The written disclosure must be translated into the primary language of any group of employees whose primary language was not English and who comprised 5% or more of the affected work unit.)
- Hold duly noticed meetings to answer any questions about the proposed schedule.
- Send the written disclosure by mail to the home of any employee who does not attend the meetings.
- Conduct, not less than 14 days after the meetings, a secret-ballot election in which two-thirds of the eligible employees vote to accept the schedule.
- Wait, at least 30 days after the election, before requiring employees to work the alternative schedule.
- Notify, within 30 days of the election, the Division of Labor Statistics and Research of the outcome of the election.
- Accommodate those employees who voted in the election but who are unable to work the alternative schedule.[139]

The Labor Commissioner may, upon receipt of a complaint from an employee, require a neutral third party to conduct an alternative workweek election. Employers may speak their opinions about alternative workweeks, but may not coerce, intimidate, discharge or discriminate against employees for opposing or supporting the adoption of alternative workweeks.

Employees must be offered an election by which to repeal an alternative work schedule if, after one year, one-third of the employees ask for such an election. Two-thirds of the employees must vote in favor of repealing the schedule in order to terminate the schedule. An employer is, absent some contractual commitment to the contrary, free to repeal an alternative schedule at any time.

Employees' wage rates may not be reduced as a result of the implementation, repeal or nullification of an alternative work schedule.

Once an alternative work schedule is implemented, it is anticipated that the work unit will work the schedule. The Wage Orders require that an employer attempt to accommodate employees who voted in the election and who would incur a hardship by working the schedule and accommodate employees whose religious faith or observance would be impacted by working the schedule.[140]

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[139] Alternative work schedules that were correctly implemented prior to 1998 or under the rules in effect prior to 1998 remain valid provided that the results of the election were reported to the state by January 1, 2001. CAL. LAB. CODE § 515(f).

[140] The Labor Commissioner has concluded that any number of employees who are hired after a schedule has been implemented may be offered a schedule of eight hours per day. DLSE ENFORCEMENT POLICIES AND INTERPRETATIONS MANUAL (June 2002) § 56.20. In the past, the Labor Commissioner has taken the position that an alternative work schedule has been abandoned when more than 1/3 of the employees in a work unit are not working the alternative work schedule.

Under Wage Order 16, an identifiable work unit is all employees in a craft at a particular site. An employer that is covered by Wage Order 16 must mail ballots to all employees who were employed in the 30 days preceding an election and must conduct a new election if the number of employees who are covered by the election increases by 50% for a period of 30 days. The results of an election under Order 16 must be reported to the state and posted at the job site. An alternative schedule may be repealed after six months by employees who are covered by Order 16.

A.B. 60 provides that employees who were, as of July 1, 1999, voluntarily working an alternative schedule of not more than ten hours of work in a day may continue to work that schedule without the payment of overtime if the employee requests to do so and the employer approves the request. The Interim Wage Order limited this provision to employees who are covered by Wage Orders 1, 4, 5, 7 and 9, and who agreed to work such a schedule after January 1, 1998.

§ 3.1.4(g)

Limits on Hours of Work

Employees can be required to work overtime except where limited by contract or law. California generally requires all employees (including overtime-exempt employees) to be given one day's rest out of every seven. The day-of-rest requirement is excused in emergencies and where a union contract has a contrary provision. The day-of-rest requirement is also excused where an employee does not work more than 30 hours in a week or more than six hours on any day of the week. Where the nature of the work reasonably requires an employee to work seven consecutive days, an employee can be required to do so, so long as the employee receives four days off per month.

California also has specific limitations on certain employees' hours of work. Employees who work under Wage Orders 4, 8, 13 and 16 generally cannot be required to work more than 72 hours in a week. Employees covered by Wage Order 12 cannot be required to work more than a span of 16 hours in a day. Health care employees working 12-hour alternative work schedules can work more than 12 hours in a day only in very limited circumstances. Employees with direct responsibility for children and others not emancipated from the foster care system who are receiving 24-hour care are not to work more than 24 hours without receiving eight consecutive hours off duty.

Special hours-of-work limitations are also imposed on railroad train personnel, mining-related occupations, pharmacists,[141] truck drivers, motion-picture employees, and minors.

Effective January 1, 2014, employers must provide a one-hour-of-pay premium for each day an employer fails to provide "recovery periods" to avoid heat-related illness for those employees who work outside.[142] This law defines "recovery period" as "a cool down period afforded to an employee to prevent heat illness." When the outdoor temperature exceeds 85 degrees Fahrenheit, the California Division of Occupational Safety and Health mandates a recovery period of not less than five minutes for employees who work outside to take a cool-down rest, in the shade, to protect themselves from overheating.

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[141] Pharmacists may elect to work alternative work schedules. CAL. LAB. CODE § 1186.5 (effective Jan. 1, 2008).

[142] CAL. LAB. CODE § 226.7 (as amended by S.B. 435 (Oct. 10, 2013)).

§ 3.1.5

E. WAGE PAYMENT OBLIGATIONS

Many of the ministerial aspects of an employment relationship are regulated by state law. Among these are the timing of breaks and meal periods and the timing and form of wage payments. The principal California regulations are discussed below. However, this summary does not include every obligation of an employer or express every qualification to the obligations that are discussed. Those obligations that are described as arising from the Wage Orders of California's IWC do not apply to overtime-exempt executive, administrative, professional employees and other employees who are specifically excluded from the Wage Orders.

§ 3.1.5(a)

Meal & Break Times

§ 3.1.5(a)(i)

Meal Periods Following Brinker Restaurant Corp. v. Superior Court

The 2012 decision in *Brinker Restaurant Corp. v. Superior Court* limits an employer's obligation to "provide" meal periods and does not require an employer to "ensure" the meal periods are taken.[143] In *Brinker*, the court found that an employer must provide the opportunity to take meal periods.[144] While the court held that meal periods must be provided—*i.e.*, made available for employees to take, an employer need not *ensure* that employees take meal periods.[145] An employer cannot coerce, create incentives for or encourage employees to skip meal periods, but the employer must take the active step of "afford[ing] an off-duty meal-period," which means "actually relieving an employee of all duty" and "relinquish[ing] control over their activities," without "pressuring employees to perform their duties in ways that omit breaks," and without "exerting coercion against the taking of, creating incentives to forego, or otherwise encouraging the skipping of legally protected breaks."[146]

An employer that provides an employee the opportunity to take a timely, off-duty meal period must still pay the employee the employee's regular wage for the meal period if the employer knew or reasonably should have known that the employee worked through the meal period. However, the one hour of premium pay due for a missed meal is not due if an employee voluntarily works through an off-duty meal period that the employee could have taken. The ability of an employee to work through a meal period that was duly provided makes the limited waiver provision in the Labor Code and Wage Orders somewhat superfluous.

Despite the more employer-friendly decision in *Brinker*, the timing and circumstances of meal and rest periods continue to be of great concern because penalties may be imposed for failing to provide meal periods as required.[147] The ability of an employee to contest, up to four years after a meal period was missed, that a meal period was not provided results in an

[143] 53 Cal. 4th 1004 (2012).

[144] 53 Cal. 4th at 1040 (citing *Cicairos v. Summit Logistics, Inc.*, 133 Cal. App. 4th 949, 962-63 (2005)).

[145] *Brinker Rest. Corp.*, 53 Cal. 4th at 1040.

[146] 53 Cal. 4th at 1039, 1040.

[147] CAL. LAB. CODE §§ 226.7, 558.

employer's compliance objective being straightforward: the best evidence that meals were provided is that they were regularly taken and accurately recorded.

The Labor Code requires a half-hour, off-duty meal period to commence before the end of the fifth hour of work unless the employee will not work more than six hours in the day and the employee and employer agree to waive the meal period.[148] A second, half-hour, off-duty meal period must commence before the end of the tenth hour of work, unless the employee will not work more than 12 hours in the day, the employee has not waived the first meal period, and the employee and employer agree to waive the second meal period.[149] The Labor Code provides four exceptions to these requirements:

- The IWC may permit a meal period to commence after six hours of work if the Commission finds such an exception to be consistent with the health and welfare of employees.[150]
- Union-represented employees in the wholesale bakery business who work a particular schedule are exempted from the meal period requirements[151]
- Union-represented employees who are covered by Wage Order 11 for the motion picture industry or Wage Order 12 for the broadcasting industry and whose collective bargaining agreements include provisions for meal periods and monetary penalties for failing to comply with the meal period provisions are exempted from the meal period requirements.[152]
- Union-represented employees in construction occupations, commercial drivers, employees in the security services industry employed as security officers, and employees of electrical and gas corporations or local, publicly owned electric utilities subject to certain additional definitions and requirements.[153]

The Wage Orders generally follow the requirements of the Labor Code and the exceptions to those requirements, but the Wage Orders may create exceptions that do not exist in the Labor Code. The meal period provisions in Wage Orders 1, 4, 5, 12, 14 and 16 do vary somewhat from the Labor Code. For example, the meal period provisions of Wage Orders 4 and 5 have no provision for waiving the second meal period in a day.[154] However, *Brinker* concluded that the timing of when first and second meal periods should occur under Wage Orders 4 and 5 is the same as the timing under the other Wage Orders and Labor Code section 512. Further, under Wage Orders 4 and 5, employees in the health care industry may waive one of two meal periods on a shift of more than eight hours if the waiver is in writing and is voluntarily signed by the employer and employee. Such a waiver may be revoked on one day's notice. Under Wage Order 1, a meal period may commence after six hours of work if so provided in a collective bargaining agreement. Under Wage Order 16, employees covered by a collective

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[148] CAL. LAB. CODE § 512.

[149] CAL. LAB. CODE § 512; *see also McFarland v. Guardsmark, L.L.C.,* 538 F. Supp. 2d 1209 (N.D. Cal. 2008) (on-duty meal period is not a waived meal period allowing employees to have two, on-duty meal periods in a day).

[150] CAL. LAB. CODE § 512(b).

[151] CAL. LAB. CODE § 512(c).

[152] CAL. LAB. CODE § 512(d).

[153] CAL. LAB. CODE § 512(e).

[154] In *Brinker Rest. Corp. v. Superior Ct.,* 53 Cal. 4th 1004 (2012), the differences between Wage Order Nos. 4 and 5 and the Labor Code were found to relate to the waiver of meals and to not affect the scheduling of meal periods as required by the Labor Code. CAL. LAB. CODE § 512.

bargaining agreement that provides a base wage of 30% more than the minimum wage and some premium for overtime work are exempted from the meal period requirements.[155]

The text of the wage orders and the statutory provisions make clear that the right to meal periods is a generally applicable labor standard that cannot be waived by agreement.[156] An employer can seek a waiver of the meal period requirement only under Wage Orders 4 and 5.

The ability of employers to use on-duty meal periods as provided in the Wage Orders was confirmed with little discussion in *Brinker*. The *Brinker* decision's failure to provide for the use of on-duty meal period agreements in the Labor Code appears to set aside concerns about the ability to use on-duty meal periods in the Wage Orders. Previously, it was generally understood that an on-duty meal period may be worked only where the nature of the employee's work requires an on-duty meal period, the employee has voluntarily agreed in writing to work an on-duty meal period and the employee has an opportunity to eat while working. To be cautious, an employer may want to continue to meet all the requirements of an on-duty meal period when any of the following occur: the meal period is less than 30 minutes long, the employee is not free to leave the premises during the meal period, the employee is not freed of all duty during the meal period or the meal period occurs later than the time required by the applicable Wage Order. An agreement for an on-duty meal period should state that the agreement can be revoked upon notice to the employer. An agreement for an on-duty meal period in the health care industry may require one day's notice before the agreement is revoked. The special requirements for on-duty meal periods for residential care employees are discussed below.

Residential care employees may be required to work on-duty meal periods without penalty when necessary to meet regulatory or approved program standards and:

- the employees eat with the residents and the employees receive the same meals as the residents at no charge;
- the employee is in sole charge of the residents and, on the day shift, the employer provides a meal at no charge to the employee; or
- an employee, except on the night shift, may have an on off-duty meal period by providing the employer with 30 days' advance notice for each off-duty meal period, and there shall not be more than one off-duty meal period every two weeks.

A residential care employee is an employee with direct responsibility for children and others not emancipated from the foster care system who are receiving 24-hour care and employees of 24-hour residential care facilities for the elderly, blind and developmentally disabled.

The validity of the exceptions provided by the Wage Orders to the meal period requirements of the Labor Code remained open to question after the California Court of Appeal 2006 decision in *Bearden v. United States Borax, Inc.*[157] In some cases, the exceptions may be permitted based on the ability of the IWC to allow meal periods to start after six hours of work. The California Supreme Court accepted without comment the

[155] This exception to the meal periods required by the Labor Code was found invalid in *Bearden v. United States Borax*, *Inc*., 138 Cal. App. 4th 429 (2006).

[156] CAL. LAB. CODE § 219; *Valles v. Ivy Hill Corp.* 410 F.3d 1071, 1081 (9th Cir. 2005).

[157] 138 Cal. App. 4th 429 (2006).

validity of on-duty meal period agreements, despite the fact that no reference to such agreements appears in the Labor Code.[158]

§ 3.1.5(a)(ii)

Enforcement, Remedies & Penalties

No employee can be required to work through a meal required by a Wage Order.[159] If an employee is not provided a meal period as required by the applicable Wage Order and the employee has not agreed in writing to an on-duty meal period, then the employer shall pay the employee a remedy of one hour of pay at the employee's regular rate of pay.[160] While a federal court has ruled that only one one-hour-of-pay remedy can be recovered for any number of meal *and* rest periods missed in a day, a state court has ruled that separate one-hour-of-pay-per-day premiums can be imposed for however many meal periods are missed in a day and for however many rest periods are missed in a day.[161]

§ 3.1.5(a)(iii)

Rest Times

An employer is obligated to provide a ten-minute rest period for every four hours worked or major fraction thereof. While no meal period is due if an employee works fewer than 3.5 hours in a day, the 3.5-hour threshold does not define the major fraction of four. The major fraction of four is two. As a result, California's Wage Orders require that ten-minute rest periods be provided as follows:

Hours of Work	Rest Periods
0-3½	0
3½-6	1
6-10	2
10-14	3
14-18	4

Insofar as practicable, a rest period should be located in the middle of each work period. Additional flexibility with respect to the scheduling of rest periods is provided in Wage Order 16 for construction, drilling, logging and mining employees and those requirements may be further varied by collective bargaining agreements. The ability to vary the rest period requirements of Wage Order 16 by a collective bargaining agreement was eliminated in 2002.[162] Rest periods must be counted and paid as work time.

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[158] *Brinker Rest. Corp.,* 53 Cal. 4th 1004.

[159] CAL. LAB. CODE § 226.7.

[160] CAL. LAB. CODE § 226.7. The one-hour of pay premium that "shall be" paid for a failure to provide a meal or rest period required by the applicable Wage Order is a wage, and the statute of limitations for pursuing wages will apply if the premium is not paid on the payday for the pay period in which the meal or rest period was missed. *Murphy v. Kenneth Cole Prods.,* 40 Cal. 4th 1094 (2007).

[161] *Corder v. Houstons Rests., Inc.*, 424 F. Supp. 2d 1205, 1207 n.2 (C.D. Cal. 2006); *United Parcel Serv., Inc. v. Superior Ct.*, 192 Cal. App. 4th 1043 (2011).

[162] CAL. LAB. CODE § 514.

An employer must also provide a reasonable amount of break time for employees who wish to express milk.[163] The break time is to run concurrently with regular rest periods and any additional break time need not be paid. The provision of extra time is excused if doing do would seriously disrupt the operations of the employer.[164]

An employee cannot be required to work through a rest period that is required by a Wage Order of the IWC.[165] If an employee does not receive a required rest period, the employer shall pay the employee a penalty of one hour of pay at the employee's regular rate of pay.[166] An employee can recover one one-hour-of-pay premium for however many meal periods are missed in a day and a separate one-hour-of-pay premium for however many rest periods are missed in one day.[167] An employer may seek a waiver of the rest period requirement from the Labor Commissioner.

Residential employees, as defined above with respect to meal periods, may also be required to remain on the premises and maintain general supervision of residents during rest periods if the employee is in sole charge of the residents. If an employee is affirmatively required to interrupt a break to respond to the needs of residents, another rest period shall be provided.

Special rest period requirements apply to swimmers, dancers, skaters and other employees engaged in strenuous physical activities under Wage Order 12 and employees of licensed commercial passenger fishing boats under Wage Order 10.

§ 3.1.5(a)(iv)

Enforcement, Penalties & Remedies

A claim for the one-hour-of-pay premiums for the failure to provide rest periods is not a claim that gives rise to a potential award of attorneys' fees under Labor Code sections 1194 or 281.5.[168] Section 1194 concerns only the failure to pay minimum wages or overtime, and the one-hour-of-pay premium is neither. Section 218.5 allows a prevailing party to claim fees when it prevails on a claim for the "nonpayment of wages." The court narrowly characterized the ultimate nature of a claim for premiums for missed rest periods to be a failure to provide the rest periods, not a failure to pay wages, and found that section 218.5 did not provide a basis to award attorneys' fees. Of particular note is that the payment of the premium for the failure to provide a rest period did not make the failure to provide the rest period lawful. As a result, an employer may still have liability for penalties under the Private Attorneys General Act (PAGA)[169] even if the employer timely paid premiums for missed rest periods.

§ 3.1.5(b)

Reporting Pay & Split-Shift Premiums

Under California's Wage Orders, reporting pay is due employees who are required to report to work and are either not put to work or are furnished less than one-half of their

[163] CAL. LAB. CODE § 1030.

[164] CAL. LAB. CODE § 1032.

[165] CAL. LAB. CODE § 226.7.

[166] CAL. LAB. CODE § 226.7.

[167] *United Parcel Serv., Inc. v. Superior Ct.*, 192 Cal. App. 4th 1043 (2011).

[168] *Kirby v. Immoos Fire Prot., Inc.*, 53 Cal. 4th 1244 (2012).

[169] CAL. LAB. CODE §§ 2699 *et seq.* For further discussion of PAGA, see § 3.1.6(a)(iii) below.

normal or customary day's work. In such circumstances, the employees must be paid for half of the scheduled day's work, but in no event for less than two hours nor more than four hours, at the employees' customary rate of pay. Thus, if an individual is required to report on a day that he or she is scheduled to work eight or more hours, and the individual is not provided work, the individual will be entitled to four hours of pay. If an employee is required to report for work for a second time in one workday (such as after his or her usual shift is finished) the individual must be furnished with two hours of work, or pay in lieu thereof. If an employee is furnished work for at least half of the scheduled time, the employer is not required to pay reporting time pay, even if the scheduled time is less than four hours.[170]

Reporting-time pay is generally excused where the failure to provide work is due to circumstances beyond the employer's control, such as a power failure or a natural disaster. Reporting pay is also excused when an employee is asked to report at a time other than his or her normal reporting time and the employee is on paid standby status. Reporting pay may be varied by the provisions of a collective bargaining agreement for employees who are covered by Wage Order 16. Again, the ability to change the reporting pay obligation in the Wage Orders may be limited by the amendment to section 514 of the Labor Code, which limited the ability of collective bargaining agreements to vary Wage Orders to the overtime and alternative work schedule requirements of the Wage Orders.

An employee who is required to report to work for a termination meeting of very brief duration, on a day that he was not otherwise scheduled to work, was only due two hours of reporting pay. The absence of any longer-scheduled work supported the conclusion that only the two-hour minimum for a first reporting to work would apply.[171]

An employee who works a *split shift*—two distinct work periods separated by more than a *bona fide* meal or rest period—must be paid an amount at least equal to the minimum wage times the hours worked in the day plus one hour.[172] No split shift exists where employees worked from the evening of one workday, across the end of the workday, to finish work in the morning of the following workday, and then returned to work in the evening of the second workday, to work across the end of that workday, and finish work in the morning of the third workday.[173] While the shift that ends in the morning of one workday is separated by a nonworking period from the shift that starts in the evening of that workday, the test for a split shift is not nonwork periods in the work*day*, but nonwork periods in an employee's work *schedule*. The employee's work schedule from the evening of one workday to the morning of the next workday was not interrupted by nonpaid, nonwork periods other than meal and rest periods.

§ 3.1.5(c)

Uniforms & Equipment

When a California employer requires an employee to wear a uniform, the Wage Orders oblige the employer to provide and usually to launder the uniform, regardless of how much the employee is paid. An employer need not clean a uniform where the uniform needs no more

[170] *Aleman v. AirTouch Cellular*, 202 Cal. App. 4th 117 (2011).

[171] *Price v. Starbucks,* 192 Cal. App. 4th 1136 (2011).

[172] *Aleman v. Airtouch Cellular*, 2011 Cal. App. LEXIS 1609 (Dec. 21, 2011); *Securitas Sec. Servs. USA, Inc. v. Superior Ct.*, 197 Cal. App. 4th 115 (2011).

[173] *Securitas Sec. Servs.*, 197 Cal. App. 4th 115.

than simple wash and wear care. A *uniform* is defined as wearing apparel and accessories of distinctive design or color. Under federal law, a uniform becomes an issue only if payment for obtaining or cleaning a uniform would reduce an employee's income below the minimum wage. Under the regulations of California's Occupational Safety and Health Administration, an employer is responsible for providing all necessary safety equipment for employees, such as gloves and safety shoes. California requires an employer to provide all necessary work tools, with a limited exception for skilled craftsmen who are paid at least two times the minimum wage. This exception may be limited by the Labor Code.

§ 3.1.5(d)

Expenses

An employer must reimburse an employee for all "necessary expenditures and losses" incurred in the performance of the employee's duties. An employer may meet its obligation in this regard by designating a portion of an employee's regular compensation payments as an expense reimbursement, if the designation is appropriately documented, the amount is sufficient to reimburse the employee's expenses and the employee can challenge the amount of the reimbursement.[174] An employee may recover prejudgment interest, costs and attorneys' fees with any award of expenses.[175] The obligation to reimburse expenses cannot be waived.[176] An employee is not entitled to the reimbursement of legal fees incurred when the employee is sued by his or her employer for breach of contract and the diversion of corporate opportunities.[177]

§ 3.1.5(e)

Vacation Compensation

California requires that all accrued and unused vacation compensation be paid to an employee upon termination, unless otherwise provided in a collective bargaining agreement.[178] The waiver of vacation benefits through collective bargaining agreements has been narrowly construed.[179] There is no statutory definition of *vacation*— it is generally considered the right to take time off from work without the condition of being ill or a certain holiday occurring.[180] This rather straightforward concept has grown to affect the accrual and use of vacation compensation while an employee is still employed.

Basically, vacation compensation is considered to accrue in increments on a daily basis, and an employer cannot defer the accrual of vacation compensation to the end of a month or the end of a year to avoid the *pro rata* accrual of vacation benefits. Subject to these limitations, an employer can generally determine the rate at which employees accrue

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[174] *Gattuso v. Harte-Hanks Shoppers, Inc.,* 42 Cal. 4th 554 (2007).

[175] CAL. LAB. CODE § 2802.

[176] CAL. LAB. CODE § 2804; *Edwards v. Arthur Andersen L.L.P.,* 44 Cal. 4th 937 (2008); *see also Nichols Labs L.L.C. v. Chen*, 199 Cal. App. 4th 1240 (2011) (employee not due reimbursement for legal fees when sued by employer); *City of Oakland v. Hassey*, 163 Cal. App. 4th 1477 (2008) (employer could recover cost of training from resigning employee where permitted by collective bargaining agreement and confirmed by individual agreement).

[177] *Nichols Labs, L.L.C. v. Chen,* 199 Cal. App. 4th 1240 (2011).

[178] *Association for L.A. County Sheriffs v. County of Los Angeles,* 154 Cal. App. 4th 1536 (2007) (mandated use of vacation during a year in accordance with collective bargaining agreement to avoid a lump-sum payment at the end of the year was permissible).

[179] *Choate v. Celite Corp.*, 215 Cal. App. 4th 1460 (2013).

[180] *Paton v. Advanced Micro Devices*, 197 Cal. App. 4th 1505 (2011).

vacation compensation and whether employees are to accrue any vacation compensation at all. The amount of vacation that an employee can use at any one time and the dates on which vacation can be used are also subject to the approval of the employer. An employer can require a salaried, overtime-exempt, white-collar employee to use a partial day of accrued vacation for a partial-day absence without compromising the employee's salaried, exempt status.[181]

Because all unused vacation compensation must be paid out on termination, an employer cannot enforce a "use it or lose it" provision in a vacation plan. However, an employer can enforce a reasonable cap on the accrual of vacation compensation that would allow an employee to retain all previously earned vacation compensation, but that would not allow the employee to earn any additional vacation compensation until some of the previously earned amount had been used. An employer can also *cash out* an employee at the end of each year by paying the employee the cash value of all earned and unused vacation compensation.

Vacations have been found distinguishable from sabbaticals by four factors: (1) whether the sabbatical leave is granted infrequently at such long intervals as seven years; (2) whether the sabbatical leave provides extended time off that vacation does not provide to achieve the traditional objectives of a sabbatical; (3) whether a sabbatical is provided in addition to regular vacation; and (4) whether an employee is expected to return to work at the end of the sabbatical.[182] The Labor Commissioner's opinion that sabbaticals must be limited to high-level employees has been found less than persuasive. Where a sabbatical program has no required objective for a sabbatical, no accounting for the time spent on a sabbatical, and sabbaticals are similar in duration to vacation periods, there is a risk that the sabbatical program will be regulated as if it were vacation.[183]

The time limit within which a previously terminated employee may claim vacation compensation is disputed in some regards. There is no dispute that an employee must file his or her claim for vacation compensation within the statute of limitations following termination of employment. One court would allow an employee to then claim vacation that was accrued at any time in the employment relationship as long as the vacation had not been used prior to the termination of employment.[184] Another court would apply the statute of limitations a second time, reaching backwards from the date of termination, to determine for what period of time prior to an employee's last day of work he or she can claim vacation pay.[185] Where an employer's vacation policy is written, a four-year statute of limitations applies and when an employer's vacation policy is oral, a two-year statute of limitations applies.

A trucking employer was found not to have entirely succeeded in crafting its vacation plan to be regulated by the Employee Retirement Income Security Act (ERISA)[186] and thereby was not excluded from the state's regulation of vacation pay.[187] While the employer claimed it had established a separate trust account for the payment of vacation

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[181] *Conley v. Pacific Gas & Elec. Co*., 131 Cal. App. 4th 260 (2005).

[182] *Paton*, 197 Cal. App. 4th 1505.

[183] 197 Cal. App. 4th 1505.

[184] *Church v. Jamison*, 143 Cal. App. 4th 1568 (2006).

[185] *Sequeira v. Rincon-Vitova Insectaries*, *Inc*., 32 Cal. App. 4th 632 (1995).

[186] 29 U.S.C. §§ 1001 *et seq*.

[187] *Bell v. H.F. Cox, Inc.*, 209 Cal. App. 4th 62 (2012).

wages (as required by ERISA) and had followed the other formalities for establishing an ERISA-regulated plan, the annual reports of the plan stated that the vacation benefits were paid from the employer's general assets. The court remanded the matter for further consideration as to whether a *bona fide* plan existed. The court concluded that, regardless of the regulation by ERISA, the employer could, during an individual's employment, pay vacation in a specified amount that did not correspond with the individual's weekly earnings. The court also noted that the obligation to pay out an employee's accrued vacation at an employee's final rate of pay applies only upon termination of employment.

§ 3.1.5(f)

Sick Leave Compensation

An employer that offers sick leave for employees must allow an employee to use some of that leave to care for the illness of a child, spouse, parent or domestic partner.[188] Notably, an employer must allow an employee to use his or her sick leave to care for a "domestic partner" or the child of a domestic partner.[189] For these purposes, a *domestic partner* means an employee's domestic partner under a domestic partnership registered with the California Secretary of State.

In each calendar year, the employee may use available sick leave in an amount not less than that which would be accrued in six months' time at the employee's current rate of accrual. The employer may apply the same conditions to the use of leave for a child, parent or spouse that apply to the use of sick leave by employees. The ability of an employee to use sick leave for a child, parent or spouse does not apply to benefits paid from an insurance plan, an ERISA-regulated plan, unemployment compensation disability benefits, workers' compensation, or other benefits not payable from an employer's general assets. An employer cannot discharge or discriminate against an employee who uses sick leave to attend to the illness of a child, parent, spouse or domestic partner.[190] This provision may prohibit the use of absence control policies that limit the permissible use of sick leave. Additionally, San Francisco requires employees to accrue sick leave, which can be used for a wide variety of purposes and specifically prohibits adverse action due to the use of such leave.[191]

§ 3.1.5(g)

Bonuses

An employee who is required by the terms of an incentive plan to work until the date on which a bonus is paid in order to earn the bonus, need not be paid the bonus where the employee is discharged for cause prior to the payday.[192] Where the terms of the bonus plan require an employee had to "be an active employee of the company on the payment date," an employee will not earn the bonus if terminated for cause prior to the payment date.

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[188] *Sick leave* only includes a right to take time off that accrues periodically with the passage of time. Where an employer provides, essentially, an unlimited right to take time off due to illness, Labor Code section 233 will not apply. *McCarther v. Pacific Telesis Group*, 48 Cal. 4th 104 (2010).

[189] CAL. LAB. CODE § 233.

[190] CAL. LAB. CODE § 233.

[191] *See* SAN FRANCISCO, CAL. ADMIN. CODE §§ 12W.1 *et seq*.

[192] *Neisendorf v. Levi Strauss & Co.,* 143 Cal. App. 4th 509 (2006).

Basing bonuses on an employer's profits was found lawful over objections that the calculation of such bonuses necessarily included deductions for cash shortages and the cost of workers' compensation insurance.[193] In *Prachasaisoradej v. Ralphs Grocery Co., Inc.*, the employer fully absorbed the costs of cash shortages and workers' compensation costs before calculating profits, there was no dollar-for-dollar reduction in an employee's individually earned wages for shortages and workers' compensation costs, and employees regularly received a separate wage that was not subject to reduction.

An employee can elect to take shares of restricted stock in lieu of cash compensation.[194] The forfeiture of the restricted stock when an employee terminates before the vesting date is not an impermissible forfeiture of wages.

§ 3.1.5(h)

Commissions & Piece-Rate Pay

§ 3.1.5(h)(i)

Commissions

Labor Code section 2751 requires all commission contracts to be in writing and to expressly set forth the method by which the commissions will be computed and paid.[195] A commission-paid employee must receive a signed copy of the contract, and the employer must obtain a signed receipt for the contract. The statute covers all employers who pay commissions for services performed within California.

The Labor Code defines a commission as "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."[196] Commissions must be a payment for the sale of goods or services, not for actually making a product or rendering a service.[197]

There is some uncertainty as to what forms of compensation constitute a commission, as opposed to a "bonus" or "piece-rate" plan. The Division of Labor Standards Enforcement defines a *piece-rate plan* as a plan that "simply relies upon a 'percentage' of some sum such as the cost of the goods sold or the services rendered by an establishment."[198] However, a commission can be calculated based on net profit rather than the percentage price of a product or services.[199] And, a commission may include a fixed amount that is paid for each car sold by an employee.[200]

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[193] *Prachasaisoradej v. Ralphs Grocery Co., Inc.*, 42 Cal. 4th 217 (2007).

[194] *Schachter v. Citigroup, Inc.,* 27 Cal. 4th 610 (2009).

[195] CAL. LAB. CODE § 2751 (as amended by A.B. 1396, ch. 556 (Oct. 7, 2011)). Section 2751 was amended in 2011 but was effective January 1, 2013.

[196] CAL. LAB. CODE § 204.1.

[197] *See, e.g.*, *Ramirez v. Yosemite Water Co., Inc*., 20 Cal. 4th 785 (1999) (delivery drivers do not make sales); *Keyes Motors, Inc. v. DLSE*, 197 Cal. App. 3d 557 (1987) (car mechanics do not make sales).

[198] DLSE ENFORCEMENT POLICIES AND INTERPRETATIONS MANUAL (June 2002) § 34.1, *available at* http://www.dir.ca.gov/dlse/manual-instructions.htm.

[199] *Muldrow v. Surrex Solutions Corp.*, 202 Cal. App. 4th 1232 (2012), *review granted*, 2012 Cal. LEXIS 3472 (Apr. 11, 2012), *vacated and transferred*, 143 Cal. Rptr. 3d 528 (2012), *substituted op.*, 208 Cal. App. 4th 1381 (2012).

[200] 195 Cal. App. 4th 996 (2011).

The following are specifically excluded from "commissions" for the purposes of section 2751: (1) short-term productivity bonuses such as 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 there has been an offer by the employer to pay a fixed percentage of sales or profits as compensation for work to be performed.[201]

Section 2751 does not include a specific penalty for a failure to comply with its provisions, but there are potential consequences. Without a written agreement in place, courts are likely to put more weight on an employee's understanding of the terms on which commissions are earned than the employer's understanding of when the earning of commissions occurs. In addition, a plaintiff may be able to bring a claim for penalties under the PAGA, which provides a civil penalty for every provision of the Labor Code that has no other penalty.

Commissions are treated the same as hourly wages for minimum wage purposes.[202] Commissions will only provide compensation for activities that directly result in the earning of commissions. An employee must be paid the minimum wage for otherwise uncompensated time.

§ 3.1.5(h)(ii)

Piece-Rate

The Division of Labor Standards Enforcement defines a *piece-rate plan* as a plan that "simply relies upon a 'percentage' of some sum such as the cost of the goods sold or the services rendered by an establishment."[203] A piece rate will only provide compensation for activities that result in the earning of piece rate pay. Otherwise uncompensated time, including rest periods, must be paid at the minimum wage.[204]

§ 3.1.5(i)

The Record-keeping Obligation

The state's Wage Orders require an employer to maintain an accurate record of employees' hours of work and compensation. As under federal law, an employer's failure to maintain accurate records will impose upon the employer the burden to disprove what an employee claims to have been his or her actual hours of work. The basic record-keeping obligation includes:

- name;
- home address;
- date of birth, if under 18;
- occupation in which employed;

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[201] CAL. LAB. CODE § 2751(c) (as amended by A.B. 2675, ch. 826 (Sept. 30, 2012)).

[202] *Balasanyam v. Nordstrom, Inc.*, 913 F. Supp. 2d 1011 (C.D. Cal. 2013), *review denied*, *Nordstrom, Inc. v. United States Dist. Court In re Nordstrom, Inc.*, 719 F.3d 1128 (9th Cir. 2013).

[203] DLSE ENFORCEMENT POLICIES AND INTERPRETATIONS MANUAL (June 2002) § 34.1, *available at* http://www.dir.ca.gov/dlse/manual-instructions.htm.

[204] *Armenta v. Osmose, Inc.*, 135 Cal. App. 4th 314, 323 (2005).

- the clock time at which each work period and off-duty meal period begins and ends;
- total wages paid each payroll period including the value of board, lodging, and other compensation;
- total hours worked in the payroll period and applicable rates of pay; and
- an explanation of any piece-rate or incentive plan.

All basic earning records and time cards should be kept for three years. An employer must provide payroll information or copies of that information to employees within 21 days of an oral or written request for the information.[205] In addition, an employer may not prevent an employee from maintaining a personal record of his or her hours worked.[206]

§ 3.1.5(j)

Personnel Records Inspection

Current and former employees and their representatives have a right to inspect and obtain copies of the personnel records that the employer maintains relating to the employee's performance or to any grievance concerning the employee.[207] Certain public employees are excluded from the right to inspect and copy personnel records.

An employer must make the records available no later than 30 calendar days from the date the employer receives a request to inspect or copy.[208] The current or former employee, or his or her representative, and the employer can agree in writing to a date beyond 30 calendar days, but the agreed-upon date cannot extend past 35 calendar days from the employer's receipt of the written request. The employer must make a current employee's records available either at the place where the employee reports to work or at a different, mutually agreeable location. Additional alternatives for making the records or copies available exist for former employees who engaged in violations of law or harassment or workplace violence.

A request to inspect or obtain copies of personnel records must be made in writing. An employer can, within limits, require an employee to use an employer-provided form for requesting the inspection or copying of records. An employer can take reasonable steps to verify the identity of a current or former employee or his or her authorized representative.

An employer may redact the names of nonsupervisory employees from the records made available for inspection or copying. An employer is not obligated to provide records relating to a possible criminal offense, letters of reference or certain promotional examination records.

An employer need only respond once per year to the request of an employee to copy or inspect records. An employer is not required to comply with more than 50 requests per month to inspect or copy records when the requests are received from employees' representatives. Further, an employer can charge the actual cost of duplication for making copies.

The right to inspect and make copies of personnel records ceases if an employee has filed a lawsuit to which the records are relevant. In addition, the obligation to make records available

[205] CAL. LAB. CODE § 226(c).

[206] CAL. LAB. CODE § 1174.

[207] CAL. LAB. CODE § 1198.5(a) (as amended by A.B. 2674, ch. 842 (Sept. 30, 2012)).

[208] CAL. LAB. CODE § 1198.5(b)(1).

for inspection and copying does not apply if a collective bargaining agreement provides a procedure for inspecting and copying records and the collective bargaining agreement provides premium wage rates for all overtime hours worked and a regular rate of pay that is not less than 30% more than the state minimum wage rate. Personnel records must be maintained for at least three years following termination of employment.

A violation of the right to inspect or copy records is an infraction, and a failure to timely respond to a request is subject to a penalty of $750.[209]

§ 3.1.5(k)

Time Keeping

Employers are permitted to round time entries when calculating employees' pay if the rounding operates to the equal benefit and burden of the employer and employee. In *See's Candy Shops v. Superior Court*,[210] the court upheld the employer's policy of rounding in tenths of an hour. One key conclusion was that employees performed no work during the ten-minute "grace period" at the beginning of a shift during which all punches were rounded up to the hour. A similar "grace period" existed at the end of the shift. The appellate court rejected the trial court's conclusion that rounding had to result in no underpayment of wages as measured by each pay period. Instead, the appellate court deferred to the long-established policy under the FLSA, which permits rounding as long as the rounding operates to the equal burden and benefit of the employer and employee.

§ 3.1.5(l)

Method of Payment & Wage Records

The wages of employees may be paid by check, in cash or by direct deposit. Payment by direct deposit is permitted only if voluntarily agreed to by the employee.[211] Payment by scrip, coupon or in merchandise is prohibited.[212]

The obligation to accompany every wage payment with a statement of earnings first became more onerous effective January 1, 2001 and then significantly more onerous on January 1, 2013. With every payment of wages, an employer must provide an employee with a detachable paycheck stub or separate written statement that shows:[213]

- gross wages;
- total hours worked for hourly paid employees;[214]
- all applicable hourly rates in effect during the pay period and the hours worked at each rate;

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[209] CAL. LAB. CODE § 1198.5.

[210] 210 Cal. App. 4th 889 (2012), *review denied*, 2013 Cal. LEXIS 1537 (Cal. Feb. 13. 2013).

[211] CAL. LAB. CODE § 213(d).

[212] CAL. LAB. CODE § 212(a)(2).

[213] CAL. LAB. CODE § 226.

[214] The obligation to list total hours worked may be met if straight-time and overtime hours are listed separately. *Morgan v. United Retail, Inc.*, 186 Cal. App. 4th 1136 (2010).

- the number of piece rate units and the applicable piece rate;[215]
- all deductions, provided that all deductions made on the order of the employee may be shown as one;
- net wages;
- the beginning and ending dates of the pay period;
- name of employee and Social Security number;[216] and
- name and address of the legal entity that is the employer.

Temporary service employers must also include the rate of pay and the total hours worked for each temporary worker's assignment or date.[217] If the employer is a farm labor contractor, the earning statement must include the name and address of the legal entity that secured the employer's services.[218] Willful violation of this law is a crime.[219]

When an employer pays wages for work in excess of the regular work period one payday late, the payment must be accompanied by a notation of the pay period for which such wages are provided, the applicable rate, the number of hours worked at the rate and the other information generally required to appear on paycheck stubs.[220]

An employee is presumed to have suffered injury and the employer has the burden of showing no injury resulted if the employer provided a wage statement that did not fully comply with all of the requirements of Labor Code section 226(a). Employees who are injured by a knowing and intentional failure to comply with the record keeping provisions shall recover the greater of the actual damages or $50 for the first pay period where the employer does not provide all necessary information and $100 per employee for any subsequent pay period where the necessary information is lacking, not to exceed an aggregate penalty of $4,000.[221] An employee may also recover attorneys' fees and costs. Failure to comply with this requirement may also result in a penalty payable to the State of California of up to $1,000 per employee for each violation.

Every paycheck must bear the name and address of a business in the state at which the check can be cashed immediately and without discount. The provision that appeared to allow an employer to simply enter the name of a bank on a paycheck was interpreted to be limited to the circumstance where a bank was the employer of the employees at issue.[222] Employers may voluntarily authorize the direct deposit of wages in a bank account.

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[215] The Division of Labor Standards Enforcement has interpreted "piece rates" to include commissions in this context, but the interpretation is inconsistent with the many distinctions otherwise made between the two types of compensation. DLSE ENFORCEMENT POLICIES AND INTERPRETATIONS MANUAL (June 2002) § 14.1.1.

[216] Effective January 1, 2008, an employee's Social Security number is to be limited to the last four digits of such number or is to be replaced with an employee identification number. CAL. LAB. CODE § 226(a).

[217] CAL. LAB. CODE § 226 (as amended by A.B. 1744, ch. 844 (Sept. 30, 2012)). This took effect on July 1, 2013.

[218] CAL. LAB. CODE § 226(a) (as amended A.B. 243, ch. 671 (Oct. 7, 2011)).

[219] CAL. LAB. CODE § 226(a) (as amended by A.B. 243).

[220] CAL. LAB. CODE § 204(b) (as amended effective Jan. 1, 2007).

[221] CAL. LAB. CODE § 204(b) (as amended effective Jan. 1, 2007); *see also Elliot v. Spherion Pacific Work, L.L.C.,* 572 F. Supp. 2d 1169 (C.D. Cal. 2008) (an employer's use of an abbreviated version of its name on pay check stubs might be a technical violation of Labor Code section 226, but no penalty was imposed for such a technical violation because the employee failed to make the necessary showing that she suffered injury as a result).

[222] *Fleming v. Dollar Tree Stores Inc*., 2006 U.S. Dist. LEXIS 67749 (Sept. 15, 2006).

§ 3.1.5(m)

Timing of Payment

California requires most employees who are not exempt from the receipt of overtime to be paid at least twice monthly. Wages for the 1st through the 15th day of the month must be paid by the 26th day of the month; wages for the 16th through the last day of the month must be paid by the 10th day of the following month. Wages for weekly, biweekly, and other semimonthly pay periods must be paid within seven days of the close of the pay period. Pay for hours worked in excess of an employee's regular schedule are to be provided no later than the payday for the next regular payroll period, but such payments must be accompanied by an additional explanation of the nature of the payment.[223]

The failure of a California employer to pay all wages that are due every pay period may result in the imposition of a penalty of up to $200 per employee per pay period plus 25% of the wages not paid to each employee each pay period.[224] A failure to pay the minimum wage is subject to a separate penalty of $100 per employee per pay period for an initial violation and $250 per employee per pay period for any subsequent violation.[225] Other provisions of the Labor Code are subject to penalties in the same amount with lower penalties for initial violations and higher penalties for subsequent violations.[226]

§ 3.1.5(n)

Enforcement, Remedies & Penalties for Wage Order Violations

Employers and individuals acting on behalf of employers that violate or cause to be violated any provision of A.B. 60 or its accompanying provisions or any provision of a Wage Order regulating hours and days of work is subject to a penalty of:

- $50 per employee per pay period and the amount of the unpaid wages for any initial violation; and
- $100 per employee per pay period and the amount of the unpaid wages for any subsequent violation.[227]

The penalty previously applicable only to construction industry employers for payment of wages or benefits by a check drawn on a nonexistent account or an account with insufficient funds has been made applicable to all private employers. Where such a failure to make payment occurs, the wages or benefits shall continue to accrue as a penalty on a day-by-day basis until payment is made, up to a maximum penalty of 30 days' pay. The penalty will not apply if the failure to pay was unintentional or if the employee recovers the service charge for dishonored checks authorized by the Civil Code.[228]

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[223] CAL. LAB. CODE § 204(b).

[224] CAL. LAB. CODE § 210.

[225] CAL. LAB. CODE § 1197.1.

[226] CAL. LAB. CODE § 225.5; *see also Amaral v. Cintas Corp. 2,* 163 Cal. App. 4th 1157 (2008) (penalties for subsequent violations do not apply until employer is on notice that violation exists).

[227] CAL. LAB. CODE § 558.

[228] CAL. LAB. CODE § 203.1.

§ 3.1.5(o)

Payment upon Separation / Termination

A discharged or laid-off employee must be paid on the day of discharge.[229] A California employee who resigns must be paid within 72 hours of ceasing work unless the employee has given 72 hours' advance notice of quitting, in which case the final wages must be paid when the employee ceases work. An employee who resigns with less than 72 hours' notice is entitled to have his or her final paycheck mailed if requested by the employee. The obligation to pay "discharged" employees immediately upon cessation of employment applies equally to employment relationships that end as a result of the completion of a specific assignment or term of employment.[230] Special provisions for the payment of final wages apply to certain temporary employees of temporary services agencies, seasonal employees in certain industries, to employees engaged in the production or broadcasting of motion pictures, to oil drilling employees, to certain unionized employees who temporarily work at live theatrical or concert events, and to employees of the state.[231]

The *willful* failure to pay a terminated employee in a timely fashion usually subjects an employer to a penalty, which consists of the continuation of the employee's wages on a day-by-day basis until the final paycheck is ready, or until a maximum time limit of 30 days is reached.[232] A willful failure to pay is considered to be a conscious failure to pay and no proof of evil intent is required. A negligent failure to pay is usually not penalized. An employer cannot condition the payment of final wages on an employee's execution of a release.[233] The waiting time penalty is excused if there is a good-faith dispute that *no* additional wages are due, or if there are strong equitable considerations, such as where the obligation to pay turns upon a previously unresolved legal issue. The waiting time penalty is calculated by dividing an employee's weekly pay by five and paying the resulting amount for each day that a penalty is due.[234] The maximum penalty of 30 days' pay may, as a result, exceed what an employee would earn in a month.

The Labor Code generally prohibits requiring the execution of a release 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.[235] This prohibition has been interpreted as permitting the settlement of a wage claim after all wages concededly due have been paid.[236] Subsequent changes in the Labor Code have raised questions about whether and in what circumstances claims for wages can be settled.[237]

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[229] An employee whose term of employment comes to an end is neither discharged nor laid off for the purpose of imposing a waiting time penalty. *Smith v. Superior Court*, 123 Cal. App. 4th 128 (2004).

[230] *Smith v. Superior Court* (*L'Oreal USA, Inc.*), 39 Cal. 4th 77 (2006).

[231] CAL. LAB. CODE §§ 201, 201.3, 201.5, 201.7, 201.9.

[232] The waiting time penalty is generally subject to the same multiyear statute of limitations as for the recovery of the unpaid wages. CAL. LAB. CODE § 203; *see also Pineda v. Bank of America*, N.A., 50 Cal. 4th 1389 (2010); *McCoy v. Kimco Staffing Servs., Inc.,* 157 Cal. App. 4th 225 (2007) (an employee who is paid all of his wages late, and then sues to recover a waiting time penalty, is subject to a one-year statute of limitations).

[233] *Singh v. Southland Stone, U.S.A., Inc.*, 186 Cal. App. 4th 338 (2010).

[234] *Mamika v. Barca*, 68 Cal. App. 4th 487 (1998).

[235] CAL. LAB. CODE § 206.5.

[236] *Reid v. Overland Machined Prods.,* 55 Cal. 2d 203 (1961).

[237] *Perez v. Uline, Inc.*, 157 Cal. App. 4th 953 (2007) (general release of claims was, with little discussion, found valid as to a release of overtime wages).

§ 3.1.5(p)

Deductions from Wages

California severely limits the circumstances in which an employer can make a deduction from an employee's wages.[238] An employer can deduct from an employee's paychecks a regular installment on a loan or a debt only where the employee has voluntarily consented in writing to such a deduction.

The DLSE has set forth specific conditions that must be met before an employer may deduct overpayments to employees without violating California law. Specifically, an employer does not violate California law when, as a consequence of the employer's standard payroll practice, it recovers overpayments of wages provided that:

1. the deductions reflect predictable and expected overpayments made in the immediately preceding pay period;
2. the wage deduction is for an ascertainable amount;
3. the deduction is expressly authorized in writing by the employee;
4. the employee voluntarily consents to the deduction;
5. the amount deducted does not go above the authorized ascertained amount;
6. there is never a deduction from an employee's *final* paycheck; and
7. the deduction does not put the employee's earnings for all hours worked below the minimum wage.[239]

An employer can make deductions from an employee's wages for damage that has resulted from an employee's gross negligence, recklessness, or willful misconduct. An employer must bear the burden of losses that result from an employee's ordinary negligence or that occurred without any negligence on the part of the employee.[240] Where an employer cannot determine which employee's sales should be charged for the commissions previously paid on returned items, the employer cannot distribute the unearned commissions among all employees and deduct such commissions from their wages.[241] If an employer makes a deduction but cannot prove that an employee was guilty of the requisite degree of misconduct, then the employer will incur a waiting time penalty. Any doubt as to an employer's ability to prove misconduct is best resolved in a small claims or other court proceeding against the employee.

An employer can recover an advance paid on a commission if the conditions precedent for earning the commission have not occurred, but cannot recover commissions already paid for completed sales. An employee's right to commissions is subject to certain conditions precedent set forth in the employer's compensation plans and payments made before these conditions are satisfied are not earned commissions, but merely advances, and are subject to

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[238] *California State Employees' Ass'n v. State*, 198 Cal. App. 3d 374 (1988); *Barnhill v. Robert Saunders & Co*., 125 Cal. App. 3d 1 (1981).

[239] DLSE Opinion Letter 2008.11.25.

[240] *Quillian v. Lion Oil Co.,* 96 Cal. App. 3d 156 (1979).

[241] *Hudgins v. Nieman Marcus Group*, *Inc*., 34 Cal. App. 4th 1109 (1995).

chargeback.[242] However, an employer cannot recoup a commission when all the requirements for earning a commission under the contract had been satisfied.[243] In *Sciborski v. Pacific Bell Directory*, the court rejected the employer's argument that the commission could be recouped because the plaintiff had been assigned the customer as a result of a clerical error. The court held that all the express contractual conditions for earning a commission had been satisfied, and there was nothing in the contract providing that a commission is not earned if it is later determined that a clerical error resulted in an employee accidentally working with the wrong customer.

Indirect deductions from employees' wages are also prohibited. An employer cannot require an employee to patronize the employer or any other person with respect to the purchase of anything of value. This prohibition has been extended to preclude an employer from requiring an applicant for employment to pay any fee in connection with the application for, receipt of, or processing of an application for employment.[244]

An employer does not violate the Labor Code by deducting advances that might be earned in the future from other advances.[245] Where a payment made at the time of sale did not become an earned commission until the product was later delivered and payment was made, and well after the order was booked, the payment was only an advance. If an order that had been booked did not later become an earned commission, the employer would deduct the previously provided advance from the advances provided in the next pay period. The deduction of the advances from other advances was found to be permissible as the advances were not wages that were subject to the limitations on requiring employees to return earned wages. A similar conclusion was reached where commissions were advanced when subscriptions were booked, but the commissions were not earned until the subscription was maintained for a period of time.[246] A contrary result may be reached where an incentive plan suggests that telemarketers earn incentives at the time of sale.[247] If a customer cancelled a subscription that had been sold by the telemarketer, the employer would deduct the previously paid incentive from the incentives due in the period when the subscription was cancelled. The telemarketers had not expressly agreed in writing to the deduction of incentives that the employer did not consider to be earned. In addition, the employer retained a portion of the customer's subscription payment, which suggested that the telemarketers had conferred a benefit on their employer.

Once all the requirements for earning a commission under a contract have been satisfied, the commission is earned, and the employer cannot recoup the commission.[248]

California extends additional wage protection to immigrants to the United States. Employers are prohibited from deducting from the wages of employees to pay for the cost of the individual immigrating to and being transported to the United States.[249]

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[242] *Deleon v. Verizon Wireless, L.L.C.*, 207 Cal. App. 4th 800 (2012); *see also Steinhebel v. Los Angeles Times Communications, L.L.C.*, 126 Cal. App. 4th 28 (2006).

[243] *Sciborski v. Pacific Bell Directory*, 205 Cal. App. 4th 1152 (2012).

[244] CAL. LAB. CODE § 450(b).

[245] *Koehl v. Verio*, *Inc*., 142 Cal. App. 4th 1313 (2006).

[246] *Steinhebel v. Los Angeles Times Commc'ns*, *L.L.C.*, 126 Cal. App. 4th 696, 705 (2005).

[247] *Harris v. Investors Bus. Daily*, 138 Cal. App. 4th 28 (2006).

[248] *Sciborski v. Pacific Bell Directory*, 205 Cal. App. 4th 1152 (2012).

[249] CAL. CIV. CODE § 1670.7.

§ 3.1.5(q)

Posting Requirements

California requires employers to post a copy of the applicable Wage Order and a notice that advises employees of paydays. A summary of the provisions of the Wage Order and a notice as to how to contact the Division of Labor Standards Enforcement must be printed on the first page of each Wage Order.[250]

§ 3.1.5(r)

Notice Requirements

§ 3.1.5(r)(i)

Wage Theft Prevention Act Notice Requirements

The Wage Theft Prevention Act[251] requires notices in a particularized form to all employees hired after January 1, 2012, and, in some circumstances, notice to employees hired prior to that date.[252] The statute requires notice at the time of hire of the following:

- The rate or rates of pay and the basis for pay, *i.e.*, whether the employee will be paid by the hour, shift, day, week, salary, piece, commission, or otherwise. The rate information must also include overtime rates.
- Any allowances claimed as part of the minimum wage, including meal or lodging allowances.
- The regular payday designated by the employer.
- The name of the employer, including any "doing business as" names used by the employer.
- The physical address of the employer's main office or principal place of business. The mailing address must also be provided if it differs from the principal physical address.
- The telephone number of the employer.
- The name, address, and telephone number of the employer's workers' compensation insurance carrier.
- Any other information the Labor Commissioner deems material and necessary.

Temporary service employers must also include 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.[253]

An employer's duty to disclose the above information continues after hiring the employee. When any of the information listed above changes, employers must notify employees in writing within seven business days of the change. An employer may satisfy this notice of

[250] CAL. LAB. CODE § 1183(b).

[251] A.B. 469, ch. 65 (Oct. 9, 2011).

[252] CAL. LAB. CODE § 2810.5.

[253] CAL. LAB. CODE § 2810.5 (as amended by A.B. 1744, ch. 844 (Sept. 30, 2012)).

modification if all the changes are reflected on a timely itemized wage statement (paystub) or if the changes are provided in another writing required by law. Notice must be provided in the language the employer normally uses to communicate to employees.

The notice requirement applies to all employees except: public employees; employees who are exempt from the receipt of overtime; and employees who are covered by *bona fide* collective bargaining agreements that provide overtime and provide a base wage that is 30% more than the state's minimum wage.

The Labor Commissioner issued a template notice that expands the information that employers are required to provide to employees.[254] The template includes:

- The date of hire.
- Any fictitious names used by the employer.
- Whether the hiring employer is a staffing agency/business.
- Whether there is a written agreement regarding rates of pay.
- The identifying information for the employer's workers' compensation insurer and policy number or number of the employer's self-insurance certificate.
- Spaces for both the employer and employee to sign the notice. The employee's signature is only an acknowledgement of receipt.
- The name and position of the employer representative issuing the notice and the date issued.
- A concluding paragraph of information about the new statute.

The Labor Commissioner also issued "Frequently Asked Questions" that impact the notice process. Notably:

- All of the information in the template form is deemed material and necessary and must, therefore, be provided to an employee. An employer need not, however, use the exact form of the Labor Commissioner's template.
- The notice has to be a separate, self-contained document.
- The notice can be delivered electronically.
- The notice requirement cannot be waived.[255]

The template notice and FAQs are likely to be a source of controversy in the future. This is particularly true because a failure to comply with the new statute may give rise to penalties under the Private Attorneys General Act of 2004.[256]

[254] A sample "Notice to Employee" is available on the DIR website, http://www.dir.ca.gov/dlse/Governor_signs_Wage_Theft_Protection_Act_of_2011.html.

[255] *See* http://www.dir.ca.gov/dlse/Governor_signs_Wage_Theft_Protection_Act_of_2011.html.

[256] CAL. LAB. CODE §§ 2699 *et seq.* For further discussion of the PAGA, see § 3.1.6(a) below.

§ 3.1.5(r)(ii)

California Transparency in Supply Chains Act Notice Requirements

The California Transparency in Supply Chains Act,[257] requires retail sellers and manufacturers doing business in California to disclose their efforts to eradicate slavery and human trafficking from their direct supply chains for tangible goods offered for sale. The law is not intended to apply to a retail seller or manufacturer having less than $100 million in annual worldwide gross receipts.[258]

§ 3.1.6

F. ENFORCEMENT OF WAGE & HOUR LAWS

§ 3.1.6(a)

Administrative Procedure & Court Actions

California gives employees the choice of using a specialized administrative procedure to resolve wage claims or filing their claims directly in court. An employee can pursue wage claims that are based on a law, such as minimum wage or overtime claim, and wage claims that are based on a contract, such as bonuses and commissions, through either process.

§ 3.1.6(a)(i)

Claims Filed with the Labor Commissioner

The Labor Commissioner may take assignments of claims for wages lost as the result of demotion, suspension or discharge for lawful conduct during nonworking hours away from the employer's premises.[259] It is not clear whether this provision is to provide broad protections for off-duty conduct, or just a further mechanism to enforce laws.

An outline of California's special wage claim hearing procedure is set out below:

- A wage claim is filed by the completion of a relatively simple form. A notice that the claim is filed and a summary description of the claim are mailed to the employer with an invitation to reply.
- Most often a voluntary conference is scheduled, at which time the facts underlying the claim will be reviewed and the possibility of settling the matter will be investigated. If the claim is not settled, then the Labor Commissioner may dismiss the claim so that the employee can pursue it in court or the Labor Commissioner may set the matter for a hearing.
- A notice of a formal hearing and complaint will be mailed to the employer. An answer to the complaint should be filed within ten days.
- The hearing itself is conducted informally. However, a record of the hearing is maintained, and an employer must have all relevant documents and witnesses available at the hearing.

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[257] CAL. CIV. CODE § 1714.43 (as amended by S.B. 657, 2009-2010 Sess. (Feb. 7, 2009), effective Jan. 1, 2012).

[258] CAL. CIV. CODE § 1714.43 (as amended by S.B. 657, 2009-2010 Sess. (Feb. 7, 2009), effective Jan. 1, 2012).

[259] CAL. LAB. CODE § 96(k).

The interest payable on wages recovered in a Labor Commissioner proceeding is now the same as that which can be sought in a court proceeding for unpaid wages. That rate of interest is 10% simple interest per year.[260]

A party that loses before the Labor Commissioner can appeal to court and obtain a new trial.[261] California Labor Code section 98.2 allows parties to appeal the Labor Commissioner's decision and seek *de novo* review in superior court. An employee who pursues an appeal under section 98.2 is not required to pay the employer's costs and attorneys' fees if the employee's appeal is dismissed on jurisdictional grounds as an untimely appeal.[262] However, if the appealing party does not prevail in court, the appealing party must pay the other party's costs and attorneys' fees. An employee will be considered to prevail in an appeal if the employee is awarded any amount by the court.[263] In *Arias v. Kardoulias*, the court reasoned that this provision is meant to discourage unmeritorious appeals, and an employee can only present an unmeritorious appeal if the superior court reaches the merits of the claim. Therefore, section 98.2(c) does not become operative against an employee unless the superior court had jurisdiction to conduct a trial on the merits of the employee's wage claim.

The employee can recover attorneys' fees for the efforts of the attorney on the appeal, but not for the time spent by the attorney at the Labor Commissioner hearing.[264] If an indigent employee is represented in a successful appeal by an attorney from the Labor Commissioner's office, the employee can recover attorneys' fees, even though the attorney is regularly paid by the Labor Commissioner.[265]

To appeal an adverse decision of the Labor Commissioner, an employer must post a bond with the court in the amount awarded by the Labor Commissioner and give written notice of the bond to the parties and the Labor Commissioner. The obligation to post a bond is not jurisdictional and the late posting of a bond may not result in the dismissal of an appeal.[266] The bond shall be payable upon the judgment, withdrawal or dismissal of the appeal or upon a settlement if the employer does not otherwise satisfy the obligation within ten days.[267] The failure to pay an award of the Labor Commissioner may lead to further bonding obligations and penalties.[268] Once the Labor Commissioner elects to hold a hearing on a wage claim, the Labor Commissioner cannot then summarily dismiss the matter and deny the employee a right of appeal.[269]

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[260] CAL. LAB. CODE § 98.1.

[261] *Gonzalez v. Beck*, 158 Cal. App. 4th 598 (2007) (employer that fails to answer or appear at a hearing before the Labor Commissioner and does not appeal within the ten-day period for doing so must apply to the Labor Commissioner for relief from its failure to appear before pursuing any relief in court; employer that has not appeared or answered but that appeals from a decision of the Labor Commissioner within the ten-day period need not apply for relief from the Labor Commissioner).

[262] *Arias v. Kardoulias*, 207 Cal. App. 4th 1429 (2012).

[263] CAL. LAB. CODE § 98.2.

[264] *Sampson v. Parking Serv. 2000 Com*, *Inc*., 117 Cal. App. 4th 212 (2004).

[265] *Lolley v. Campbell*, 28 Cal. 4th 367 (2002).

[266] *Progressive Concrete*, *Inc. v. Parker*, 136 Cal. App. 4th 540 (2006) (late filing of bond does not result in dismissal); *Williams v. Freedomcard*, *Inc*., 123 Cal. App. 4th 609 (2004) (appeal dismissed when no showing of excuse for failing to timely post bond).

[267] CAL. LAB. CODE § 98.2.

[268] CAL. LAB. CODE § 243.

[269] *Post v. Palo/Haklar & Assocs*., 23 Cal. 4th 942 (2000).

The Labor Commissioner has withdrawn the decisions of Hearing Officers in wage claim proceedings that had been designated as precedential.[270] The court of appeal found the designation of such decisions as precedential was an invalid attempt to circumvent the Administrative Procedure Act.[271] The court concluded that a decision could be designated as a precedential decision only where an administrative agency is required to issue a decision by a statute or the Constitution, and no such requirement exists with respect to claims filed with the Labor Commissioner.

An employee may use the Labor Commissioner's wage claim procedure for some types of claims even though the employee works under a union contract that provides that disputes are to be resolved by arbitration.[272] Where the sole claim that an employee raises is based on a state statute concerning the timeliness of final wage payments, the employee's claim can be heard before the Labor Commissioner because the claim does not require an interpretation of the contract or require arbitration pursuant to the contract. Indeed, the Labor Commissioner's failure to consider such a claim would be unlawful.[273] However, if the collective bargaining agreement under which an employee works must be interpreted in order to resolve whether overtime is due under state law, the wage claim will be preempted by section 301 of the Labor Management Relations Act (LMRA).[274] Where no interpretation of a collective bargaining agreement is needed to understand the pay practice at issue, then the fact that the dispute arises under a collective bargaining agreement will not preempt the resolution of the legality of the pay practice in state court.[275] The Railway Labor Act has been found to preempt the wage claims of airline employees.[276] Claims concerning the compensation of union-represented employees also raise issues as to whether such claims must be arbitrated under the grievance arbitration provisions of the applicable collective bargaining agreement. For example, an employer could not compel an employee to arbitrate his meal and rest period claims pursuant to the grievance and arbitration process set out in a collective bargaining agreement where there was no clear commitment to arbitrate statutory claims.[277]

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[270] Memorandum of Roger Roginson, Chief Counsel to the Labor Commissioner, Mar. 7, 2008.

[271] Memorandum of Roger Roginson, Chief Counsel to the Labor Commissioner, Mar. 7, 2008.

[272] *Sonic-Calabasas v. Moreno*, 51 Cal. 4th 659 (2011).

[273] *Livadas v. Bradshaw*, 512 U.S. 107 (1994).

[274] 29 U.S.C. § 185(a); *Firestone v. Southern Cal. Gas Co.*, 219 F.3d 1063 (9th Cir. 2000); *see also Cramer v. Consolidated Freightways*, *Inc.*, 255 F.3d 683 (9th Cir. 2001).

[275] *Gregory v. SCIE*, *L.L.C.*, 317 F.3d 1050 (9th Cir. 2003) (no preemption of employees' wage claim by section 301 of LMRA where collective bargaining agreement had to be referenced but not interpreted to resolve wage claim); *Burnside v. Kiewit Pac. Corp*., 491 F.3d 1053 (9th Cir. 2007) (collective bargaining agreement that provided some compensation for the same travel did not negate the ability of the employees to seek compensation for the travel independent of the collective bargaining agreements where resolution of the employees' claims did not require an interpretation of the collective bargaining agreement); *Lujan v. Southern Cal. Gas Co.*, 96 Cal. App. 4th 1200 (2002). *See also Sciborski v. Pacific Bell Directory*, 205 Cal. App. 4th 1152 (2012) (dispute over whether a commission was illegally recouped was not preempted because the claim arose from state law obligations and determination of liability did not depend on an interpretation of the collective bargaining agreement).

[276] *Fitz-Gerald v. Skywest, Inc.* 155 Cal. App. 4th 411 (2007) (the plaintiffs' claims for minimum wages, overtime, missed meal and rest periods and penalties were "inextricably intertwined" with the terms of the collective bargaining agreement).

[277] *Zavala v. Scott Brothers Dairy*, *Inc*., 143 Cal. App. 4th 585 (2006); *see also Cicairos v. Summit Logistics*, *Inc*., 133 Cal. App. 4th 949 (2005); *Bearden v. United States Borax*, *Inc*., 138 Cal. App. 4th 429 (2006) (both to the same effect).

The Labor Commissioner can file suit to recover wages for a group of employees, without any formal assignment of the claims by the employees to the state. The DLSE can be awarded attorneys' fees when pursuing employees' wage claims.

The Labor Commissioner's Bureau of Field Enforcement (BOFE) conducts field audits of employers' pay practices. BOFE may ask an employer to conduct a self-audit to ascertain how much in the way of wages may be due employees. If an employer declines to voluntarily cooperate with the audit, the DLSE can subpoena the employer's records and conduct its own audit.[278] If an employer disagrees with the result of an audit, then the Labor Commissioner can file suit against the employer.

An employer that fails to pay the required minimum wage to an employee may be penalized and the penalty may include restitution to the employee of the amount of the unpaid wages.[279] Both employees and the Labor Commissioner can recover liquidated damages in an amount equal to any unpaid minimum wages. An employee can recover liquidated damages in a proceeding before the Labor Commissioner.[280] The amount of liquidated damages may be reduced or eliminated where the employer demonstrates that it had a good-faith and reasonable belief that it was complying with the law. For information on updates to the liquidated damages penalties, see § 3.1.2(a)(iv) above.

§ 3.1.6(a)(ii)

Class Actions

Class action suits require the identification of a class representative. In *Pirjada v. Superior Court of Los Angeles County*, an attorney was not entitled to precertification discovery to identify a new suitable class representative when the original class representative lacked standing to represent the class.[281]

Employees are ever more frequently filing their claims for wages in court without pursuing claims with the Labor Commissioner. Under state law, an employee may pursue an "opt-out" class action, which can include all similarly situated employees unless an employee affirmatively "opts-out." Under federal law, an employee must affirmatively "opt-in" to such a class action. Whether both "opt out" and "opt in" types of claims can be pursued in the same action is a continuing source of controversy.[282] The more potent "opt-out" nature of state class actions has been reinforced by a number of court decisions, both historical and current, that support the class action mechanism. Some of the key points related to class actions in California are detailed below.

First, California courts historically have demonstrated an unwillingness to deny class certification at early stages of the litigation. In *Prince v. CLS Transportation, Inc.,* the court of appeal concluded that wage and hour class actions should not be defeated at the initial pleading stage.[283] In *Lee v. Dynamex, Inc.,* the court of appeal found that the lower court's denial of class certification was not appropriately made in advance of discovery as to class members'

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[278] *Millan v. Restaurant Enters. Group*, 14 Cal. App. 4th 477 (1993).

[279] CAL. LAB. CODE § 1197.1.

[280] CAL. LAB. CODE § 98. *See also* CAL. LAB. CODE §§ 1194.2, and 1197.1 (as amended by A.B. 442 (Oct. 11, 2013)).

[281] 201 Cal. App. 4th 1074 (2011).

[282] *Edwards v. City of Long Beach,* 467 F. Supp. 2d 986 (C.D. Cal. 2006).

[283] 118 Cal. App. 4th 1320 (2004).

identities, particularly where the class was sufficiently ascertainable for class certification purposes.[284] In particular, the class was ascertainable by reference to business records and application of a set of common characteristics, and the other criteria for class certification needed to be reconsidered. However, in *Sotelo v. MediaNews Group, Inc.*, the court of appeal affirmed denial of class certification where many putative class members had no agreements with the defendant employers and could not otherwise be identified through defendants' records because any obligation to track the members of the proposed class would depend on the merits of the plaintiffs' allegation that they were employees.[285]

Second, in 2004, the California Supreme Court reassessed the role of a trial court in certifying class actions in *Sav-On Drug Stores, Inc. v. Superior Court*.[286] Read narrowly, the decision did no more than reaffirm that an appellate court should not reverse a trial court's certification of a class unless the trial court abused its discretion in certifying the class. However, the broad rationale used to determine that there was no abuse of discretion was troublesome for employers. The *Sav-On* decision emphasized that whether common claims predominate over individual claims is truly a test of predominance and that individual proof of damages and even liability will not, as a matter of law, bar class certification. A disagreement as to which activities are exempt and which are nonexempt may form a sufficient nexus of predominance for a class to be certified. An allegation that misclassification of employees was deliberate or the unintended consequence of a uniform policy, if established, could support a class proceeding.[287] The court emphasized that many forms of proof could be used to assess the viability of class actions regarding employees' exempt status.[288] And, the court emphasized that the proof needed to establish a predominance of common issues was not great.

The *Sav-On* decision did not conclude the controversy over when a class action is appropriately certified. In *Dunbar v. Albertson's, Inc.,* the court denied class certification in a store manager's suit alleging that managers were misclassified as overtime exempt.[289] The court of appeal concluded that the lower court's denial of class certification was not an abuse of discretion because common issues did not predominate, a class action was not the superior means of resolving the issues presented, and that given the significant variations in the grocery managers' work, very particularized, individual liability determinations would be necessary.[290] In *Mora v. Big Lots Stores, Inc.*, retail store managers could not pursue a class action where their employer did not operate its stores or exercise supervision over the store managers in such a standardized manner that would permit a determination that the

[284] 166 Cal. App. 4th 1325 (2008).

[285] 207 Cal. App. 4th 639 (2012).

[286] 34 Cal. 4th 319 (2004).

[287] *Arnold v. Mutual of Omaha Ins. Co.*, 202 Cal. App. 4th 580 (2011) (holding that the foundational legal question of whether a group of employees were independent contractors or employees was appropriate for class certification. The court rejected the argument that individualized analysis would be necessary because of differences in job titles, skill levels, pay grades and the level of supervision between class members.).

[288] *Parris v. Lowe's HIW, Inc.*, 2007 Cal. App. LEXIS 1638 (Aug. 28, 2007) (class that the trial court considered "too big" to manage should still be certified as a class; individual proof of whether the employer knew of off-the-clock work was not needed, the trial court only need determine whether the circumstances at the company's stores indicated that the employer had knowledge of the hours worked by employees or had "the opportunity through reasonable diligence to acquire such knowledge").

[289] *Dunbar v. Albertson's*, *Inc*., 141 Cal. App. 4th 1422 (2006).

[290] *See Mora v. Big Hot Stores, Inc.*, 194 Cal. App. 4th 496 (2011); *Marlo v. United Parcel Serv., Inc.,* 2011 U.S. App. LEXIS 8664 (9th Cir. Apr. 28, 2011).

employees were misclassified on a class-wide basis.[291] In *Marlo v. United Parcel Service, Inc., m*anagers were also unsuccessful in pursuing a class action even after one manager was found to be entitled to overtime.[292] In *Walsh v. Ikon Office Solutions, Inc.,* the court approved the decertification of a class where individual determinations of liability would have to be made.[293] All of these decisions were subject to reevaluation after the California Supreme Court's decision in *Brinker Restaurant Corp. v. Superior Court,* which emphasized the need for common proof as a basis for a class action.[294]

In 2012, the *Brinker* court emphasized a balanced approach to determining whether a class action should be certified. A court needs to address the threshold issues necessary to determine whether a class can be certified and should address the merits only to the extent that they bear on the class-certification issue. A court must determine whether liability can be shown by common proof and if any issues that require individualized proof can be managed in a class proceeding.

Brinker highlights the role of an employer's policies in determining whether a class action can be maintained. In *Brinker*, a class concerning rest-period violations was appropriate because the restaurant's uniformly applied rest-period policy was deficient.[295] On the other hand, *Brinker* found that the certification of a class regarding alleged, off-the-clock work was inappropriate because the restaurant's policy prohibited off-the-clock work and the anecdotal evidence offered by the plaintiff was not sufficient to demonstrate that there was a practice contrary to the policy. In *Dailey v. Sears, Roebuck & Co.*, a post-*Brinker* decision, the court similarly denied class certification where common questions did not predominate.[296]

The ultimate balance between an employer's obligation only to "provide" meal periods and class certification remains to be determined. The California Supreme Court de-published three post-*Brinker* rulings that found class certification of meal period class claims not to be appropriate where the appellate court had set a low standard for providing meal periods.[297]

Third, in yet another older decision—*Bell v. Farmers Insurance Exchange*—the court of appeal concluded that a reliable statistical average of the uncompensated overtime worked by a class was a sufficient basis to uphold an award of $88 million in damages.[298] Where the total amount of liability can be accurately calculated, the fact that individual claims may not be accurately calculated is considered to be of diminished concern to an employer. This interest was further diminished where the claims process included a procedure for the claims administrator to examine claims that appeared to be fraudulent.

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[291] *Mora v. Big Lots Stores, Inc.,* 194 Cal. App. 4th 496, 505 (2011).

[292] *Marlo v. United Parcel Service, Inc.,* 2011 U.S. App. LEXIS 8664 (9th Cir. Apr. 28, 2011).

[293] 148 Cal. App. 4th 1440 (2007).

[294] *Brinker Rest. Corp. v. Superior Ct.,* 53 Cal. 4th 1004 (2012).

[295] *See also Faulkinbury v. Boyd & Assoc.*, 216 Cal. App. 4th 220 (2013).

[296] 214 Cal. App. 4th 974 (2013), *review denied*, 2013 Cal. LEXIS 5853 (July 10, 2013).

[297] *Lamps Plus Overtime Cases*, 195 Cal. App. 4th 389 (2012), *review granted,* 143 Cal. Rptr. 3d 527 (2011), *transferred to, on remand*, 209 Cal. App. 4th 35 (2012), *review denied*, *depublished*, 2012 Cal. LEXIS 11738 (Dec. 12, 2012); *Hernandez v. Chipotle Mexican Grill*, 208 Cal. App. 4th 1487 (2012), *review denied, depublished,* 2012 Cal. LEXIS 11598 (Dec. 12, 2012); *Tien v. Tenet Healthcare*, 209 Cal. App. 4th 1077 (2012), *review denied, depublished*, 2013 Cal. LEXIS 426 (Jan. 16, 2013).

[298] 115 Cal. App. 4th 715 (2004).

As seen in *Bell*, the trial court has discretion to permit a class action to proceed even where damages recoverable by the class must be based on statistical estimations. However, the court in *Evans v. Lasco Bathware, Inc.*[299] distinguished *Bell* and explained that the trial court "equally has discretion to *deny* certification when it concludes the fact and extent of each member's injury requires individualized inquiries that defeat predominance." The court in *Evans* upheld the trial court's denial of class certification where there was a potentially wide disparity in the amount of damages recoverable by each class member. The ability of a plaintiff to pursue a class action by sampling and statistical proof will be reviewed by the state supreme court in the near future.[300]

Fourth, once a class action is filed, communications with the class members may become a matter of importance and dispute. In *Howard Gunty Profit Sharing Plan v. Superior Court*,[301] the court of appeal concluded that the permission of the court was required to send notices to class members because prosecution of a class action must be subject to the court's supervision. In *Belaire-West Landscape, Inc. v. Superior Court (Rodriguez)*,[302] the court ordered notice to be sent to employees to determine if they objected to the receipt by plaintiffs' counsel of the employee's addresses and telephone numbers. However, the series of cases that have provided an "opt-out" procedure for protecting class members' privacy may have come to an end with the ruling in *Crab Addison, Inc. v. Superior Court (Martinez)*.[303] In that case, the court held that putative class members are "witnesses" and, therefore, a plaintiff is entitled to the contact information for such witnesses without advance notice to the witness-employees. In that case, the court of appeal held that any reservations about plaintiff's use of the information could be addressed by a protective order.

Fifth, random sampling of a large class has become a basis for reversal of a certification decision. A trial court's unilateral decision to determine the exempt status of 260 bank employees by conducting a trial of a sample of 20 employees was found to be procedurally flawed.[304] The trial court's finding that the bank had failed to rebut the testimony of the 20 employees could not be accepted where the bank had repeatedly attempted to introduce the testimony of 70 other employees who would have sustained the bank's burden of proof. The California Court of Appeal found the inclusion of the named plaintiffs in the sample of 20, the small size of the sample, the high rate of witnesses from the sample of 20 who withdrew from the case, and the absence of expert input or principled statistical foundation for the court's trial plan made it inappropriate to extrapolate from the sample to the rest of the class. The extrapolation from the sample of 20 to the class was also inappropriate because the class included individual employees who appeared to be correctly classified as exempt. Drawing on the U.S. Supreme Court's decision in *Wal-Mart Stores v. Dukes*,[305] the California Court of Appeals concluded that "due process principles require individualized inquiries where the applicability of the exemption turns on the specific circumstances of each

[299] 178 Cal. App. 4th 1417 (2009).

[300] *Duran v. U.S. Bank Nat'l Ass'n*, 203 Cal. App. 4th 212 (2012), *review granted*, 140 Cal. Rptr. 3d 795 (Cal. 2012).

[301] 88 Cal. App. 4th 572 (2001).

[302] 149 Cal. App. 4th 554 (2007), *review denied*, 2007 Cal. LEXIS 8065 (July 25, 2007); *see also CashCall, Inc. v. Superior Court*, 159 Cal. App. 4th 273 (2008); *Puerto v. Superior Court*, 158 Cal. App. 4th 1242 (2008).

[303] 169 Cal. App. 4th 958 (2008).

[304] *Duran v. U.S. Bank Nat'l Ass'n,* 203 Cal. App. 4th 212, *review granted*, 140 Cal. Rptr. 3d 795 (Cal. 2012).

[305] 131 S. Ct. 2541 (2011).

employee, even where the employer's misclassification may be willful."[306] Ultimately, the appellate court decertified the class. The extent to which this case may provide relief to employers should be resolved by the California Supreme Court, which accepted review of the case in 2012.[307]

Sixth, the courts are much more likely now to certify classes if there are consistent company- or employer-wide policies that are the subject of the lawsuit. For example, in *Bradley v. Networkers International L.L.C.*, the court of appeal ruled in favor of class certification after noting that the employer had consistent companywide policies for all employees because the companywide policies would assist in determining whether the class members were independent contractors or employees.[308]

Seventh, employers are now entitled to individualized damages and affirmative defense determinations in wage and hour class actions. For example, in *Wang v. Chinese Daily News, Inc.*,[309] the Ninth Circuit Court of Appeals held that employers defending against wage and hour claims are "'entitled to individualized determinations of each employee's eligibility' for monetary relief" and entitled "to litigate any individual affirmative defenses they may have to class members' claims."

Lastly, even the settlement of a wage and hour class action can be a contentious proceeding. In *Kullar v. Foot Locker Retail, Inc.*,[310] the California Court of Appeal vacated a $2 million settlement of a class action because it found the trial court did not have a sufficient basis to assess the adequacy of the proposed agreement. In that case, after one class action regarding reimbursement for uniforms, meal periods and off-the-clock work was settled, the plaintiff in a second class action against the same employer for the same alleged violations objected that the first settlement was inadequate. The objections were that counsel in the first action had not conducted a sufficient investigation of the claims and that there was no demonstration of the scope of any investigation in the settlement pleadings filed with the court. The court of appeal concluded that significant weight should be given to the competency and integrity of counsel, the involvement of a neutral mediator, and that the settlement was reached by arms-length negotiation. A settlement reached in such circumstances will have a presumption of fairness when there are few objectors. However, it is the responsibility of the trial court to ensure that recovery represents a reasonable compromise of the size and merits of the claims, in consideration of the risks and expense of establishing and collecting the amounts claimed to be due. Accordingly, the matter was remanded for further consideration.

§ 3.1.6(a)(iii)

Private Attorneys General Act of 2004 (PAGA)

Under the California Labor Code Private Attorneys General Act of 2004 (PAGA), the civil penalties in the Labor Code can now be pursued by private litigants as well as by the Labor

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[306] *Duran v. U.S. Bank Nat'l Ass'n,* 203 Cal. App. 4th at 255.

[307] *Duran v. U.S. Bank Nat'l Ass'n,* 140 Cal. Rptr. 3d 795 (Cal. 2012).

[308] 221 Cal. App. 4th 1129 (2012).

[309] *Wang v. Chinese Daily News, Inc.*, 709 F.3d 829 (9th Cir. 2013).

[310] 168 Cal. App. 4th 116 (2008); *see also Lee v. Dynamex, Inc*., 166 Cal. App. 4th 1325 (2008) (court's refusal to order disclosure of contact information as witnesses where class is composed of independent contractors and defendant proposed opt-out procedure reversed).

Commissioner.[311] The PAGA, sometimes referred to as the "bounty hunter's law," specifically authorizes the pursuit of such penalties through class actions and the award of attorneys' fees to successful plaintiffs. In addition, the PAGA adds a separate civil penalty for the violation of any provision of the Labor Code for which there was not previously a penalty.[312] The California Supreme Court held that an "aggrieved employee" may bring an action for civil penalties on behalf of other employees in a representative action pursuant to the PAGA without complying with California class action procedure.[313] The procedure for initiating such actions was substantially modified by Senate Bill (S.B.) 1809, which went into effect in 2004.[314] S.B. 1809 requires most, but not all, actions under the PAGA to be reviewed by the Labor Commissioner before they are filed. In this regard, S.B. 1809 divided all PAGA actions into three kinds:

1. Actions for the violation of provisions of the Labor Code listed in section 2699.5 of the Labor Code, which may only be commenced:

   - if the aggrieved employee gives notice to the Labor and Workforce Development Agency ("Agency") and the employer; and either
     - the Agency declares that it will not take action or takes no action in the following 33 days; or
     - after assuming responsibility for pursuing the alleged violation within the first 33 days, the Agency either takes no further action in the 158 days following the employee's notice, or decides that no citation shall be issued.[315]

   No action may be commenced if the Agency issues a citation within the 158-day period. Section 2699.5 contains most of the Labor Code's basic minimum wage, overtime, meal period and timing of wage payment provisions and some occupational safety and health provisions.

2. Actions for violation of the provisions of the Labor Code concerning occupational safety and health that are set out in Division 5 of the Labor Code, other than those listed in section 2699.5, which may only be commenced if the aggrieved employee gives notice to the Division of Occupational Safety and Health, the Labor and Workforce Development Agency and employer of the alleged violation and the facts and theories underlying the alleged violation; and either:

   - the Division of Occupational Safety and Health ("Division") assumes responsibility to pursue the matter, but fails to issue a citation, in which case the employee may challenge the decision of the Division in Superior Court and the court may order the Division to issue a citation; or

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[311] CAL. LAB. CODE §§ 2698 *et seq.*

[312] *Solis v. Regis Corp.*, 621 F. Supp. 2d 1085 (N.D. Cal. 2007) (providing paychecks that could not always be cashed upon demand as required by section 212 of the Labor Code would not give rise to a penalty under section 225.5 of the Labor Code unless the employee actually suffered a delay in the receipt of payment, but a penalty could be imposed under the PAGA because it provides a penalty for every violation of the Labor Code where there is no otherwise applicable penalty).

[313] *Arias v. Superior Court*, 46 Cal. 4th 969 (2009).

[314] CAL. LAB. CODE §§ 2699 *et seq.,* as amended.

[315] S.B. 1809, § 4; CAL. LAB. CODE § 2699.3(a).

- the Division Health fails to act after the employee's initial notice, in which case the employee must follow the procedure set out below before initiating suit.[316]

No action may be commenced if the Division issues a citation within the prescribed time period for doing so.

3. Actions for violations of the Labor Code (other than those listed in section 2699.5 and Division 5 of the Labor Code) may only be commenced if the aggrieved employee gives notice to the Agency and the employer of the alleged violation and the facts and theories underlying the allegation; and either:

   - the employer fails to cure the alleged violation and give notice of the cure within the next 33 days; or
   - the employer gives notice of curing the violation in the next 33 days, the employee gives notice to the Agency and the employer of alleged shortcomings in the cure, and the Agency fails to act, the Agency finds the cure deficient and does not give the opportunity a further opportunity to cure, or the employer fails to take further corrective action within five days of the Agency's providing notice that the cure is deficient.[317]

It is the intent of the Labor Commissioner to review and filter out proposed filings that are of a nuisance nature, while permitting more substantial disputes to be pursued by private plaintiffs in court.

S.B. 1809 did not, despite its terms, limit employees from pursuing many of the penalties that are listed in Labor Code section 2699.5. That section has been found to apply only to civil penalties that were not payable to an employee until the PAGA was passed. Statutory penalties that were payable to employees prior to the passage of the PAGA may still be pursued by employees without exhausting the PAGA procedure.[318] S.B. 1809 did, however, eliminate the ability of an employee to file suit regarding posting, notice, agency reporting, or filing requirements, other than mandatory payroll or workplace injury reporting.[319]

The penalties imposed by the PAGA were unchanged by S.B. 1809.[320] Under S.B. 1809, 75% of the penalties are distributed to the Department of Industrial Relations for enforcement and education and 25% are distributed to the aggrieved employee.[321] Even if the violations occurred prior to the date that the Act took effect, the penalties under PAGA are recoverable if the DLSE could have recovered the same penalties for the same violations.[322]

The penalties recoverable under PAGA may still be tempered.[323] Penalties may not be imposed under both section 558 of the Labor Code and section 20 of the Wage Orders because PAGA only provides penalties for the violation of the Labor Code, and the penalty in section 20 of the Wage Orders is simply a reiteration of the penalty in Labor Code

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[316] S.B. 1809, § 4; CAL. LAB. CODE § 2699.3(b).

[317] S.B. 1809, § 4; CAL. LAB. CODE § 2699.3(c).

[318] *Caliber Bodyworks*, *Inc. v. Superior Court*, 134 Cal. App. 4th 365, 373 (2005).

[319] S.B. 1809, § 3; CAL. LAB. CODE § 2699(g)(2), as amended.

[320] CAL. LAB. CODE § 2699(e).

[321] S.B. 1809, § 3; CAL. LAB. CODE § 2699(i), as amended.

[322] *Lee v. Dynamex, Inc*., 166 Cal. App. 4th 1325 (2008).

[323] *Thurman v. Bayshore Transit Mgmt.,* 203 Cal. App. 4th 1112 (2012).

section 558.[324] S.B. 1809 allows a court to reduce the amount that is awarded under the PAGA if the award would, based on the facts and circumstances of the case, be unjust, arbitrary and oppressive or confiscatory.[325] This amendment, while favorable to an employer, limits the ability of an employer to argue that the penalties are unconstitutional.[326] Penalties under PAGA can be reduced as "unjust, arbitrary, oppressive or confiscatory" in circumstances other than where the employer cannot pay the penalty, such as where, as in *Thurman v. Bayshore Transit Management*, the employer came into compliance with its obligations over the objection of the union that represented the employees.[327] More significantly, an employee can collect wages as part of the civil penalty under Labor Code section 558.

The recent decisions under PAGA open the way for an employee to use a non-class proceeding under *Arias v. Superior Court*[328] to pursue both penalties and wages. The statute of limitations for collecting penalties and wages as penalties in such a proceeding would be one year. The court in *Thurman* reiterated the sobering admonition that penalties, including wages, might in some circumstances be imposed on individuals acting on behalf of an employer under section 558.[329] Finally, section 558 allows an employee to recover penalties for rest periods not provided, as the requirement to provide rest periods is a "provision regulating hours and days of work" in a Wage Order.[330] Note that under *Kirby v. Immoos Fire Protection, Inc.*,[331] the payment of the one-hour-of-pay premium when an employer fails to provide a required meal or rest period did not make the failure to provide the missed me or rest period lawful. As a result, an employer that timely pays premiums for missed meals may still be subject to penalties under PAGA.

Employees who file claims under the PAGA are also protected against retaliation by an amendment made by S.B. 1809 to section 98.6(b) of the Labor Code.

An employee who participates in the settlement of one class action could not thereafter sue in a second class action for penalties under PAGA. The second class action was barred, even though it involved claims that were not included in the settlement of the first class action. The settlement of the first class action barred not only the specific claim asserted in that class action but also all claims that could have been included in that action.[332]

§ 3.1.6(a)(iv)

Mass Actions

In addition to class actions, employees in California have attempted to pursue "mass" actions under section 17200 of the California Business and Professions Code.[333] A plaintiff in such a "mass" action may seek wages for the four-year period preceding a

[324] *But see Franco v. Athens Disposal Co.*, 171 Cal. App. 4th 1277 (2009).

[325] *See Hale v. Morgan*, 22 Cal. 3d 388 (1978).

[326] 22 Cal. 3d 388.

[327] 203 Cal. App. 4th 1112.

[328] 46 Cal. 4th 969 (2009).

[329] 203 Cal. App. 4th 1112.

[330] CAL. LAB. CODE § 558.

[331] 53 Cal. 4th 1244 (2012).

[332] *Villacres v. ABM Indus., Inc.*, 189 Cal. App. 4th 562 (2010).

[333] *Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163 (2000).

lawsuit.[334] Such "mass" actions can also be used to pursue violations of the federal Fair Labor Standards Act.[335] The ability to pursue such a "mass" actions was substantially limited by Proposition 64, effective November 4, 2004. Proposition 64 amended section 17200 to condition a plaintiff's standing to prosecute a representative action on that individual's actual injury due to the alleged unfair business practice.[336] Proposition 64 also amended the Business and Professions Code to require that "private representative actions comply with the procedural requirements applicable to class action lawsuits."[337] A class certification allows damages to be paid through a "fluid recovery fund," with any unclaimed balance of the fund providing a second payment to the affected individuals or payment for a related purpose.

Attorneys' fees are awardable to the prevailing party for many wage claims commenced in state court, even if not part of a "mass" action. However, the provision of the Labor Code that awards attorneys' fees to a prevailing party in a dispute regarding the payment of wages does not apply to claims for minimum wages or overtime. Only employees may recover attorney fees in claims for minimum wages or overtime.[338] In actions for unpaid wages, interest shall be awarded at the rate of 10% simple interest per year.[339]

§ 3.1.6(b)

Judgments for Wages

The DLSE must file a request for entry of judgment on a civil penalty or fee against an employer within three years from the date the penalty or fee became final, and the clerk of the superior court must enter the judgment immediately.[340]

Generally, an employee may recover attorneys' fees and costs that are incurred in enforcing a court judgment for unpaid wages under the Labor Code.[341] An employer that fails to pay a final court judgment or final order issued by the Labor Commissioner for wages due to an employee who has been terminated or who quits within 90 days of the date that the judgment was entered or the order became final may be the subject of increased civil penalties and criminal prosecution. The penalties increase based upon the amount of the wages owed. If an employer willfully fails to pay a final court judgment or final order issued by the Labor Commissioner, it will be subject to a fine of not less than $1,000 and not more than $10,000 for each offense if the total amount of wages due is *equal to or less than* $1,000, and a fine of not less than $10,000 and not more than $20,000 if the total amount of wages due is *more than* $1,000.[342] Wages due several employees may be totaled to determine the amount of the penalties.[343]

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[334] CAL. BUS. & PROF. CODE § 17204.

[335] *Bahramipour v. Citigroup Global Mkts., Inc.*, 2006 U.S. Dist. LEXIS 9010 (Feb. 22, 2006).

[336] CAL. BUS. & PROF. CODE § 17204; *Amalgated Transit Union, Local 1756, AFL-CIO v. Superior Court,* 46 Cal. 4th 993 (2009) (union could not serve as plaintiff in unfair competition action or pursue claims under the PAGA).

[337] Official Voter Information Guide, Proposition 64 Official Title and Summary. Previously, a plaintiff had the option of certifying a "mass" action as a "class" action. *Corbett v. Superior Court*, 101 Cal. App. 4th 649 (2002).

[338] CAL. LAB. CODE § 218.5; *see also Earley v. Superior Court*, 79 Cal. App. 4th 1420 (2000).

[339] CAL. LAB. CODE § 218.6.

[340] CAL. LAB. CODE § 200.5.

[341] CAL. LAB. CODE § 1194.3.

[342] CAL. LAB. CODE § 1197.2.

[343] CAL. LAB. CODE § 1197.2.

An employer who fails to satisfy a judgment for wages or who is convicted of violating the laws regarding wage payments must maintain a bond for two years. In addition, if the employer fails to post a bond, the Labor Commissioner may require the employer to provide an accounting of assets.[344] The bond posted by an employer convicted of a second violation of Labor Code section 243 must be payable for wages, interest, or damages. The Labor Commissioner may also require that the employer provide an accounting of assets. An employer that fails to provide a requested accounting is subject to additional sanctions.[345]

§ 3.1.6(c)

Defenses to State Wage Claims

An employer can defend against wage claims arising under state law on essentially the same bases as are provided under federal law. Thus, an employer can raise an employee's exemption from receipt of the minimum wage or overtime compensation, or a failure to have worked the hours claimed.

Employers can also assert that an employee's claim is barred in whole or in part by the statute of limitations. A claim that is based on the state's Wage Orders has a three-year statute of limitations. Claims that are based solely on oral contracts have a two-year statute of limitations; claims that are based solely on written contracts have a four-year statute of limitations. The California Supreme Court has held that the statute of limitations is determined by the date on which an employee files a claim with the Labor Commissioner or files a complaint in court.[346] As noted above, a failure to pay all wages due may be alleged to be an unfair business practice, in which case a four-year statute of limitations will apply.[347]

An employer's ability to use an arbitration and a waiver of class actions in an arbitration agreement as a defense to a proceeding in a state forum or a class action remains uncertain. When the U.S. Supreme Court ruled that states could not apply doctrines such as unconscionability as a defense to arbitration agreements, the previous California Supreme Court decision relying upon the unconscionability doctrine appeared to be overruled.[348] However, the California Supreme Court's declaration that employees have an unwaivable right to start wage claims before the Labor Commissioner leaves unanswered questions as to whether arbitration can be a complete bar to a state forum.[349] And the National Labor Relations Board's 2012 decision finding waivers of class actions to be unlawful opens another chapter in the battle against class actions.[350]

§ 3.1.6(d)

Franchisor Liability for Alleged Wage Violations of Franchisee

A franchisor that also processed the payroll for the employees of franchisees was not liable for alleged wage payment violations because the franchisor was not, on the record before the

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[344] CAL. LAB. CODE § 240.

[345] CAL. LAB. CODE § 243.

[346] *Cuadra v. Millan*, 17 Cal. 4th 855 (1998).

[347] *Cortez v. Purolator Air Filtration Prods. Co*., 23 Cal. 4th 163 (2000).

[348] *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011); *Gentry v. Superior Court*, 41 Cal. 4th 443 (2007).

[349] *Sonic-Calabasas v. Moreno*, 51 Cal. 4th 659 (2011).

[350] *D.R. Horton, Inc.*, 357 N.L.R.B. No. 184 (2012).

court, an "employer" that had any wage payment obligations.[351] The plaintiff had made no more than conclusory allegations that the franchisor was an employer and had failed to allege in her complaint the particular Labor Code sections that the franchisor had supposedly violated. The processing of payroll did not itself make the franchisor an "employer," as the franchisor had no control over the employees of the franchisee, the franchisor did not suffer or permit the plaintiff to work for the franchisor, and the processing of payroll did not rise to the level of negotiating and controlling wage rates, which might meet an alternate definition of employer.[352]

§3.1.7

G. SPECIALLY REGULATED INDUSTRIES

§ 3.1.7(a)

Garment Industry: Enforcement Procedures

Effective January 1, 2000, the special enforcement procedures for the garment industry were further enhanced by Assembly Bill (A.B.) 633. A person who contracts to have garments manufactured is liable for a proportionate share of any unpaid wages. The Labor Commissioner is to issue regulations that define the scope of garment manufacturing. The Labor Commissioner is to determine through an investigation, subpoenas, and a conference the proportionate share of each person contracting to have the garments made. The employee's claim is to be presumed correct unless the contractor provides specific and accurate written records to the contrary. The contractor who actually makes the garments is liable for any unpaid wages plus an equal amount as liquidated damages. A person contracting to have garments made will be liable for a proportionate share of the liquidated damages if the person has acted in bad faith. "Bad faith" includes impeding the Labor Commissioner's investigation and setting a price that is so low as to not allow payment of the minimum wage and overtime. If the person or manufacturer refuses to pay the amount determined to be due at the conference and the employee prevails at a later hearing, the person and/or contractor who made the garments will be liable for the employee's attorneys' fees. If an employee refuses to accept the amount determined to be due at the conference and later prevails at the hearings the contractor shall be liable for the employee's attorneys' fees. A person who contracts to have garments made shall be jointly and severally liable with the contractor for the attorneys' fees if the person acted in bad faith. If the contractor is not licensed, the person shall be jointly liable with the contractor for any unpaid wages. A contractor or person who wishes to appeal the Labor Commissioner's decision must post a bond. An employee may proceed directly to court against any unregistered manufacturer for all remedies. Any person engaged in garment manufacturing that contracts with an unregistered manufacturer shall be deemed a joint employer for the foregoing remedies.

A successor employer may be found liable for the failure of a predecessor garment manufacturer to pay all wages that are due. A *successor* is broadly defined to include entities using the same facilities and workforce to serve the same customers as a predecessor, shared management, ownership, or control over labor relations with the predecessor, employment of the individuals who had control over the wage payment practices of a predecessor, or an immediate family member of any owner, partner, officer, or director of a predecessor.

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[351] *Aleksick v. 7-Eleven, Inc.*, 205 Cal. App. 4th 1176 (2012).

[352] *See also Futrell v. Payday Cal., Inc.*, 190 Cal. App. 4th 1419 (2010).

Goods made by an unregistered contractor may be seized by the Labor Commissioner. If the employer from which the goods were seized has had a previous seizure within five years, then the Labor Commissioner may also then seize the means of production. The Labor Commissioner may enforce the wage payment and guarantee provisions by initiating a proceeding in court.

§ 3.1.7(b)

Warehouse Services: Limitations on Contracting

Warehouse contractors have been added to the list of service providers with which a business cannot contract if the business knows or should know that the contract does not include funds sufficient to allow the warehouse contractor to comply with all applicable local, state and federal laws or regulations governing the labor or services to be provided.[353]

§ 3.1.7(c)

Carwash Companies: Successor Liability

A carwash company that leased premises previously occupied by a different carwash company was a "successor" under Labor Code section 2066 and therefore liable for the predecessor's unpaid wages and penalties.[354] Section 2066 imposes liability upon a carwash employer that is a successor to a predecessor carwash employer with unpaid wages and penalties in four circumstances. The carwash fell under the statute's first circumstance, where the successor uses the same facilities to perform substantially the same services as the predecessor. The court rejected the employer's argument that application of section 2066 violated due process because the employer did not purchase the carwash from the predecessor and had no notice of the predecessor's unpaid wage claims. The court held that section 2066 provided the necessary notice, and any car washing business is presumptively aware of its requirements.

§ 3.1.7(d)

Oil Refineries: Prevailing Wage for Contracting Workers

California Senate Bill 54 requires owners and operators of oil refineries to pay the prevailing hourly wage rate, discussed in more depth in § 3.2, to any contracted workers who perform onsite work within an apprenticeable occupation in the building and construction trades.[355]

§ 3.1.7(e)

Farm Labor Contractors: Successorship Liability

California Senate Bill 168, adding section 1698.9 to the California Labor Code, provides that farm labor contractors succeed to any claim for owed wages or penalties to a former employee of the predecessor farm labor contractor and are liable for those wages and penalties if the successor farm labor contractors meet one or more specified criteria.[356]

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[353] CAL. LAB. CODE § 2810 (as amended by A.B. 1855, ch. 813 (Sept. 20, 2012)).

[354] *Harris v. Sunset Car Wash L.L.C.*, 205 Cal. App. 4th 1433 (2012).

[355] CAL. LAB. CODE § 25536.7 (as added by S.B. 54 (Oct. 13, 2013)).

[356] CAL. LAB. CODE § 1698.9 (as added by S.B. 168 (Oct. 10, 2013)).

§ 3.2

II. CALIFORNIA PREVAILING WAGE LAW

§ 3.2.1

A. OVERVIEW OF THE PREVAILING WAGE OBLIGATIONS UNDER CALIFORNIA LAW

§ 3.2.1(a)

Prevailing Wage Update

In *Hensel Phelps Construction Co. v. San Diego Unified Port District*,[357] the California Court of Appeal held that California's prevailing wage law applied to a privately developed hotel project constructed on land leased from a public entity where the lease provided a rent credit of up to $45.6 million during the first 11 years of the lease. The court held that the construction project was "paid for in whole or in part out of public funds"[358] within the meaning of prevailing wage laws in California, and, therefore, construction workers must be paid the applicable prevailing wage.

The court in *Azusa Land Partners v. Department of Industrial Relations*[359] held that prevailing wage law both before and after Senate Bill 975 amendments in 2001 render any private master development a "public works" if any "public funds" are used for any part of the construction project. The court further held that "Mello-Roos Funds" are "public funds", and that the payment of public funds toward construction of even a single public improvement with a development requires payment of the prevailing wage for all public improvements within the development, even if all such other public improvements use only private financing.

Senate Bill 1370 added section 1730 to the Labor Code to make it easier for businesses to determine whether their project is subject to prevailing wage laws. Beginning June 1, 2013, the Administrative Director of the Department of Industrial Relations (DIR) is required to post on the DIR's website a list of every California code section that relates to the prevailing rate of per diem wage requirements for workers employed on a public work project.

Contractors working on public works construction projects will be subject to new regulations of the Division of Labor Standards Enforcement (DLSE) Compliance Monitoring Unit (CMU). The CMU is a new component within the DLSE that is created to monitor and enforce prevailing wage requirements on public works projects that receive public funds. The laws and regulations that govern the new program went into effect on January 1, 2012. The CMU provisions will only apply to contracts awarded after January 1, 2012. The CMU will actively monitor public works construction on an ongoing basis to ensure that public works construction workers are promptly and properly paid the legally mandated prevailing wage. The CMU will require contractors to submit certified payroll records (CPRs) through an electronic service ("My LCM"), and the DLSE will review those records on at least a

[357] 197 Cal. App. 4th 1020 (2011), *review denied*, 2011 Cal. LEXIS 10532 (Oct. 12, 2011).

[358] CAL. LAB. CODE § 1720(b)(4).

[359] 191 Cal. App. 4th 1 (2010), *review denied*, 2011 Cal. LEXIS 2202 (Mar. 2, 2011).

monthly basis, on either or both a random or targeted basis. The DLSE will also conduct follow-up investigations to confirm the accuracy of the reported payroll information and to determine if prevailing wage requirements are being met. The follow-up investigations may include examination of other time and pay records, on-site inspections, worker interviews and any other information relating to the pay practices of the contractor. If the DLSE finds a violation or potential violation, it will make a determination and enforce the applicable laws in the same way as any matter initiated by way of a complaint. For further discussion, see § 3.2.3(e) below.

On January 23, 2012, the DLSE announced modifications to the answers to two of its Frequently Asked Questions (FAQs), and added ten new FAQs and answers concerning the wage notice required by the California Wage Theft Prevention Act in Labor Code section 2810.5. FAQ 17 requires an employer paying prevailing wages on a public works project to include in the notice "all rates applicable to such work that are known or can be determined at the time the notice is to be provided. . . . It would be insufficient to simply state 'appropriate prevailing wage' or 'variable prevailing wage' when providing the rate(s) of pay for purposes of the notice."

On July 2, 2012, the California Supreme Court issued its long awaited decision in *State Building & Construction Trades Council v. City of Vista*.[360] The court held that locally funded public works performed by chartered cities are municipal affairs pursuant to the California Constitution and therefore not subject to California's prevailing wage law. This decision resolves the issue of whether the municipal affairs "home rule doctrine" can be used by charter cities to avoid the application of the state's prevailing wage law. The issue before the California Supreme Court concerned a conflict between the California prevailing wage law and the exemption for charter cities found in the California Constitution, which provides that charter cities may make and enforce all local ordinances and regulations with respect to municipal affairs free from state regulations, other than those regulations governing matters of statewide concern. In resolving the conflict, the court applied the following four part test:

1. Whether the city ordinance regulates an activity that can be characterized as a municipal affair.
2. Whether the case presents an actual conflict between state and local law.
3. Whether the state law addresses a matter for statewide concern.
4. Whether the state law is reasonably related to resolution of the statewide concern and narrowly tailored to avoid unnecessary interference with local governments.

The California Supreme Court found that the City's use of local funds to build two local fire stations was a municipal affair and that there was a conflict between state prevailing wage laws and the municipal ordinance that prohibited any city contract from requiring the payment of prevailing wages. In resolving the conflict, the court determined that the subject matter of California's prevailing wage law is not a statewide concern.[361]

City of Vista has resolved a long standing challenge to the power of charter cities to exempt local public works projects from the burdensome requirements of the state prevailing wage law. There are currently 122 charter cities in the State of California. Many of these cities are

[360] 54 Cal. 4th 547 (2012).

[361] 54 Cal. 4th at 56.

experiencing serious budget constraints or shortfalls. The *City of Vista* decision gives local governments a way to control costs that were not previously available. However, it is unclear how much public construction can be performed without the benefit of state funds, so it cannot be determined how many charter cities will benefit from this decision. Moreover, this decision will not likely reduce legal conflict as it could prompt disputes regarding the extent to which a public works project is locally funded and whether the project itself is one of purely local concern.

§ 3.2.1(b)

Summary of California Prevailing Wage Obligations

Under California law, a "prevailing wage" obligation is generally imposed upon employers that perform "construction, alteration, demolition or repair work" on "public works" that cost more than $1,000 under contract with the State of California or other public entities (such as a county, municipality or public school district) and that is "paid for in whole or in part out of public funds."[362] It also extends to work performed for irrigation, utility, reclamation and other types of special assessment or improvement districts;[363] street, sewer or other works of improvement performed under the direction of government officials; public utility construction projects;[364] the laying of carpet in a public building or under a building lease-maintenance contract paid for out of public funds; public transportation demonstration projects; and other work that is done in close relationship with the state government.[365] The definition of *construction* also includes: (1) work performed during the design and preconstruction phases of construction; and (2) inspection[366] and land surveying work.[367] Thus, except for public works projects of $1,000 or less, California law requires that "not less than the prevailing wage of *per diem* wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of *per diem* wages for holiday and overtime work . . . shall be paid to all workers employed on public works."[368] However, this prevailing wage obligation is only applicable to work performed under contract and is not applicable to work performed by the public agency with its own workforce.[369]

The obligation to pay prevailing wages also includes private construction work where more than one-half of the property will be leased to a public entity and either the lease was signed

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[362] CAL. LAB. CODE § 1720(a)(1).

[363] However, "the operation of the irrigation or draining system of any irrigation or reclamation district" is not a "public works project." CAL. LAB. CODE § 1720(a)(2).

[364] *See* California Public Utilities Commission Order Adopting Rules for Public Utility Construction, Decision 04-12-056 (Dec. 16, 2004).

[365] CAL. LAB. CODE § 1720(a).

[366] Off-site testing and inspection services are not subject to the prevailing wage requirements. *Off-Site Testing & Inspection Servs., Jurupa Unified Sch. Dist.—Glen Avon High Sch.*, Public Work Case No. 2005-037 (Jan. 12, 2007).

[367] *Off-Site Testing & Inspection Servs., Jurupa Unified Sch. Dist.—Glen Avon High Sch.*, Public Work Case No. 2005-037 (Jan. 12, 2007). This expanded definition of *construction* does not apply in connection with public works projects that commence on or after April 1, 2003 that are covered by the Kindergarten-University Public Education Facilities Bond Acts of 2002 and 2004. *See* CAL. LAB. CODE § 1771(b).

[368] CAL. LAB. CODE § 1771. The prevailing wage obligation is also applicable to contracts for "maintenance work." CAL. LAB. CODE § 1771; *see* CAL. CODE REGS. tit. 8, § 16200; *Reclamation Dist. No. 684 v. Department of Indus. Relations*, 125 Cal. App. 4th 1000 (2005).

[369] CAL. LAB. CODE § 1771.

before the construction contract or the work was done pursuant to the specifications of the public entity and the lease was entered into during or upon completion of the construction work.[370] This obligation applies to both the construction of a new building and the renovation of an existing building that will be primarily occupied by a public agency.[371] Effective January 1, 2009, theatrical and technical services performed by workers in connection with the presentation of a show on property owned by the state, which costs more than $1,000, must also be compensated at not less than the general prevailing rate of *per diem* wages, and not less than the general prevailing rate of *per diem* wages for holiday and overtime work.[372]

Private residential projects built on private property are *not* subject to the requirements of the California Prevailing Wage Law if the projects are not built pursuant to an agreement with a state agency, redevelopment agency or local housing authority.[373] The fact that the state or political subdivision reimburses a private developer for costs that would ordinarily be borne by the public or provides any type of public subsidy to a private development project that is *de minimis* in the context of the project does *not* subject the project to the requirements of the California Prevailing Wage Law.[374] If the state or political subdivision requires a private developer to perform construction, alteration, demolition, installation or repair work on a public work of improvement as a condition of regulatory approval of the private development project, and the state or political subdivision contributes no more money or the equivalent of money to the overall project than is required to perform the public improvement work and the state or political subdivision maintains no proprietary interest in the overall project, then *only the public improvement work itself* is subject to the California Prevailing Wage Law.[375]

However, a California court of appeal has ruled that, both before and after the amendments made to the California Prevailing Wage Law in 2001 by Senate Bill 975, a private master development would be considered a "public works" project if any "public funds" were used for any part of the construction project[376] and require payment of prevailing wages for all public improvements within the development, even if all other such public improvements use only private financing.[377]

The definition of *public works* also includes any hauling of refuse from a public works site to an off-site disposal area if the public work involves a state agency.[378] The term *refuse* includes soil, sand, gravel, rocks, concrete, asphalt, excavation materials and construction debris but does not include recyclable metals (such as copper, steel, and aluminum) that have been separated from other materials at the jobsite prior to be hauled away and sold at fair

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[370] CAL. LAB. CODE § 1720.2.

[371] *Plumbers & Steamfitters Local 290 v. Duncan*, 157 Cal. App. 4th 1083 (2007) (there is no differentiation in Section 1720.2 "between a building newly constructed for the purpose of being leased to a public entity and a building substantially renovated for that same purpose," and "the Legislature intended to create a bright line for determining when construction on a privately owned building qualifies as a public works project" under Labor Code section 1720.2).

[372] CAL. LAB. CODE §§ 2250 *et seq*.

[373] CAL. LAB. CODE § 1720(c)(1).

[374] CAL. LAB. CODE § 1720(c)(1)(B).

[375] CAL. LAB. CODE § 1720(c)(2)(A).

[376] *Azusa Land Partners v. Department of Indus. Relations*, 191 Cal. App. 4th 1 (2010), *review denied*, 2011 Cal. LEXIS 2202 (Mar. 2, 2011).

[377] The court of appeal also held that "Mello-Roos Funds" are "public funds." 191 Cal. App. 4th 1.

[378] Cal. Lab. Code § 1720.3.

market value to a *bona fide* purchaser.[379] However, truck driver employees engaged in hauling building materials to ("on hauling") and from ("off hauling") a public works project are not required to be paid prevailing wages if they qualify as a materialman/material supplier.[380] It also includes the on-site upkeep and repair of heavy equipment performed by workmen in the execution of a contract for public work.[381] However, off-site manufacturing

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[379] CAL. LAB. CODE § 1720.3(b).

[380] *O.G. Sansone Co. v. Department of Transp.*, 55 Cal. App. 3d 434, 444 (1976) (truck driver employed by an independent materials supplier who delivers standard commercial building materials to a public works site is a materialman/material supplier exempt from the prevailing wage requirement if: (1) the hauled materials are from an established independent material supplier rather than a dedicated site; or (2) the truck driver does not immediately and directly incorporate the hauled material into the ongoing public works project, but merely delivers materials that are stockpiled for later use, and which are rehandled or incorporated by other on-site workers); *Williams v. SnSands Corp*., 156 Cal. App. 4th 742 (2007) (truck driver employees who haul materials from a public works project to a nonpublic site that has no relationship to the public works site are exempt from prevailing wage requirement absent evidence that, either by contract or custom, the off-hauling was "an integrated aspect of the 'flow' process of construction"). DIR public works coverage determinations involving the hauling of materials to and from a public works construction project have continued to apply the *O.G. Sansone* analysis. *See, e.g., Production of Recycled Asphalt Concrete from Reclaimed Asphalt Pavement & Related Off-Hauling & On-Hauling*, Public Works Case No. 2002-010 (Aug. 8, 2007) (contractor awarded asphalt recycling by a city was subject to the prevailing wage requirements because it established a recycling plant specifically for the contract with the city on a designated parcel of land leased from the city and the city was entitled to use the plant's full production capacity for recycling city-owned materials for the public work of street improvements, and thus prevailing wages must be paid to production employees and truckers for time spent in hauling); *Off-Hauling of Contaminated & Clean Soil, Long Beach Unified Sch. Dist., Avalon Sch.*, Public Works Case No. 2006-017 (June 26, 2007) (off-hauling of contaminated soil by truck and barge to various disposal locations is a public work subject to prevailing wage requirements because it constitutes "refuse", but off-hauling of clean uncontaminated soil used by landfill as ground cover is not a public work); *Richmond-San Rafael Bridge/Benicia-Martinez Bridge San Francisco-Oakland Bay Bridge,* Public Works Case No. 2004-023 (on-hauling is a public work when the materials are hauled to the public works site from an adjacent facility dedicated to the public works project or when the material haulers engage in the immediate incorporation of the hauled material into the public works project; however, "the mere delivery to a public works project of material that is rehandled or incorporated by other on-site workers, or the haulers' incidental placement on the public works site of the materials hauled is not covered work"); *Williams St. Widening Project/Off-Hauling of Road Grindings—City of San Leandro,* Public Works Case No. 2003-049 (Aug. 23, 2005). DIR public works coverage determinations have applied the analysis of *O.G. Sansone*, as interpreted by *Williams,* in determining whether an independent trucking company is a subcontractor, rather than a *bona fide* material supplier, performing work in the execution of the contract. *See Oil Field Remediation Project—Off-Haul of Groundwater, Port of Long Beach,* Public Works Case No. 2008-028 (Dec. 22, 2008) (off-hauling of groundwater from oil field remediation project site to a disposal site integrally connected to public work by independent truck company required to carry out a specific term of the contract for public work is subject to prevailing wage requirements); *On-Haul and Off-Haul to and from the Friendly Inn/Senior Ctr.—Abatement and Demolition Project—City of Morgan Hill,* Public Works Case No. 2008-027 (Oct. 31, 2008) (off-hauling of demolition debris and materials, whether performed by the on-site demolition contractor's employees or by an independent trucking company, is subject to prevailing wage requirements, and on-hauling of material for backfill performed by on-site demolition contractor's employees is also subject to prevailing wage requirements); *Canyon Lake Dredging Project, Lake Elsinore & San Jacinto Watersheds Auth.,* Public Works Case No 2005-025 (Mar. 28, 2008) (off-haul of dredged silt from public works project performed by an employee of the on-site construction contractor is subject to prevailing wage requirements).

[381] *On-Site Heavy Equipment Upkeep and Repair for the Interstate 80 Soda Springs Improvement Project*, Public Works Case No. 2008-022 (Oct. 31, 2008).

and construction is generally not subject to prevailing wage requirements unless the work is performed at a dedicated off-site location established exclusively for or integrally connected to the public works project.[382]

The California prevailing wage law does not apply to construction contracts that are awarded by the federal government[383] or under the supervision and control of federal authorities.[384] In addition, the construction of housing by the University of California for students, faculty, and others without the use of state funds does not trigger an obligation to pay prevailing wage rates.[385] Likewise, because charter cities enjoy autonomous sovereign control over their "municipal affairs" under article XI, section 5 of the California Constitution, the provisions of the California Prevailing Wage Law are not binding on charter cities or applicable to public works contracts of charter cities for municipal improvement works.[386] Although the California Supreme Court previously declined to clarify the scope and contours of

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[382] *See Wasco Union High Sch. Dist./JTS Modular, Inc.- Off-Site Manufacture of Modular Classrooms*, Public Works Case No. 2007-009 (May 5, 2008). *But cf. San Diego City Sch., Constr. of Portable Classrooms,* Public Works Case No. 99-012 (June 23,2000); *Off-site Fabrication by Helix Electric - City of San Jose/SJSU Joint Library Project,* Public Works Case No. 2002-064 and *Cuesta Coll./Offsite Fabrication of Sheet Metal Work*, Public Works Case No. 2000-027 (Mar. 4, 2003).

[383] *Southern Cal. Labor/Mgmt. Operating Eng'rs Contract Compliance Comm'n v. Aubry*, 54 Cal. App. 4th 873, 883, 886 (1997). Employers that contract with the federal government or federal agencies to perform construction on public works of improvement may have a prevailing wage obligation under the Davis-Bacon Act (29 U.S.C. §§ 276a *et seq*.).

[384] *Southern Cal. Labor/Mgmt. Operating Eng'rs Contract Compliance Comm'n v. Rea*, 2007 Cal. App. Unpub. LEXIS 1029 (Feb. 8, 2007). In *State Building & Construction Trades Council of California v. Duncan*, 162 Cal. App. 4th 289, 324-25 (2008), the court of appeal held that Low Income Housing Tax Credits (LIHTC) do not constitute "public funds" under Labor Code section 1729 and, thus, do not trigger a requirement for the payment of prevailing wages on low income housing projects for which LIHTC are granted.

[385] *Regents of Univ. of Cal. v. Aubry*, 42 Cal. App. 4th 579 (1996).

[386] *Piledrivers' Local Union v. City of Santa Monica*, 151 Cal. App. 3d 509, 512 (1984); *Vial v. City of San Diego*, 122 Cal. App. 3d 346, 348 (1981); *Smith v. City of Riverside,* 34 Cal. App. 3d 529, 536 (1973); *City of Pasadena v. Charleville*, 215 Cal. 384 (1932), *overruled on other grounds*, *Purdy & Fitzpatrick v. State of Ca.* (1969) 71 Cal. 2d 566, 585-86 (1969); *Storm Drain Pump Station High Water Cuttoffs, City of Merced*, Public Works Case No. 2007-001 (Oct. 12, 2007) (installation of automated storm drain pump station high water mechanism is a municipal affair under the home rule provision of the City's charter and therefore exempt from California's prevailing wage laws). *But cf., Division of Labor Standards Enforcement v. Ericsson Info. Sys., Inc.*, 221 Cal. App. 3d 114, 123 (1990) [dictum]; *Sewer & Storm Lift Station Upgrade Project, City of Visalia/Goshen Cmty. Servs. Dist.*, Public Works Case No. 2005-012 (Oct. 9, 2007) (the collection, conveyance, treatment and disposal functions of a regional wastewater system delivers treated water beyond the city to downstream users is not a purely municipal affair because it has an extraterritorial effects that are not limited to the municipal purpose, and therefore is not exempt from the prevailing wage requirements under California law). The California Supreme Court specifically declined to address this issue in *City of Long Beach v. Department of Indus. Relations*, 34 Cal. 4th 942 (2004), and instead held that the Prevailing Wage Law did not apply to a private construction project built on property owned by the City of Long Beach, but leased to the SPCA-LA, despite the fact that the project was partly funded by a $1.5 million grant from the city expressly limited to project development and other preconstruction expenses, because the 2000 amendment to Labor Code section 1720(a)(1) that redefined construction to include such activities as "the design and preconstruction phases of construction" was not retroactive but only prospective in application. Although Senate Concurrent Resolution No. 49 (filed Sept. 18, 2003) "reaffirm[s] the intent" of the [California] Legislature for the prevailing wage law to apply to all projects subsidized with public funds, including the projects of chartered cities," it is not binding on any court of law, the Department of Industrial Relations or any chartered cities.

the exemption of charter cities from the California prevailing wage law,[387] in 2012, it affirmed a court of appeal decision that held that the California prevailing wage law does not address matters of statewide concern, and a charter city's public works contracts financed solely from city revenues are municipal affairs over which the city has paramount power under article XI, section 5, subdivision (a) of the California Constitution.[388]

All "public works" projects of more than $1,000 are subject to California's prevailing wage law.[389] However, a public entity that awards contracts for public works may not require the prevailing wage obligation for small jobs by adopting a Labor Compliance Program (LCP) for all public works.[390] The Director of the Department of Industrial Relations (DIR) has the authority to grant or revoke approval of a LCP, to monitor the performance of LCPs in enforcing the prevailing wage system and to regulate the operation of LCPs.[391] An approved LCP includes notices and pre-job conferences regarding labor obligations, enhanced record-keeping obligations and enforcement of the prevailing wage obligations by the awarding body itself.[392] An awarding body may initiate its own LPC or may contact with a third party to initiate and enforce all of part of its LCP, provided the third party has been approved by the Director of DIR.[393]

A public entity that awards a contract for a public works job is required to include provisions in the contract that describes the obligation to pay prevailing wages and the penalties that apply for not paying the prevailing wage.[394] However, a contractor who is performing work under a public works contract is obligated to pay prevailing wages to its employees even if the contract fails to include any mention of the obligation to pay prevailing wages.[395] Nevertheless, if a contractor reasonably relies on representations that the particular work or project is exempt from the prevailing wage obligation, then the contractor may have a claim for indemnity against the public entity. In addition, a contractor may have the right to bring a civil action against the awarding body to recover the difference between the wages actually

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[387] *City of Long Beach v. Department of Indus. Relations*, 34 Cal. 4th 942 (2004). The California Supreme instead held that the California prevailing wage law did not apply to a private construction project built on property owned by the City of Long Beach, but leased to the SPCA-LA, despite the fact that the project was partly funded by a $1.5 million grant from the City expressly limited to project development and other preconstruction expenses, because the 2000 amendment to Labor Code section 1720(a)(1), which redefined *construction* to include such activities as "the design and preconstruction phases of construction," was not retroactive but only prospective in application.

[388] *State Bldg. & Constr. Trades Council of Cal. AFL-CIO v. City of Vista*, 54 Cal. 4th 547 (2012).

[389] CAL. LAB. CODE § 1771; CAL. CODE REGS. tit. 8, §§ 16421-16439. On November 30, 2007, the DIR proposed for public comment a variety of technical and substantive amendments to the regulations governing the approval, revocation, reporting requirements, operations, investigatory authority and methods, duties and enforcement procedures of a LCP.

[390] These smaller-scale jobs include public works projects of $25,000 or less when the project is for construction work, or for any public work project of $15,000 or less when the project is for alteration, demolition, repair or maintenance work. CAL. LAB. CODE § 1771.5. In addition, awarding bodies that use certain funds from the Kindergarten-University Public Education Facilities Bond of 2002 or 2004, the Water Security, Clean Drinking Water, Coastal and Beach Protection Act of 2002 or the Safe, Reliable High-Speed Passenger Train Bond Act for the 21st Century for a public works project are required to adopt and enforce a LCP for that public works project. CAL. LAB. CODE §§ 1771.7, 1771.8 and 1771.9.

[391] CAL. LAB. CODE § 1771.5(d).

[392] CAL. LAB. CODE §§ 1771.5(b)(1)-(6), 1771.6.

[393] CAL. CODE REGS tit. 8, § 16421(b).

[394] CAL. LAB. CODE §§ 1771.5(b)(1), 1773.2.

[395] *Lusardi Constr. Co. v. Aubry*, 1 Cal. 4th 976 (1992).

paid and the prevailing wage rate that was required to be paid, any penalties assessed, and costs and attorneys' fees incurred by the contractor if the awarding body *either*:

- affirmatively represented to the contractor in writing, in the call for bids or otherwise, that the project was not a "public work"; or
- received actual notice from the DIR that the project is a "public work" and failed to disclose that information to the contractor.[396]

The California Prevailing Wage Law includes not only a requirement for the payment of "prevailing wage rates," as determined by the California Department of Industrial Relations, but also includes the requirement to prepare and submit certified payroll records to the public entity upon request and the employment of "apprentices."[397]

§ 3.2.1(c)

What Is the Prevailing Wage Obligation?

The prevailing wage is essentially the same as a minimum wage although the amount that must be paid as a prevailing wage is generally much higher than the minimum wage. The principal difference between the minimum wage requirement and the "prevailing wage" is that California Prevailing Wage Law requires the payment of locally prevailing wage rates and the provisions of fringe benefits or the payment of the cost of such benefits.[398] The prevailing wage is generally the single rate that is most frequently paid or "modal rate." The modal rate is often the rate provided in a collective bargaining agreement as the agreement will set a single rate for a large number of employees.[399]

Under California law, a contractor who is performing work on a public works contract is required to pay the specified "prevailing wage rate" and either pay or provide benefits in an amount equal to the prevailing benefit rate to all workmen employed in the execution of the contract.[400] Any compensation that is paid in excess of the prevailing benefit rate cannot be

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[396] CAL. LAB. CODE § 1726(c). A contractor may also bring a civil action against the body awarding a contract for public work or otherwise undertaking any public work to recover any "increased costs" incurred by the employer as a result of a decision by the body, the DIR or a court *after* the date the body accepts the employer's bid or awards a contract to the employer that classifies the work as a "public work," *if* the body failed to identify the project as a "public work" in the bid specification or in the contract documents before the bid opening or awarding the contract. CAL. LAB. CODE § 1781(a)(1). However, if construction has not commenced at the time a final decision by the DIR or a court classifies all or part of the work covered by the contract or bid as a "public work," the body that solicited the bid or awarded the contract must rebid the work and any bid that was submitted and any contract that was executed are null and void. CAL. LAB. CODE § 1781(b).

[397] CAL. LAB. CODE § 1776.

[398] "Prevailing wage laws were enacted in response to economic conditions of the Depression, when the oversupply of labor was exploited by unscrupulous contractors to win government contracts when private construction virtually stopped." *State Building & Constr. Council of Cal. v. Duncan*, 162 Cal. App. 4th 289, 294 (citing *Universities Research Ass'n v. Coutu,* 450 U.S. 754 (1981)).

[399] CAL. LAB. CODE §§ 1773, 1773.9(b)(1). The State of California's definition of *prevailing wage rate* is different from the federal definition in the Davis-Bacon Act, which provides a different method for determining the prevailing wage rate.

[400] CAL. LAB. CODE §§ 1771, 1774.

used to make up for a shortfall in the prevailing hourly straight time or overtime wage rate.[401] The specification of separate prevailing wage and benefit rates is not preempted by the provisions of the Employee Retirement Income Security Act (ERISA).[402]

The obligation to pay the prevailing hourly wage and benefit rate applies only to hours worked in furtherance of a public contract; the obligation does not generally apply to hours in a week or a day spent in work unrelated to the public works contract. Thus, hours spent by workers on a public works contract should be separately identified on an employee's time card and the amount paid for such work also should be separately identified in the employee's payroll check. The amount paid in satisfaction of the prevailing hourly wage obligation should also be separately stated from any amount paid in satisfaction of the prevailing benefit obligation.

The obligation to provide or pay the locally prevailing benefits requires the provision of specified benefits, benefits of equal value or payment of the difference between the benefits provided and the total amount due for the locally prevailing benefits.[403] Benefits that may be included in a prevailing wage determination include "employer payments" for: medical and life insurance; retirement benefits; disability and sick-leave insurance; travel time and subsistence; overtime; vacation and holiday pay; apprentice or other training programs; worker protection and assistance programs or committees established under the federal Labor Management Cooperation Act of 1978 to monitor and enforce laws related to public works; and industry advancement and collective bargaining administrative fees required under a collective bargaining agreement.[404] However, no credit can be taken for benefits required to be provided under other state or federal law and "credits for employer payments also shall not reduce the obligation to pay the hourly straight time or overtime wages found to be due."[405] Likewise, an employer cannot count towards the prevailing wage obligation amounts paid to employees from which union dues are assessed and then paid back to the employer.[406]

An employer can discharge its fringe benefit obligations under the California Prevailing Wage Law by providing benefits of an equivalent cost to those that have been determined to be locally prevailing. However, the benefits that an employer provides must meet certain minimum standards before they can be credited against the fringe benefit obligation.[407] Particular care must be taken with retirement plans (many profit-sharing programs may not qualify) and medical insurance plans (self-insurance poses special problems). An employer can also discharge its fringe benefit obligations by paying its employees the difference in cost

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[401] CAL. LAB. CODE § 1773.1(c). This limitation does not apply under the Davis-Bacon Act, which allows the prevailing wage rate to be satisfied by any combination of wages and benefits that meets or exceeds the specified prevailing wage rate.

[402] *WSB Elec. v. Curry*, 88 F.3d 788 (9th Cir. 1996), *cert. denied*, 519 U.S. 1109 (1997).

[403] CAL. LAB. CODE §§ 1773.1 (a) and (b), 1773.9(b)(2). Section 1773.9(c) of the California Labor Code was amended, effective January 1, 2008, to provide that whenever the DIR's prevailing wage determination contains a predetermined change (based on a definite and predetermined change already established by a collective bargaining agreement), but does not specify how the change will be allocated between hourly wages and employee benefits, contractors and subcontractors may make their own allocation equal to the change for up to 60 days after the DIR publishes the specified allocation, without exposure to prevailing wage law liability. S.B. No. 929, Chapter 482.

[404] CAL. LAB. CODE § 1773.1(a).

[405] CAL. LAB. CODE § 1773.1(c)(1) and (2).

[406] *International Bhd. of Elec. Workers v. Aubry*, 41 Cal. App. 4th 1632 (1996).

[407] CAL. CODE REGS. tit. 8, § 16200(a)(3)(I).

between any benefits that it provides and the total amount that is due for benefits.[408] The amount that is paid in lieu of providing benefits is excluded when calculating an employee's overtime rate. However, any amount that is paid in cash must be treated as wages for tax purposes. This will, of course, result in additional costs for the employer.

A prevailing wage determination may also include special overtime premiums if those premiums are found to be a locally prevailing practice. In the absence of any prevailing overtime requirement, all employees who are engaged on a public works project must be paid overtime after eight hours of work in a day and 40 hours of work in a week.

Employers are precluded from paying less than the journeyman prevailing wage rate to a trainee in a given craft unless the individual is enrolled in the appropriate state-certified apprenticeship plan.[409]

An employer can challenge the prevailing wage determinations made by the California Division of Labor Statistics and Research. However, any such appeal must be made within 20 days after the public works contract is first put out to bid.[410]

Monetary penalties and, in extreme cases, debarment are authorized by the California Prevailing Wage Law to be imposed against contractors for violations of the "prevailing wage," apprenticeship and paperwork requirements.[411]

§ 3.2.2

B. COVERAGE & SCOPE OF THE CALIFORNIA PREVAILING WAGE LAW

As set forth above, the prevailing wage obligations apply to all "public works contracts" of more than $1,000. The key components of the California Prevailing Wage Law encompass the following:

- *Public works* includes construction, demolition, installation or repair work done under contract and "paid for in whole or in part out of public funds." Public works also encompasses work done for irrigation, utility, reclamation, and improvement districts, and other districts of the same type; street, sewer or other improvement work performed under the direction and supervision, or by the authority of, any officer or public body, political subdivision, or district of the state; the laying of carpet in a public building or under a building-lease maintenance contract where such work is paid out of public funds; and public transportation demonstration projects authorized pursuant to the California Streets and Highways Code.[412]

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[408] CAL. CODE REGS. tit. 8, § 16200(a)(3)(I).

[409] The Federal Aviation Administration Authorization Act—which preempts state regulations related to the price, route or service of motor carriers—does not preempt the application of the prevailing wage requirement for dump truck drivers. *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184 (9th Cir. 1998), *cert. denied*, 526 U.S. 1060 (1999).

[410] CAL. LAB. CODE § 1773.4.

[411] *See* CAL. LAB. CODE §§ 1771.1, 1775(a), 1776(g), 1777.7(a) and (b).

[412] CAL. LAB. CODE § 1720(a).

- A *public works contract* is defined as "an agreement for the erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement of any kind."[413]
- The term *paid for in whole or in part out of public funds* includes "the payment of money or the equivalent of money by a state or political subdivision directly to or on behalf of the public works contractor, subcontractor or developer, performance of construction work by the state or political subdivision in execution of the project, transfer of an asset of value for less than fair market price; fees, costs, rents, insurance or bond premiums, loans, interest rates or other obligations that would normally be required in execution of the contract, which are paid, reduced, charged at less than fair market value, waived or forgiven;[414] money to be paid on a contingent basis; or credits applied against repayment obligations."[415]
- All workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work.[416]
- The term *worker* includes "laborer, worker or mechanic."[417]
- The terms *contractor* and *subcontractor* include a contractor, subcontractor, licensee, officer, agent or representative thereof, acting in that capacity, when working on public work projects.[418]
- All workers employed on public works must be paid the prescribed prevailing wage rate and provided prevailing benefits or paid the equivalent amount as part of their pay.[419]
- Contractors who employ workers in any apprenticeable trade or craft on a public works project must employ apprentices in a specified ratio of journeymen to apprentices.[420]
- The DIR has the authority to determine whether a project is a "public works" and shall determine the prevailing wage and benefit rate(s) for workers employed on public works.[421]

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[413] CAL. PUB. CONT. CODE § 1101.

[414] In *Hensel Phelps Const. Co. v. San Diego Unified Port Dist.,* 197 Cal. App. 4th 1020 (2011), *review denied*, 2011 Cal. LEXIS 10532 (Oct. 12, 2011), a California Court of Appeal held that California's prevailing wage law applies to a privately developed hotel project constructed on land leased from a public entity where the lease provided a rent credit of up to $45.6 million during the first 11 years of the lease. The appellate court held that, based on the rent credit provided under the terms of the lease, the construction project was "paid for in whole or in part out of public funds" within the meaning of Labor Code section 1720(b)(4) and, therefore, construction workers must be paid the applicable prevailing wage for all hours they worked on the project.

[415] CAL. LAB. CODE § 1720(b).

[416] CAL. LAB. CODE § 1772.

[417] CAL. LAB. CODE § 1723.

[418] CAL. LAB. CODE § 1722.1.

[419] CAL. LAB. CODE § 1771.

[420] CAL. LAB. CODE § 1777.5.

[421] CAL. LAB. CODE §§ 1770, 1773.5.

§ 3.2.3

C. DUTIES & RESPONSIBILITIES OF THE PARTIES UNDER THE CALIFORNIA PREVAILING WAGE LAW

§ 3.2.3(a)

Director of the Department of Industrial Relations

The Director of the Department of Industrial Relations (DIR) is appointed by the Governor and is responsible for establishing and coordinating the administration of the California Prevailing Wage Law, including the determination of coverage issues.[422] The state agency responsible for the actual determination and publication of prevailing wage rates is the Division of Labor Statistics and Research (DLSR).[423]

§ 3.2.3(b)

California Labor Commissioner

The Division of Labor Standards Enforcement (DLSE) is the state agency within the DIR that is responsible for the enforcement of the California Prevailing Wage Law, including but not limited to ensuring the payment of prevailing wages to workers on public works projects.[424] The California Labor Commissioner is the administrative head of the DLSE.

§ 3.2.3(c)

The Awarding Body

The body awarding any contract for public work, or otherwise undertaking any public work, must comply with the provisions of the California Prevailing Wage Law by doing all of the following:[425]

- Obtain the relevant prevailing wage rates from the DIR.[426]
- Specify in the call for bids, in the bid specifications and in the contract itself the appropriate prevailing wage rates that apply to all work to be performed on the public works project.[427]

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[422] CAL. LAB. CODE § 1770; CAL. CODE REGS. tit. 8, § 16100.

[423] CAL. CODE REGS. tit. 8, § 16100. "The general prevailing rate of *per diem* wages is set by the DIR Director for each locality where the work is to be performed for each craft, classification or type of worker needed to execute a public works contract, based on a statutorily mandated methodology." *Sheet Metal Workers Int'l Ass'n, Local Union No. 104 v. Rea*, 153 Cal. App. 4th 1071, 1078 (2007) (citations omitted).

[424] CAL. CODE REGS. tit. 8, § 16100.

[425] CAL. CODE REGS. tit. 8, § 16100.

[426] CAL. LAB. CODE § 1773.

[427] CAL. LAB. CODE § 1773.2. If the awarding body failed to identify the project as a "public work" in the bid specification or in the contract documents *before* the bid opening or awarding the contract, and the project is subsequently classified as a "public work" by the awarding body, the DIR or a court, then it must rebid the work if construction has not commenced at the time a final decision has been issued by the Department of Industrial Relations or a court classifying all or part of the work covered by the contract or bid as a "public work;" and any bid that was submitted and any contract that was executed are null and void. CAL. LAB. CODE § 1781(b). Indeed, a California appellate court invalidated a contact awarded by a public agency that failed, *inter alia*, to "specify in the call for bids for the contract, and in

- Comply with posting requirements.
  - If a wage rate for a craft, classification or type of worker is not published in the DIR's general prevailing wage determinations, a request for a special determination must be made by the awarding body to the DLSR at least 45 days prior to the project bid advertisement date.
- Notify the Division of Apprenticeship Standards within five days of the award of a public works contract.[428]
- Notify the general or prime contractors of all relevant requirements under the California Prevailing Wage Law, which includes:
  - the appropriate number of apprentices to be employed on the public works project;[429]
  - maintain accurate records of the work performed on the public works projects;[430] and
  - prepare and submit certified payroll records.[431]
- Take cognizance of violations of the California Prevailing Wage Law committed in the course of the execution of the public works contract/project and promptly report any suspected violations to the California Labor Commissioner.[432]
- Withhold monies from offending contractors and subcontractors.[433]
- Ensure that the public works project is not split or separated into smaller work orders or projects for the purpose of evading the applicable provisions of the California Prevailing Wage Law.
- Deny the right of contractors and/or subcontractors who have violated the California Prevailing Wage Law to bid or perform services on public work contracts.[434]
- Not permit workers on public works projects to work in excess of eight hours in a day or 40 hours in a workweek, unless such workers receive overtime compensation at not less than 1½ times the specified prevailing wage rate.[435]
- Not take or receive any portion of the workers' wages or accept a fee in connection with a public works project.
- Comply with the requirements specified in California Labor Code sections 1776(g), 1777.5, 1810, 1813 and 1860.

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the bid specifications, and in the contract itself, what the general rate of *per diem* wages is for each craft, classification or worker needed to execute the contract," or to include a statement in any of those documents that copies of the prevailing wage rates were located in its offices, as required by Labor Code section 1773.2. *Hallman v. Modoc Joint Unified Sch. Dist.*, 2005 Cal. App. Unpub. LEXIS 10009 (Nov. 1, 2005).

[428] CAL. LAB. CODE § 1773.3.

[429] CAL. LAB. CODE § 1777.5.

[430] CAL. LAB. CODE § 1812.

[431] CAL. LAB. CODE § 1776.

[432] CAL. LAB. CODE § 1726.

[433] CAL. LAB. CODE §§ 1727, 1771.6.

[434] CAL. LAB. CODE § 1777.7.

[435] CAL. LAB. CODE § 1815.

§ 3.2.3(d)

Labor Compliance Programs (LCP)

An approved LCP must include all of the following requirements:

- Include in the call or advertisement for bids, construction contract or purchase order appropriate language concerning the prevailing wage requirements set forth in the California Prevailing Wage Law.[436]
- Conduct a "pre-job conference" with all contractors and subcontractors before commencement of the work on the public works project to discuss applicable federal and state law requirements, and furnish suggested reporting forms.[437]
- Require certified payroll records to be maintained and furnished by contractors and subcontractors to the awarding body at times designated in the public works contract or within 10 days of request by the awarding body, along with a "statement of compliance" signed under penalty of perjury.[438]
- Provide a program for the orderly review and, if necessary, audit of payroll records of contractors and subcontractors to verify compliance with the requirements of the California Prevailing Wage Law.[439]
- Prescribe a routine for withholding of contract payments for penalties, forfeitures and underpayment of wages by the awarding body for violation of the California Prevailing Wage Law determined to have occurred following an investigation.[440]
- Provide in all contracts to which a prevailing obligation applies that contract payments shall not be made when payroll records are delinquent or inadequate.[441]
- Notify contractors, subcontractors and bonding companies of the proposed withholding and/or recommended forfeiture of contact payments for violation of the California Prevailing Wage Law, and the procedure for obtaining review of the withholding of contract payments.[442]
- Request and obtain approval of the Labor Commission for any recommended forfeitures, including a determination of the amount of the forfeiture.[443]
- Respond to requests for review of enforcement actions by the LCP.[444]

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[436] CAL. LAB. CODE § 1771.5(a)(1); CAL. CODE REGS. tit. 8, § 16421(a)(1).

[437] CAL. LAB. CODE § 1771.5(a)(2); CAL. CODE REGS. tit. 8, § 16421(a)(2).

[438] CAL. LAB. CODE § 1771.5(a)(3); CAL. CODE REGS. tit. 8, § 16421(a)(3).

[439] CAL. LAB. CODE § 1771.5(a)(4); CAL. CODE REGS. tit. 8, § 16421(a)(4).

[440] CAL. LAB. CODE § 1771.5(a)(5) and (6); CAL. CODE REGS. tit. 8, § 16421(a)(5).

[441] CAL. CODE REGS. tit. 8, § 16421(a)(6).

[442] CAL. CODE REGS. tit. 8, § 16435.

[443] CAL. CODE REGS. tit. 8, § 16437.

[444] CAL. CODE REGS. tit. 8, § 16439.

§ 3.2.3(e)

DLSE's Compliance Monitoring Unit

The use of LCPs has been significantly limited by the enactment of Assembly Bill 436, which amends Senate Bill X2-9 and revises California statutes,[445] effective January 1, 2012, and changes the way prevailing wage requirements are monitored and enforced. Awarding bodies undertaking certain public works projects awarded after January 1, 2012,[446] are required to undergo prevailing wage compliance monitoring by the new Compliance Monitoring Unit (CMU) of the DLSE, unless one of two exceptions apply.[447] Awarding bodies will be assessed a fee for actual monitoring and enforcement work performed by the DIR on a project that is subject to CMU monitoring.[448]

The CMU will actively monitor public works construction on an ongoing basis to insure that public works construction workers are promptly and properly paid the legally mandated prevailing wage. The CMU will require contractors and subcontractor to submit certified payroll records (CPRs) through an electronic service (called "My LCM"), which will be reviewed on at least a monthly basis. The CMU may order that contract payments be withheld from a contractor that fails to submit timely and complete CPRs.

On both a random and targeted basis, the DLSE will do follow-up investigations to confirm the accuracy of reported information or determine whether prevailing wage requirements or other laws enforced by the DLSE were violated. These follow-up investigations may include examination of other time and pay records, construction site visits, and interviews of workers or others with information about work activities, pay practices, and any other information relating to the pay practices of the contractor and subcontractors. If the DLSE becomes aware of a potential violation, it will investigate, make a determination, and enforce any violations in same manner as it traditionally handles any matter initiated through a complaint.

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[445] CAL. EDUC. CODE §§ 17250.30, 81704; CAL. GOV'T CODE § 6531; CAL. LAB. CODE §§ 1771.55, 1771.75, 1771.8, 1771.85, 1771.9; CAL. PUB. CONT. CODE §§ 6804, 20133, 20175.2, 20193; 20209.7, 20688.6, 20919.3.

[446] The following projects are subject to CMU oversight if the prime contract is awarded on or after January 1, 2012: (1) projects funded by any state-issued bond, except for projects funded through Proposition 84; (2) design-build projects conducted by school and community college districts, counties, cities and transit operators; and (3) projects covered under any of the 12 design-build or other statues that require CMU or an authorized exception as a condition for project authorization (*see* http://www.dir.ca.gov/lcp/StatutesRequiringLCPs.pdf). In addition, an awarding body that is otherwise not subject to CMU oversight may elect to have projects monitored by the CMU.

[447] The two exceptions to CMU oversight are when: (1) a Project Labor Agreement binds all contractors performing work on the project and includes a mechanism for the resolution of disputes over the payment of wages; or (2) the awarding body will utilize its LCP on all projects, use its own employees to operate the LCP except as authorized by California Code of Regulations title 8, § 16455(c), and receives approval from the DIR to operate an LCP in lieu of being subject to CMU oversight.

[448] The maximum fee that can be charged by the CMU is ¼ of 1% of the total project costs or ¼ of 1% of the state bond proceeds provided for the project, whichever is less and regardless of whether the DIR's actual monitoring and enforcement costs for the project exceed this maximum.

§ 3.2.3(f)

Contractors & Subcontractors

The California Prevailing Wage Law also prescribes specific duties and responsibilities for contractors and subcontractors in connection with public works projects. The contractor and subcontractor must:[449]

- Pay not less than the prevailing wage rate to all workers employed on public works projects.[450]
- Comply with the provisions of California Labor Code sections 1775, 1776 and 1777.5 regarding public works, including the employment of apprentices.
- Remit apprenticeship or training contributions either to the local apprenticeship committee program from which apprentices have been provided or to the California Apprenticeship Council (CAC).[451]
- Comply with California Labor Code sections 1778 and 1779 regarding receiving a portion of wages or acceptance of a fee and that sets forth criminal penalties for such actions.
- Provide workers' compensation coverage as set forth in California Labor Code section 186.
- Prepare, maintain and make available for inspection certified payroll records, as set forth in California Labor Code section 1776.
- Maintain an accurate record of the name and actual hours worked each calendar day for each calendar week for each worker employed in connection with execution of a public works contract.[452]
- Pay workers overtime pay, as set forth in California Labor Code section 1815 or as provided in a collective bargaining agreement adopted by the DIR.
- Comply with the antidiscrimination regulations issued by the DIR, the California Apprenticeship Council and/or an approved Apprenticeship Plan.
- Comply with the provisions of California Labor Code section 1777.7, which specifies the penalties imposed on a contractor who willfully fails to comply with provisions of section 1777.5 (regarding the employment of apprentices).
- Comply with the requirements specified in California Labor Code sections 1810 and 1813.

§ 3.2.4

D. COVERAGE DETERMINATIONS

The California Prevailing Wage Law applies to all "public works contracts" as set forth in California Labor Code sections 1720, 1720.2, 1720.3, 1720.4 and 1771.[453] "Workers employed by contractors or subcontractors in the execution of any *contract for public work*

[449] CAL. CODE REGS. tit. 8, § 16100.

[450] CAL. LAB. CODE §§ 1771, 1774.

[451] CAL. LAB. CODE § 1777.5(m)(1); CAL. CODE REGS. tit. 8, § 230.2.

[452] CAL. LAB. CODE § 1812.

[453] CAL. CODE REGS. tit. 8, § 16001(a).

are deemed to be employed upon public work."[454] Accordingly, the California Prevailing Wage Law applies only to workers who are employed in executing a specific contract for public work, and arguably not to workers employed on any public works project under contract in any other capacity. Therefore, the Director of the DIR, in determining whether employees are covered by the prevailing wage law under Labor Code section 1772, must initially determine whether their employer's contract is for "public work."

Any interested party may file with the Director a request to determine coverage under the prevailing wage laws regarding either a specific project or type of work to be performed which that interested party believes may be subject to or excluded from coverage as public works under the Labor Code.[455] If such a request is filed by any party other than the awarding body, a copy must be served upon the awarding body. Within 15 days of receipt of the copy of the request for coverage determination, the awarding body must forward to the DIR any documents, arguments or authorities it wishes to have considered in the coverage determination process.

Once the Director has made a coverage determination, an interested party may appeal the determination by serving a notice of appeal within 30 days of the issuance of the coverage determination. The party appealing must also provide written notification to the awarding body and other identifiable parties. The notice must set forth the full factual and legal grounds upon which the determination is appealed, and whether a hearing is desired. The decision to hold a hearing, however, remains in the Director's sole discretion. Although the Director may appoint a hearing officer to conduct the hearing, the Director is the final decision maker on the appeal. The decision of the Director to determine coverage of projects under the California Prevailing Wage Law is quasi-legislative and a final determination on any appeal is subject to judicial review.

A coverage determination by the Director that a particular project or type of work is subject to the provisions of the California Prevailing Wage Law may, under certain circumstances, subject the awarding body to liability for the "increased costs," penalties and attorneys' fees incurred by the contractor.[456] It may also require the awarding body to rebid the work if the awarding body failed to identify the project as a "public work" in the bid specification or in the contract documents and construction has not commenced at the time a final decision was issued by the Director classifying all or part of the work covered by the contract or bid as a "public work."[457]

§ 3.2.5

E. DETERMINING THE PREVAILING WAGE RATE

In determining the prevailing wage rate, the DIR ascertains and considers the applicable wage rates established by collective bargaining agreements, and the rates that may have been predetermined for federal public works under the Davis-Bacon Act, within the locality and in the nearest labor market area. Where these rates do not constitute the rates actually prevailing in the locality, the DIR must obtain and consider other data from labor organizations and employers or employer associations in the local area, including the recognized collective

[454] CAL. LAB. CODE § 1772 (emphasis added).

[455] CAL. CODE REGS. tit. 8, § 16001.

[456] *See* CAL. LAB. CODE §§ 1726(c), 1781(a)(1).

[457] CAL. LAB. CODE § 1781(b).

bargaining representative for the particular craft, classification or type work involved.[458] Such information may also include wage surveys.[459]

In order for a wage survey to carry any weight with the Director in determining the prevailing wage rate, it must reflect the actual rates being paid on public and private projects under construction or recently completed in the locality and in the nearest labor market. In addition, the wage survey must clearly demonstrate the actual hourly rate being paid *to a majority of workers* engaged in particular crafts, classifications or types of work within the locality and in the nearest labor market "if a majority of such workers is paid at a single rate" *or*, if there is no single rate being paid to a majority of such workers, then the survey must establish "the single rate (or "modal rate") being paid to the greater number of employees." A wage survey that simply provides a summary or survey of the "average," "median" or "range" of wage rates being paid to certain types of employees in the industry or region will have no effect upon the determination of the prevailing wage rate by the Director.

When the Director determines that the general prevailing rate of *per diem* wages for a particular craft, classification or type of worker is uniform throughout the local area, the Director issues a "general determination" on a county-by-county basis.[460] An awarding body may also request that the Director make a "special determination" for a particular craft, classification or type of worker not covered by a general determination.[461] A request for "special determination" must be submitted at least 45 days prior to the bid advertisement date.[462]

All determinations by the Director become effective ten days after issuance and such determinations will ordinarily contain an expiration date.[463]

§ 3.2.6

F. COMPONENTS OF THE PREVAILING WAGE RATE

The general prevailing wage rate of *per diem* wages includes the following components:[464]

- The *Basic Hourly Rate* (straight-time hourly pay) being paid to a majority of workers engaged in the particular craft, classification or type of work within the locality and in the nearest labor market area, if a majority of such workers is paid *at a single rate*. If there is no single rate being paid to a majority of workers, then the single rate being paid to the greatest number of workers (or "modal rate") is prevailing. If there is no modal rate, then the Director shall establish an alternative rate by considering the appropriate collective bargaining agreements, federal rates, or other data such as wage survey data.
- The prevailing rate for *Holiday or Overtime Work*. The rates for holiday or overtime work are those rates specified in the collective bargaining agreement when the basic hourly rate is based upon a collective bargaining agreement rate.

[458] CAL. LAB. CODE § 1773.

[459] CAL. CODE REGS. tit. 8, § 16200(e).

[460] CAL. CODE REGS. tit. 8, § 16201.

[461] CAL. CODE REGS. tit. 8, § 16202.

[462] CAL. CODE REGS. tit. 8, § 16202.

[463] CAL. CODE REGS. tit. 8, § 16204.

[464] CAL. LAB. CODE § 1773.1(a); CAL. CODE REGS. tit. 8, § 16000(a).

In the event that the basic hourly rate is not based upon a collective bargaining agreement, holidays and overtime pay included with the prevailing hourly rate of pay will be the prevailing rate.[465] For each of the prevailing wage determinations, the prevailing hourly wage rate for holiday work is based upon all holidays set forth in the respective collective bargaining agreements on file with the Director of Industrial Relations. If the prevailing wage rate is not based upon a collective bargaining agreement, the holidays are paid as provided in California Government Code section 6700, which identifies state holidays. The particular holiday provisions for the current determinations are available on the Internet at http://www.dir.ca.gov/dlsr/PWD.

- In accordance with California Labor Code sections 1773.1 and 1773.9, an employer must also make *Travel and Subsistence* payments to each worker to execute work. The travel and/or subsistence requirements are derived verbatim from the collective bargaining agreement(s) adopted by the DLSR as the basis for the prevailing wage determination and are also available on the Internet at http://www.dir.ca.gov/dlsr/PWD.
- Other *Employer Payments* from which the prevailing basic hourly wage rate was derived, including employer payments for health and welfare, pension, vacation, travel subsistence, apprenticeship or other training programs, worker protection and assistance programs or committees, and industry advancement and collective bargaining agreement administrative fees. Specifically, this may include:
  - medical and hospital care, prescription drugs, dental care, vision care, diagnostic services, and other health and welfare benefits;
  - pension or retirement plan benefits;
  - vacations and holidays with pay, or cash payments in lieu thereof;
  - compensation for injuries or illnesses resulting from occupational activity;
  - life, accidental death and dismemberment, and disability or sickness and accident insurance;
  - supplemental unemployment benefits;
  - thrift, security savings, supplemental trust, and beneficial trust funds otherwise designated, provided all of the money except that used for reasonable administrative expenses is returned to the employees;
  - occupational health and safety research, safety training, monitoring job hazards, and the like, as specified in the applicable collective bargaining agreement;
  - apprenticeship program contributions or other training programs, so long as the cost of the training is reasonably related to the amount of the contributions;
  - travel time and subsistence pay;
  - worker protection and assistance programs or committees established under the federal Labor Management Cooperation Act of 1978 to monitor and enforce laws related to public works;

[465] If an employee works on both a public works project and a private construction project during the same workday, the employer may be required to calculate overtime compensation using the "weighted average" rather than the "rate in effect" method. *See* 29 C.F.R. § 778.115.

- industry advancement and collective bargaining agreement administrative fees, provided such payments are required under a collective bargaining agreement pertaining to the particular craft, classification or type of work within the locality or the nearest labor market; and
- other *bona fide* benefits.[466]

However, the general wage rate for *per diem* wages does not include "employer payments" for any of the following:[467]

- job-related expenses other than travel time and subsistence pay;
- contract administration, operation of hiring halls, grievance processing, or similar purposes except for those amounts specifically earmarked and actually used for administration of those types of employee or retiree benefits plans enumerated above;
- union, organizational, professional or other dues except as they may be included in and withheld from the basic taxable hourly wage rate;
- industry or wage promotion;
- political contributions or activities;
- any benefit for employees, their families and dependents, or retirees including any benefit enumerated above where the contractor or subcontractor is required by federal, state or local law to provide such benefit;
- benefit required to be provided by state or federal law; and
- other payments as the Director may determine to exclude.

§ 3.2.7

G. SATISFYING THE PREVAILING WAGE RATE

A contractor is entitled to credit for amounts up to the total of all fringe benefit amounts listed in the prevailing wage determination.[468] This credit is only available for actual payments made by the contractor for the fringe benefit costs of health and welfare, pension, vacation, travel, subsistence, apprenticeship or training programs, worker protection and assistance programs or committees directed to the monitoring and enforcement of laws related to public works, and industry advancement and collective bargaining administrative fees.[469] However, an employer may take a credit for the costs of providing these fringe benefits even if the contributions or costs are not actually paid during the same pay period for which credits are taken, so long as the employer regularly pays the contributions or costs for the fringe benefit plan, fund or program on no less than a quarterly basis.[470] *Employer payments* include:

- "the rate of contribution irrevocably made by the employer to a trustee or third person pursuant to a plan, fund or program";

[466] CAL. LAB. CODE § 1773(a).

[467] CAL. LAB. CODE § 1773.1(c)(1); CAL. CODE REGS. tit. 8, § 16000(b).

[468] CAL. LAB. CODE § 1773.1(c).

[469] CAL. LAB. CODE § 1773.1(b); CAL. CODE REGS. tit. 8, § 16200(a)(3)(I).

[470] CAL. LAB. CODE § 1773.1(d).

- "the rate of actual costs to the employer reasonably anticipated in providing benefits to workers pursuant to an enforceable commitment to carry out a financially responsible plan or program communicated in writing to the workers affected";[471] and
- "payments made to the California Apprenticeship Council."[472]

The credit for such Employer Payments also must generally be computed on an annualized basis, particularly where the contractor seeks credits that are higher for public works than for private construction work.[473]

If the total Employer Payments by a contractor for the fringe benefits listed as prevailing is less than the aggregate amount set out in the prevailing wage determination, the contractor must pay the difference directly to the employee. However, no amount of credit for payments over the aggregate amount of Employer Payments shall be taken nor shall any credit decrease the amount of direct payment of hourly wages of those amounts found to be prevailing for straight time or overtime wages.[474]

§ 3.2.8

H. CHALLENGING THE DETERMINATION OF THE PREVAILING WAGE RATE

Any interested party may file a petition to review a prevailing wage determination.[475] In particular, any prospective bidder or his representative, any representative of any craft, classification or type of worker involved, or the awarding body may file a petition for review.[476]

The petition to review a prevailing wage rate determination must be filed with the DLSR pursuant to section 1773.4 of the California Labor Code within 20 days after commencement of advertising for the call for bids by the awarding body.[477] The petition must be verified and must set forth all of the facts upon which it is based. Such facts should include the prevailing rate being contested, the grounds for arguing that it fails to comply with California Labor Code section 1773, and evidence of: (1) rates established by union contracts; (2) rates on federal prevailing wage projects; and (3) rates in the locality and the nearest labor market.[478]

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[471] Notwithstanding the fact that most employers provide vacation pay to employees pursuant to a written contract, policy or handbook, and that under California law vacation pay is considered to be deferred compensation that is "earned" or "accrued" on a *pro rata* basis according to both the Labor Commissioner and the California Supreme Court (*see Suastez v. Plastic Dress-Up Co.*, 31 Cal. 3d 774 (1982)), the Labor Commissioner is of the opinion that no credit should be given for the reasonably anticipated expense of annualized vacation pay and that an employer is only entitled to credit for vacation benefits that are actually paid (and when actually paid) or through *bona fide* employer contributions irrevocably made to a vacation plan, fund or program administered by a third party. This interpretation would, of course, disqualify most vacation pay plans used by California employers.

[472] CAL. LAB. CODE § 1773.1(b).

[473] CAL. LAB. CODE § 1773.1(d)(1).

[474] CAL. LAB. CODE § 1773.1(c); CAL. CODE REGS. tit. 8, § 16200(a)(3)(I).

[475] CAL. CODE REGS. tit. 8, § 16302. *See also Independent Roofing Contractors v. Department of Indus. Relations*, 23 Cal. App. 4th 345, 353 (1994).

[476] CAL. LAB. CODE § 1773.4.

[477] *Sheet Metal Workers Int'l Ass'n, Local Union No. 104 v. Rea*, 153 Cal. App. 4th 1071, 1080-81 (2007).

[478] CAL. LAB. CODE §§ 1773, 1773.4; CAL. CODE REGS. tit. 8, § 16200.

Within two days of the filing of the petition for review with the DLSR, a copy of the petition must be filed with the awarding body.[479] The Director of the DIR will give notice to the proper parties and may either institute an investigation or hold a hearing. Within 20 days of the filing of the petition (or with a longer period agreed upon by the Director, awarding body and all interested parties), the Director shall make a final determination in writing and transmit it to the awarding body and interested parties.[480]

Upon notice of the filing of the petition for review, the body awarding the contract or authorizing the public work shall extend the closing date for the submission of bids or the starting of work until five days of the determination of the general prevailing rates of *per diem* wages.[481]

§ 3.2.9

I. APPRENTICESHIP STANDARDS & THE EMPLOYMENT OF APPRENTICES ON PUBLIC WORKS

The California Prevailing Wage Law requires contractors who employ workers in any "apprenticeable trade or craft" on a public works project to employ apprentices in a specified minimum ratio of journeymen to apprentices and in accordance with a state-approved apprenticeship training plan.[482] However, this requirement "does not apply to contracts of general contractors or to contracts of specialty contractors not bidding through a general or prime contractor where the contract of the general contractor or those specialty contractors involve less than $30,000."[483]

Only apprentices who are in training under Apprenticeship Standards that have been approved by the Chief of the Division of Apprenticeship Standards (DAS) are eligible to be employed by contractors who are parties to a written apprenticeship agreement with the local apprenticeship committee at the apprentice wage rate on public works projects. The employment and training of each apprentice must be in accordance with either the Apprenticeship Standards or apprenticeship agreements under which he or she is training, or the rules and regulations of the California Apprenticeship Council.[484]

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[479] CAL. LAB. CODE § 1773.4.

[480] CAL. LAB. CODE § 1773.4.

[481] CAL. LAB. CODE § 1773.4.

[482] The ratio of work performed by apprentices to journeymen employed in a particular craft or trade on the public work may be no higher than that stipulated in the apprenticeship standards of the applicable local apprenticeship program, but in no case shall the ratio be less than one hour of apprentice work for every five hours of journeymen work. CAL. LAB. CODE § 1777.5(g). An *apprenticeable craft or trade* is a craft or trade determined as an apprenticeable occupation in accordance with rules and obligations prescribed by the California Apprenticeship Council. CAL. LAB. CODE § 1777.5(d).

[483] The historical exclusion of "projects that will be completed in less than twenty (20) days" is no longer an exemption from the requirement to employ apprentices on a public works project. CAL. LAB. CODE § 1777.5(o). As a result, only contracts of general contractors and contracts of specialty contractors not bidding for work through a general or prime contractor involving less than $30,000 are exempt from the apprenticeship requirement. The employer is nevertheless required to remit apprenticeship contributions for each hour worked by journeymen on public works projects in order to satisfy the prescribed prevailing wage and benefit rate.

[484] CAL. LAB. CODE § 1777.5(c); CAL. CODE REGS. tit. 8, § 230.1(a).

Apprenticeship Standards include, *inter alia*, the terms and conditions for the qualification, recruitment, selection, employment and training, working conditions, wages, employee benefits and other compensation for apprentices, and other provisions as required by the California Labor Code for a particular apprenticeable occupation.[485] A detailed list of the contents of Apprenticeship Standards for apprenticeable trades, crafts and occupational classifications may be found in section 212 of title 8 of the California Code of Regulations. A copy of the current Apprenticeship Standards of an approved Apprenticeship Committee for certain trades and crafts may be obtained from the DIR.

§ 3.2.9(a)

Requirements of Employing Apprentices

Contractors required to employ apprentices must comply with the following six basic requirements:

First, prior to commencing work on a contract for public works, the contractor shall submit contract award information to an applicable apprenticeship program that can supply apprentices to the site of the public work.[486] The contractor must include an estimate of the journeymen hours to be performed under the contract, the number of apprentices proposed to be employed, and the approximate dates the apprentices would be employed. A copy of this information must also be provided to the awarding body upon request. In exchange for making an application and submitting the necessary information, the contractor is seeking a certificate approving the contractor under the apprenticeship standards for the employment and training of apprentices in the area or industry affected. If the apprenticeship program approves the contractor, then it will arrange for the dispatch of apprentices to the contractor.[487]

Second, the contractor must determine the ratio of work to be performed by apprentices to journeymen. In no case shall the ratio be less than one hour of apprentice work for every five hours of journeyman work. The ratio may be no higher than the ratio stipulated in the apprenticeship standards under which the apprenticeship program operates (where the contractor agrees to be bound by those standards).[488] Where an hourly apprenticeship ratio is not feasible for a particular trade for craft, the Chief of DAS may order a minimum ratio of one apprentice for each five journeymen in that craft or trade.[489] In that event, a contractor is not required to employ an apprentice in such a craft or trade unless and until it employs five journeymen in that craft or trade classification on the public works project. However, the contractor is, of course, still required to remit apprenticeship or training contributions to the relevant local apprenticeship plan or to the California Apprenticeship Council for all journeyman hours worked on the project.

Third, the contractor must determine the total number of hours that apprentices must work according to the following method:[490] The number of "regular" hours (*i.e.*, hours not in excess

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[485] CAL. CODE REGS. tit. 8, § 205(f).

[486] *See* DAS Form 140.

[487] CAL. LAB. CODE § 1777.5(e). Once a contractor is covered by apprenticeship programs standards, it does not need to submit any additional application in order to include additional public works contracts under the program.

[488] CAL. LAB. CODE § 1777.5(g).

[489] CAL. LAB. CODE § 1777.5(h).

[490] This *hourly method* would not apply where a minimum ratio of not less than one apprentice for each five journeyman in a craft or trade classification has been ordered by the Chief of the DAS.

of eight hours per day or 40 hours per week) that any journeyman works in any day or portion of a day should be tallied. The resulting figure (*e.g.*, 1,000) should be included into the ratio to determine the number of apprenticeship hours required (*e.g.*, if the ratio were 1:5, then 200 apprenticeship hours would be required). The statute provides that a contractor should "endeavor" to the greatest extent possible to employ apprentices during the same time period that the journeymen in the same craft or trade are employed at the job site. The contractor must employ apprentices for the requisite number of hours before the end of the contract (or in the case of a subcontractor, before the end of the subcontract).[491]

Fourth, the contractor must submit a written request for the dispatch of the required number of apprentices from the apprenticeship committee that provides training for the applicable trade or craft in the local geographic area where the project is located at least 72 hours (excluding Saturdays, Sundays and holidays) before the date on which the apprentices are needed for the project If the apprentice committee does not dispatch the apprentices as requested, the contractor must request the dispatch of apprentices from each and every other apprenticeship committees that provide training for the applicable trade or craft in the geographic area of the project.[492]

Fifth, the contractor may pay apprentices the prevailing rate of *per diem* wages for apprentices in the trade to which he or she is registered, so long as the apprentices are eligible to be paid at the apprentice wage rate. Eligible apprentices[493] include those: (1) who are in training under apprenticeship standards that have been approved by the Chief of the DAS; and (2) who are parties to written apprentice agreements.[494] This is a benefit to the contractor as the apprentice wage rate is generally much lower than the journeyperson wage rate.

Sixth, within 60 days after concluding work on the public works contract, the contractor must submit a verified statement of the journeyman and apprentice hours performed on the contract to the apprenticeship program and, if requested, to the awarding body. The information is public and retained by the apprenticeship program for 12 months.[495]

§ 3.2.9(b)

Exemptions from the Apprenticeship Ratio

A contractor may be exempted from the 1:5 hourly ratio either by the DAS or the appropriate apprenticeship program. The DAS may grant a certificate exempting a contractor from the 1:5 hourly ratio if the contractor can show that it employs apprentices in a particular craft or trade in the state on all of his or her contracts on an annual average of not less than one hour of apprentice work for every five hours of labor performed by journeymen.[496]

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[491] CAL. LAB. CODE § 1777.5(h).

[492] CAL. CODE REGS. tit. 8, § 230.1(a).

[493] *Apprentices* are persons at least 16 years of age who have entered into a written agreement (apprentice agreement) with an employer or program sponsor. CAL. LAB. CODE § 3077.

[494] CAL. LAB. CODE § 1777.5(c). The California Labor Code effectively precludes a contractor from paying less than the journeyperson prevailing wage to a trainee in a given craft unless the individual is employed in the appropriate state-certified apprenticeship plan.

[495] CAL. LAB. CODE § 1777.5(e).

[496] CAL. LAB. CODE § 1777.5(j).

An apprenticeship program also has the discretion to grant to a participating contractor a certificate, subject to the approval of the Administrator of Apprenticeship, exempting the contractor from the 1:5 ratio when it finds that any one of the following conditions is met:[497]

- unemployment for the previous three-month period in the local area exceeds an average of 15%;
- the number of apprentices in training in the local area exceeds a ratio of 1:5;
- there is a showing that the apprenticeable craft or trade is replacing at least one-thirtieth of its journeymen annually through apprenticeship training, either on a statewide basis or on a local basis; or
- assignment of an apprentice to any work performed under a public works contract would create a condition that would jeopardize his or her life or the life, safety, or property of fellow employees or the public at large, or the specific task to which the apprentice is to be assigned is of a nature that training cannot be provided by a journeyman.

In addition to these formal methods for obtaining an exemption, a contractor may escape the obligation to employ apprentices if no approved Apprenticeship Committee dispatches or agrees to dispatch an apprentice upon request to the contractor, which has agreed to employ and train apprentices in accordance with either the Apprenticeship Committee's Standards or the apprenticeship regulations, within 72 hours of such request (excluding Saturdays, Sundays and holidays).[498]

§ 3.2.9(c)

Apprenticeship Contributions

A contractor to whom a contract is awarded who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade must contribute to the California Apprenticeship Council the same amount that the director determines is the prevailing amount of apprenticeship training contributions in the area of the public works site.[499] However, in making these contributions, a contractor can take as a "credit" any amounts paid by the contractor to an approved apprenticeship program that can supply apprentices to the site of the public works project. Moreover, the contractor can also add the amount of the apprenticeship training contributions in computing his or her bid for the contract.[500]

Contractors who are neither required nor wish to make apprenticeship training contributions to the applicable local training trust fund must make their training contributions to the Council. In doing so, contractors may refer to the Director's applicable prevailing wage determination for the amount owed for each hour of work performed by journeymen and apprentices in each apprenticeable trade, craft or occupation.[501]

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[497] CAL. LAB. CODE § 1777.5(k).

[498] *See* CAL. CODE REGS. tit. 8, § 230.1(a).

[499] CAL. LAB. CODE § 1777.5(m)(1). *See* California Apprenticeship Council Form 2.

[500] CAL. LAB. CODE § 1777.5(m)(1). *See* California Apprenticeship Council Form 2.

[501] CAL. CODE REGS. tit. 8, § 230.2.

§ 3.2.9(d)

Responding to a Request for Contributions & Agreement to Train Apprentices

A contractor is, of course, under no obligation to agree to the Apprenticeship Standards adopted by the local apprenticeship committee or to employ apprentices if it does not employ any workers in an apprenticeable trade or craft. Likewise, if a nonsignatory contractor declines to comply with the terms of the local committee's Apprenticeship Standards, the local committee is not required to dispatch apprentices to the contractor.[502] However, if the local apprenticeship fails or refuses to dispatch an apprentice upon written request to a contractor that has agreed to employ and train apprentices under either the local apprenticeship committee's standards or the standards adopted by the California Apprenticeship Council within 72 hours (excluding Saturdays, Sundays and holidays) after the contractor has requested in writing the dispatch of apprentices,[503] "the contractor is excused from the obligation to employ apprentices for the remainder of the project."[504] The contractor is, however, still required to remit apprenticeship contributions to the applicable apprenticeship committee or to the Council for all journeyman hours worked on the project.

§ 3.2.10

J. PREPARATION & SUBMISSION OF CERTIFIED PAYROLL RECORDS & OTHER RECORD-KEEPING REQUIREMENTS

With respect to each journeyman, apprentice, worker, or other individual employed by a contractor or subcontractor in connection with a public work, the contractor/subcontractor must keep accurate payroll records showing the following information:[505]

- Name
- Address
- Social Security number
- Work classification
- Straight time worked each day and week
- Overtime worked each day and week
- Actual *per diem* wages paid

Payroll records must be certified by the contractor/subcontractor and made available for inspection at all reasonable hours at the principal office of the contractor.[506] Moreover, these

[502] As a practical matter, a local apprenticeship committee generally will *not* dispatch apprentices to a contractor that is not signatory to a current collective bargaining agreement with the union affiliated with the local apprenticeship committee.

[503] Contractors who are not approved to train apprentices by a local joint apprenticeship committee must request the dispatch of apprentices from the applicable joint apprenticeship committee whose geographic area of operation includes the public works project and notify the apprenticeship committee at least 48 hours (excluding Saturdays, Sundays and holidays) before the date on which one or more apprentices are required. CAL. CODE REGS. tit. 8, § 230.1(a). *See* DAS Form 142.

[504] CAL. CODE REGS. tit. 8, § 230.1(a). *See* DAS Form 142.

[505] CAL. LAB. CODE § 1776(a).

[506] CAL. LAB. CODE § 1776(b). However, "the payroll records may consist of printouts of payroll data that are maintained as computer records, if the printouts contain the same information as the forms provided by the DLSE and the printouts are verified in the manner specified in subdivision (a)." CAL. LAB. CODE § 1776(b).

certified payroll records must be made available for inspection or furnished within ten days of a written request to the following:

1. the employee (or his or her authorized representative);
2. the Labor Commissioner or DLSE;
3. the Division of Apprenticeship Standards (DAS); and
4. the public.[507]

However, members of the general public do not have the right to access certified payroll records at the principal office of the contractor; rather, members of the public must request review through the awarding body, the DLSE or the DAS.[508]

Copies of certified payroll records that are made available for inspection to members of the public by the awarding body, the DAS or the DLSE are required to be marked or obliterated only to prevent disclosure of an individual's name, address and Social Security number. However, any certified payroll records made available for inspection by, or furnished to, a joint labor-management committee established pursuant to the federal Labor Management Cooperation Act of 1978 must be marked or obliterated only to prevent disclosure of an individual's name and Social Security number.[509] The labor-management committee is entitled to the home addresses of all workers employed on public works projects.[510]

The contractor/subcontractor must notify the awarding body as to the location of the payroll records. A notice of change of location and address must be made within five days.[511]

§ 3.2.10(a)

Requests for Certified Payroll Records

Any person may make requests for certified copies of payroll records. Requests must be made to the body awarding the contract, the DLSE or the DAS.[512] However, any such request must be made in writing and must contain, at a minimum, the following information:[513]

- body awarding the contract;
- contract number and/or description;
- particular job location if more than one;
- name of the contractor; and
- regular business address, if known.

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[507] CAL. LAB. CODE § 1776(b)(1)-(3).

[508] CAL. LAB. CODE § 1776(b)(3).

[509] CAL. LAB. CODE § 1776(e).

[510] *Helix Elec. Inc. v. Division of Labor Standards Enforcement*, 2006 U.S. Dist. LEXIS 7337 (E.D. Cal. Feb. 24, 2006) [denying motion for preliminary injunction], *affirmed*, 203 F. App'x 813 (9th Cir. 2006).

[511] CAL. LAB. CODE § 1776(f).

[512] CAL. CODE REGS. tit. 8, § 16400.

[513] CAL. CODE REGS. tit. 8, § 16400(b).

If a request for payroll records involves more than one contractor or subcontractor, it must list the information for that contractor individually, even if all requests pertain to the same public works project. Blanket requests are unacceptable, unless the contractor and subcontractor responsibilities on the project are not clearly defined.[514]

Once received, the public entity receiving the request for payroll records must acknowledge receipt of the request and indicate the cost of producing the payroll records based upon an estimate by the contractor, subcontractor or public entity.[515] In turn, the public entity will contact the contractor or subcontractor regarding the request for payroll records.

This request to the contractor or subcontractor can be in any form or method, but must include the following:[516]

- identification of the specific records to be provided and the form upon which the information is to be provided;
- conspicuous notice that the person certifying the records, if not the contractor, is the agent of the contractor, and that failure to comply to the request within ten days will subject the contractor to a penalty of $25 per day for each worker until strict compliance is achieved;
- payment of the cost of preparation;[517] and
- provide for inspection.

§ 3.2.10(b)

Responding to Requests for Certified Payroll Records

Once it has received written notice of a request for certified payroll records, a contractor has ten days in which to comply. The format for the reporting of payroll records must be on a form provided by the public entity. Copies of the forms may be obtained at any office of the DLSE throughout the State of California or by writing to:

> Division of Labor Statistics & Research
> P.O. Box 420603
> San Francisco, CA 94142
> Attention: Prevailing Wage Unit

An alternate form may be used if it contains all of the information required pursuant to California Labor Code section 1776 (name, address, Social Security number, work classification, straight time worked each day and week, overtime worked each day and week, and actual *per diem* wages paid).[518]

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[514] CAL. CODE REGS. tit. 8, § 16400(b).

[515] CAL. CODE REGS. tit. 8, § 16400(c).

[516] CAL. CODE REGS. tit. 8, § 16400(d).

[517] The person seeking the payroll records must provide in advance, and prior to the release of the documents, the cost of preparing the payroll records to each contractor, subcontractor or public entity. Costs include $1 for the first page and 25¢ for each page thereafter, plus $10 to the contractor or subcontractor for handling costs. CAL. CODE REGS. tit. 8, § 16402.

[518] CAL. CODE REGS. tit. 8, § 16401. Under a regulation that was adopted by the DIR, and effective beginning on January 21, 2009, "[t]he certified payroll records required by Labor Code section 1776 may be maintained and submitted electronically" subject to the following conditions:

Each payroll record must be verified by a written certification of the contractor that it is made under penalty of perjury, stating that the information contained in the payroll record is true and correct and in compliance with California Labor Code sections 1771, 1811 and 1815 for any work performed by its employees on the public works project.[519] The wording of the certification must be exactly as follows:[520]

> I, (Name-print), the undersigned, am (title or position) with the authority to act for and on behalf of (name of business and/or contractor) certify under penalty of perjury that the records or copies thereof submitted and consisting of (description and number of pages) are the originals or true, full and correct copies of the originals which depict the payroll record(s) of the actual disbursements by way of cash, check, or whatever form to the individual or individuals named.
>
> Date: _____ Signature: _____

If a contractor or subcontractor fails to comply with a written request for certified payroll records within the prescribed ten-day period, it is subject to a penalty of $25 per day for each worker employed on the public works project until strict compliance is effected.[521] However, a contractor is not subject to a penalty assessment based upon the noncompliance of a subcontractor in responding to a request for certified payroll records.[522]

(a) The reports must contain all of the information required by Labor Code section 1776, with the information organized in a manner that is similar or identical to how the information is reported on the [DIR's] suggested 'Public Works Payroll Reporting Form' (Form A-1-131);

(b) The reports shall be in a format and use software that is readily accessible and available to contractors, awarding bodies, Labor Compliance Programs and the [DIR];

(c) Reports submitted to an awarding body, a Labor Compliance Program, the Division of Labor Standards Enforcement, or other entity within the [DIR] must be either: (1) in the form of a non-modifiable image or record that bears an electronic signature or includes a copy of any original certification made on paper; or alternatively (2) printed out and submitted on paper with an original signature;

(d) The requirements for redacting certain information shall be followed when certified payroll records are disclosed to the public pursuant to Labor Code section 1776(e), whether the records are provided electronically or as hard copies; and

(e) No party shall be mandated to receive electronic reports when it otherwise lacks the resources or capacity to do so nor shall any party be required to purchase or use proprietary software that is not generally available to the public.

CAL. CODE REGS. tit. 8, § 16404.

[519] CAL. LAB. CODE § 1776(a).

[520] A public entity may, however, require a stricter or more extensive certification. CAL. CODE REGS. tit. 8, § 16401.

[521] CAL. LAB. CODE § 1776(g).

[522] CAL. LAB. CODE § 1776(g).

§ 3.2.10(c)

Privacy of Payroll Records

The payroll records received from the employing contractor must be kept on file in the office or by the public entity that processed the request for at least six months following completion and acceptance of the project. Thereafter, the records may be destroyed unless administrative, judicial or other pending litigation, including arbitration, mediation or other methods of alternative dispute resolution, are in process.[523]

Copies of the payroll records that are provided to the public upon written request must be redacted to prevent disclosure of employee names, addresses, Social Security numbers and other private information. No other information may be redacted, including the identification of the contractor.[524]

If asked, the public entity may affirm or deny that a particular person(s) was or is employed on a public works contract by a specific contractor as long as the entity requires such information of an identifying nature that will reasonably preclude release of private or confidential information.[525]

§ 3.2.11

K. REMEDIES & CONSEQUENCES FOR FAILURE TO PAY PREVAILING WAGES

The principal remedy for the failure to pay the prevailing wage rate is the withholding from the employer of the amounts allegedly due the employees and any applicable penalties.[526] A penalty of not less than $10 and up to $50 per employee per day, or portion thereof, can be imposed for the failure to pay prevailing wages.[527] Contractors may be penalized $100 per day for failing to comply with the state apprenticeship training requirements.[528]

The Labor Commissioner and the Chief of DAS each have the discretion to reduce the penalty for noncompliance and, in fact, are now required to consider specified circumstances in setting or reducing the amount of the penalty.[529] That determination is reviewable only for

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[523] CAL. CODE REGS. tit. 8, § 16403(a).

[524] CAL. CODE REGS. tit. 8, § 16403(b).

[525] CAL. CODE REGS. tit. 8, § 16403(c).

[526] Interest must also be assessed on all unpaid wages at the rate specified in Civil Code section 3289(b) from the date the wages were due and payable. CAL. LAB. CODE § 1741(b).

[527] CAL. LAB. CODE § 1775. A prescribed "minimum" penalty must be assessed in the amount of: (1) $10 per day for each worker paid less than the prevailing wage rate, unless the failure to pay the prevailing wage rate was a good faith mistake, and was promptly and voluntarily corrected when brought to the employer's attention; (2) $20 per day if the employer has been assessed penalties within the previous three years for failing to meet its prevailing wage obligations, unless those penalties were subsequently withdrawn or overturned; and (3) $30 per day if the Labor Commissioner determines the employer's violation was "willful." CAL. LAB. CODE § 1775(a)(2)(B).

[528] CAL. LAB. CODE § 1777.7(a)(1).

[529] The Chief of DAS is authorized to reduce the monetary penalty for violations of the apprenticeship requirements if it "would be disproportionate to the severity of the violation" and to order the contractor to provide apprenticeship employment equivalent to the hours that would have been provided to apprentices in lieu of a monetary penalty for a first-time violation. CAL. LAB. CODE § 1777.7(a)(1), (2).

an abuse of discretion. However, in lieu of the monetary penalty for a first-time violation of the apprenticeship requirements of the California Prevailing Wage Law, the Chief of the DAS may, with the concurrence of the relevant apprenticeship program, order affected contractors to provide apprenticeship employment to individuals in an amount equivalent to hours of work that would have been provided to apprentices during the period of noncompliance.[530]

In addition, if a worker on a public works project is not paid the prevailing wage rate by a subcontractor, or the subcontractor has failed to comply with the apprenticeship requirements, the prime or general contractor shall not be liable for any penalties unless it had knowledge of that failure by the subcontractor or unless it fails to take all of the following precautions:

- Include a copy of California Labor Code sections 1771, 1775, 1776, 1777.5, 1813 and 1815 in its contract with the subcontractor.
- Monitor the payment of prevailing wages and/or the use of the required number of apprentices by the subcontractor by periodic review of the certified payroll records of the subcontractor.
- Take prompt corrective action upon becoming aware of the failure of the subcontractor to pay prevailing wages and/or to employ the required number of apprentices to halt or rectify such failure, including but not limited to retaining sufficient funds due to the subcontractor for work performed on the public works project upon becoming aware of such failure by the subcontractor.
- Obtain an affidavit signed under penalty of perjury from the subcontractor that the specified prevailing wage rate was paid to his or her employees for work performed on the public works project and/or the requisite number of apprentices were employed by the subcontractor prior to making final payment to the subcontractor.[531]

In addition to monetary penalties, a contractor may also be barred from bidding on public works for fraudulent or willful violation of the California Prevailing Wage Laws, including the failure to comply with the apprenticeship training requirements, for not less than one and up to three years.[532] The debarment of contractors may be based upon the conduct of a contractor's "responsible managing officer" as well as any supervisors, managers, and officers found by the Labor Commissioner or Chief of DAS to be personally and substantially responsible for any willful violation of the California Prevailing Wage Laws.[533]

Debarment will automatically be imposed against any contractor or subcontractor found to have violated the provisions of the California Prevailing Wage Law, other than the apprenticeship requirements, "with intent to defraud."[534] However, with respect to a "knowing" violation of the

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The Labor Commissioner is required to consider both of the following factors in determining the amount of the penalty against a contractor or subcontractor for paying less than the prevailing wage rate: (1) whether the failure of the contractor or subcontractor to pay the correct rate of *per diem* wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected upon being brought to the attention of the contractor or subcontractor; and (2) whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations. CAL. LAB. CODE §§ 1775(a), 1777.7(f).

[530] CAL. LAB. CODE § 1777.7(a)(2).

[531] CAL. LAB. CODE §§ 1775(b), 1777.7(d).

[532] CAL. LAB. CODE §§ 1777.1, 1777.7(b).

[533] CAL. LAB. CODE § 1777.1(e).

[534] CAL. LAB. CODE § 17771.1.

apprenticeship requirements by a contractor or subcontractor, the Chief of DAS must consider specified circumstances that could mitigate the extent of enforcement sanctions "in setting the amount of a monetary penalty, in determining whether a violation was serious and in determining whether and for how long a party should be debarred."[535]

The Labor Commissioner publishes and distributes to awarding agencies not less than semi-annually a list of contractors who are ineligible to bid or be awarded a public works contract.[536] In addition, affected contractors will be assessed the reasonable cost of advertisements placed by the Labor Commissioner in construction industry publications stating the effective period of debarment and reason for debarment of contractors, not to exceed $5,000.[537]

§ 3.2.12

L. ENFORCEMENT OF PREVAILING WAGE LAW

California gives employees the choice of using a specialized administrative procedure to resolve wage claims or filing their claims directly in court. An employee can pursue wage claims that are based on a law (*e.g.*, minimum wage or overtime claim), and wage claims that are based on a contract (*e.g.*, bonuses and commissions), through either process.

§ 3.2.12(a)

Administrative Procedures

California's prevailing wage enforcement scheme was extensively revised effective July 1, 2001, in an attempt to satisfy constitutional due process requirements.[538] In particular, a procedure had been established for challenging a decision to withhold funds from a contractor for failure to pay prevailing wages by providing an affected contractor the right to a hearing before an impartial hearing officer appointed by the Director (who possesses the qualifications of an Administrative Law Judge but is not employed by DLSE), regarding the validity of a "civil wage and penalty assessment" issued by the Labor Commissioner.[539] Instead of requiring the contractor to file suit against the awarding agency to recover wages and penalties, the following procedure is the exclusive method for review of a "civil wage and penalty assessment" by the Labor Commissioner or the decision of the awarding body to withhold contract payments:[540]

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[535] CAL. LAB. CODE § 1777.7(f).

[536] CAL. LAB. CODE § 1777.1(d).

[537] CAL. LAB. CODE § 1777.1(d).

[538] In *Lujan v. G & G Fire Sprinklers*, *Inc*., 532 U.S. 189 (2001), the Supreme Court found that the earlier statutory scheme did not deprive a subcontractor of property without due process *if* California provided an ordinary judicial process for resolving contractual disputes. The Supreme Court indicated that, by appearing to permit a common-law breach of contract suit, California provided a subcontractor with an adequate means to pursue its interests. Subsequently, a California Court of Appeal in *Mobley v. Los Angeles Unified Sch. Dist*., 90 Cal. App. 4th 1221 (2001), concluded that there were still serious limitations with a breach of contract action and that due process concerns were not adequately met. The appellate court noted, however, that the new legislation may have rendered these due process concerns moot for future litigants.

[539] *See* CAL. LAB. CODE §§ 1741, 1742. Effective January 1, 2009, the hearing must be conducted by an Administrative Law Judge appointed by the Director pursuant to A.B. 2907.

[540] A similar, but slightly different, enforcement procedure applies when an awarding body has adopted a LCP to enforce the prevailing wage requirements under Labor Code section 1771.5. *See* CAL. LAB. CODE § 1771.6; CAL. CODE REGS. tit. 8, §§ 16435–16439.

- An awarding body must report any suspected prevailing wage violation to the Labor Commissioner, who in turn must notify the contractor within 15 days of receipt of a complaint alleging a prevailing wage violation and withhold an amount sufficient to satisfy any civil wage and penalty assessment.[541]
- Likewise, the Labor Commissioner must notify a contractor whenever it receives a complaint alleging a prevailing wage violation by a subcontractor, who must in turn withhold amounts sufficient to satisfy any civil wage and penalty assessment.[542]
- A "civil wage and penalty assessment" must be served on the affected contractor not later than 180 days after the filing of a notice of completion or 180 days after acceptance of the public work,[543] whichever occurs last.[544]
- The affected contractor must submit a written request for hearing within 60 days of service of the assessment and the hearing before the appointed hearing officer shall be commenced within 90 days.[545] The contractor has the burden of proving that the basis for the civil wage and penalty assessment is incorrect.
- A written decision must be issued by the Director within 45 days after conclusion of the hearing affirming, modifying or dismissing the assessment.[546]
- "Liquidated damages" shall be imposed on the contractor in an amount equal to unpaid wages that are not paid within 60 days after service of the wage and penalty assessment, which may be waived by the Director if the contractor establishes substantial grounds for believing that assessment or notice was in error.[547]
- The affected contractor may obtain judicial review of the Director's decision by filing a petition for *writ of mandamus* with an appropriate court within 45 days from service of the decision. The standard of review that the reviewing court must apply is that "findings [of the Director] are not supported by substantial evidence in light of the whole record."[548]

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[541] CAL. LAB. CODE §§ 1726, 1727 and 1775(c).

[542] CAL. LAB. CODE § 1775(b) and (c).

[543] Generally, once a project is completed, a notice of completion must be recorded within 10 days to be valid. *See* CAL. CIV. CODE § 3093. When a valid notice of completion is not recorded, the limitations period for DLSE to recover unpaid wages and penalties begins to run from acceptance of the public works project by the awarding body. *Department of Indus. Relations v. Fidelity Roof Co.*, 60 Cal. App. 4th 411, 418 (1997). Although the cessation of labor on a public works project for a continuous period of 30 days may constitute completion of the project (CAL. CIV. CODE § 3086), that completion cannot be deemed an "acceptance" of the project by the public entity as a matter of law. Rather, *acceptance* occurs when "public officials . . . consent to the dedication of an improvement to the public, typically . . . by determining that the improvement was satisfactorily built." *Carothers Constr.*, *Inc. v. Cake*, 2005 Cal. App. Unpub. LEXIS 3517, at *9 (Apr. 19, 2005) (quoting *In re El Dorado Improvement Corp.*, 335 F.3d 835, 840 (9th Cir. 2003)).

[544] CAL. LAB. CODE § 1741(a). "However, if the assessment is served after the expiration of this 180-day period, but before the expiration of an additional 180 days, and the awarding body has not yet made full payment to the contactor, the assessment is valid up to the amount of the funds retained." CAL. LAB. CODE § 1741(a).

[545] CAL. LAB. CODE § 1742(a).

[546] CAL. LAB. CODE § 1742(b).

[547] CAL. LAB. CODE § 1742.1.

[548] CAL. LAB. CODE § 1742(c).

The contractor and his subcontractors will be "jointly and severally liable" for all amounts due, including penalties, but the Labor Commissioner must first exhaust all remedies against the subcontractor before pursuing collection from the contractor for amounts owed by a subcontractor.[549] In addition, with respect to amounts collected by the Labor Commissioner for violations of the California Prevailing Wage Law, the wage portion of any such claim shall first be satisfied prior to applying any penalties imposed,[550] and the amounts collected shall be prorated among all of the workers if an insufficient amount is recovered to pay each worker in full.[551]

§ 3.2.12(b)

Civil Actions

In addition to the foregoing procedures, an employee or former employee of a contractor has several potential bases upon which to collect unpaid prevailing wages from the employee's employer.[552] If the employee has been specifically promised prevailing wages and such wages were not paid, then the employee can sue for breach of contract. If the obligation to pay the prevailing wage was included in the contract between the awarding body and the contractor-employer, the employee can sue as a third-party beneficiary of the contract.[553] An employee also has the right to file a claim under California Labor Code section 98.3 with the California Labor Commissioner to recover unpaid prevailing wages from the contractor-employer for its failure to meet the statutory obligation to pay prevailing wage rates.[554] In addition, at least one California court of appeal has held that the California Prevailing Wage Law is essentially a "minimum wage law . . . which guarantees a minimum cash wage for employees hired to work on public works contracts" and, as such, "[Labor Code] section 1194 provides an employee with a private statutory right to recover unpaid prevailing wages from an employer who fails to pay that minimum wage."[555]

However, a subcontractor's employees cannot sue the prime or general contractor on theories of statutory or contractual liability for the nonpayment of prevailing wages by the subcontractor, the employees' direct employer.[556] In addition, neither construction workers on a public works project nor the DLSE can recover unpaid prevailing wages from the public agency that awarded the public works contract for violating its obligations under the California Prevailing Wage Law, either on a statutory or contractual third-party beneficiary basis.[557]

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[549] CAL. LAB. CODE § 1743(a).

[550] CAL. LAB. CODE § 1775(a)(2)(C).

[551] CAL. LAB. CODE § 1743(b).

[552] A California court of appeal held that the federal Immigration Reform and Control Act of 1986 (IRCA) does not preempt the California Prevailing Wage Law and does not bar undocumented workers from bringing claims against their employer for unpaid prevailing wages. *Reyes v. Van Elk Ltd.*, 148 Cal. App. 4th 604 (2007). Although the U.S. Supreme Court has ruled that a wage claim of an employee who submitted false work authorization documents to secure employment (which is explicitly unlawful under IRCA) would be disallowed under federal labor law, (*Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002)), that issue was not presented to the court of appeal in *Reyes.* Thus, it appears that employees who are undocumented workers may be entitled to file a claim for the recovery of unpaid prevailing wages.

[553] *Tippett v. Terich*, 37 Cal. App. 4th 1517 (1995).

[554] *Aubry v. Tri-City Hosp. Dist.*, 2 Cal. 4th 962, 972 (1992) (Kennard, J., dissenting).

[555] *Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers*, *Inc.*, 102 Cal. App. 4th 765, 779 (2002).

[556] *Violante v. Communities Sw. Dev. & Const. Co.*, 138 Cal. App. 4th 972 (2006).

[557] *Aubry v. Tri-City Hosp. Dist.*, 2 Cal. 4th, 962, 967–70 (1992); *Landeros v. Department of Corr.*, 99 Cal. App. 4th 271 (2002).

Union trust funds are also entitled to bring suit "against any employer that fails to pay the prevailing wage to its employees" and such an action must "be commenced not later than 180 days after the filing of a valid notice of completion in the office of the county recorder in the county in which the public work or some portion thereof was performed, or not later than 180 days after acceptance of the public work, whichever last occurs."[558] In such an action, the court may award unpaid wages as restitution and the joint labor management committee can seek its attorneys' fees and costs incurred in bringing the action.[559]

§ 3.2.12(c)

Class Actions

Employees are ever more frequently filing their claims for wages in court without pursuing claims with the Labor Commissioner. Under state law, an employee may pursue an "opt-out" class action, which can include all similarly situated employees unless an employee affirmatively "opts out." Under federal law, an employee must affirmatively "opt in" to such a class action. Whether both "opt-out" and "opt-in" types of claims can be pursued in the same action is a continuing source of controversy.[560] The more potent "opt-out" nature of state class actions has been reinforced by a number of court decisions.

§ 3.2.12(d)

Mass Actions

In addition to class actions, employees in California may pursue "mass" actions under section 17200 of the California Business and Professions Code.[561] A plaintiff in such a "mass" action can recover wages for the four-year period preceding a lawsuit.[562] Such "mass" actions can also be used to pursue violations of the federal Fair Labor Standards Act (FLSA).[563] However, one court found the opt-out nature of class actions to be inconsistent with the "opt-in" procedure provided for pursuing claims under the FLSA.[564] The ability to pursue such a "mass" action was substantially limited by Proposition 64, effective November 4, 2004. Proposition 64 amended section 17200 to condition a plaintiff's standing to prosecute a representative action on that individual's actual injury due to the alleged unfair business practice.[565] Proposition 64 also amended the Business and Professions Code to require that "private representative actions comply with the procedural requirements applicable to class action lawsuits."[566] A class certification allows damages to be paid through

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[558] CAL. LAB. CODE §§ 1771.2, 1776(e).

[559] CAL. LAB. CODE § 1776(e).

[560] *Edwards v. City of Long Beach,* 467 F. Supp. 2d 986 (C.D. Cal. 2006).

[561] *Cortez v. Purolator Air Filtration Prods. Co*., 23 Cal. 4th 163 (2000).

[562] CAL. BUS. & PROF. CODE § 17204.

[563] *Bahramipour v. Citigroup Global Mkts*., *Inc*., 2006 U.S. Dist. LEXIS 9010 (Feb. 22, 2006).

[564] *Edwards,* 467 F. Supp. 2d 986 (only plaintiffs who opted into the FLSA proceeding would be allowed to pursue their state claims given risk of confusion between the two procedures).

[565] CAL. BUS. & PROF. CODE § 17204; *Amalgated Transit Union, Local 1756, AFL-CIO v. Superior Court,* 46 Cal. 4th 993 (2009) (union could not serve as plaintiff in unfair competition action or pursue claims under the PAGA).

[566] Official Voter Information Guide, Proposition 64 Official Title and Summary. Previously, a plaintiff had the option of certifying a "mass" action as a "class" action. *Corbett v. Superior Court*, 101 Cal. App. 4th 649 (2002).

a "fluid recovery fund," with any unclaimed balance of the fund providing a second payment to the affected individuals or payment for a related purpose.

Attorneys' fees are awardable to the prevailing party for many wage claims commenced in state court even if not part of a "mass" action. However, the provision of the Labor Code that awards attorneys' fees to a prevailing party in a dispute regarding the payment of wages does not apply to claims for minimum wages or overtime. Only employees may recover attorney fees in claims for minimum wages or overtime.[567] In actions for unpaid wages, interest shall be awarded at the rate of 10% simple interest per year.[568]

§ 3.2.12(e)

Claims Brought Under Private Attorneys General Act of 2004 (PAGA)

Furthermore, employees who have not been paid the requisite prevailing wage may also bring a claim under the PAGA,[569] which specifically authorizes the pursuit of a civil action for civil penalties for an alleged violation of various provisions of the California Labor Code,[570] including provisions of the Prevailing Wage Law.[571] The PAGA, sometimes referred to as the "bounty hunter's law," specifically authorizes the pursuit of such penalties through class actions and the award of attorneys' fees to successful plaintiffs. The California Supreme Court has held that an "aggrieved employee" may bring an action for civil penalties on behalf of other employees in a representative action pursuant to the PAGA without complying with California class-action procedure.[572] In addition, the PAGA adds a separate civil penalty for the violation of any provision of the Labor Code for which there was not previously a penalty.[573]

The procedure for initiating PAGA actions was substantially modified by S.B. 1809, effective August 11, 2004.[574] S.B. 1809 requires most, but not all, actions under the PAGA to be reviewed by the Labor Commissioner before they are filed. S.B. 1809 does eliminate the ability of an employee to file suit regarding posting, notice, agency reporting, or filing requirements, other than mandatory payroll or workplace injury reporting.[575] This provision and the provision requiring judicial approval of the settlement of any claim under the PAGA were made retroactive to January 1, 2004.[576]

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[567] CAL. LAB. CODE § 218.5; *see also Earley v. Superior Court*, 79 Cal. App. 4th 1420 (2000).

[568] CAL. LAB. CODE § 218.6.

[569] CAL. LAB. CODE §§ 2698 *et seq.*

[570] CAL. LAB. CODE § 2699.3(a).

[571] CAL. LAB. CODE §§ 1771, 1774, 1776, 1777.5, 1811, 1815, 2699.5.

[572] *Arias v. Superior Court*, 46 Cal. 4th 969 (2009).

[573] *Solis v. Regis Corp.*, 621 F. Supp. 2d 1085 (N.D. Cal. 2007) (providing paychecks that could not always be cashed upon demand as required by Labor Code section 212 would not give rise to a penalty under Labor Code section 225.5 unless the employee actually suffered a delay in the receipt of payment, but a penalty could be imposed under the PAGA because it provides a penalty for every violation of the Labor Code where there is no otherwise applicable penalty).

[574] CAL. LAB. CODE §§ 2699 *et seq.,* as amended.

[575] S.B. 1809, § 3; CAL. LAB. CODE § 2699(g)(2).

[576] S.B. 1809, § 6; CAL. LAB. CODE § 2699(g)(2), (l).

Statutory penalties that were payable to employees prior to the passage of the PAGA may still be pursued by employees without exhausting the PAGA procedure.[577] The penalties imposed by the PAGA are unchanged by S.B. 1809.[578] Under S.B. 1809, 75% of the penalties are distributed to the Department of Industrial Relations for enforcement and education and 25% are distributed to the aggrieved employee.[579] Even if the violations occurred prior to the date that the Act took effect, the penalties under PAGA are recoverable if the DLSE could have recovered the same penalties for the same violations.[580]

S.B. 1809 allows a court to reduce the amount that is awarded under the PAGA if the award would, based on the facts and circumstances of the case, be unjust, arbitrary and oppressive or confiscatory.[581] This amendment, while favorable to an employer, limits the ability of an employer to argue that the penalties are unconstitutional.[582]

§ 3.2.12(f)

Defenses to Prevailing Wage Claims

An employer can defend against prevailing wage claims on essentially the same bases any other wage and hour claim under state or federal law. Employers can also assert that an employee's claim is barred in whole or in part by the statute of limitations. A claim for unpaid prevailing wages is subject to a three-year statute of limitations. As noted above, a failure to pay prevailing wages also may be alleged to be an unfair business practice, in which case a four-year statute of limitations will apply.[583]

§ 3.2.13

M. ASSEMBLY BILL 1889 & OTHER RESTRICTIONS APPLICABLE TO PUBLIC WORKS PROJECTS

Assembly Bill (A.B.) 1889, effective January 1, 2001,[584] provided that no state funds shall be used to reimburse a contractor for any costs incurred to assist, promote or discourage unionization of employees.[585] In particular, A.B. 1889 contained the following provisions:

- The *recipient of a grant of state funds* shall not use the funds to assist, promote or deter union organizing.[586] Prior to disbursement of any state funds, the recipient must provide a certification to the State of California that none of the funds will be used to assist, promote or deter union organizing.[587]

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[577] *Caliber Bodyworks*, *Inc. v. Superior Court*, 134 Cal. App. 4th 365, 373 (2005).

[578] CAL. LAB. CODE § 2699(e).

[579] S.B. 1809, § 3; CAL. LAB. CODE § 2699(i).

[580] *Lee v. Dynamex, Inc*., 166 Cal. App. 4th 1325 (2008).

[581] S.B. 1809, § 3; CAL. LAB. CODE § 2699(e)(2).

[582] *See Hale v. Morgan*, 22 Cal. 3d 388(1978).

[583] *Cortez v. Purolator Air Filtration Prods. Co*., 23 Cal. 4th 163 (2000).

[584] CAL. GOV'T CODE §§ 16645-16649.

[585] CAL. GOV'T CODE § 16645.1(a). *Costs* include any expense, including legal and consulting fees, and salaries of supervisors and employees, that are incurred for research for, or preparation, planning, coordinating or carrying out any activity to assist, promote or deter union organizing. CAL. GOV'T CODE § 16646.

[586] CAL. GOV'T CODE § 16645.2(a).

[587] CAL. GOV'T CODE § 16645.2(c).

- No *contractor* shall assist, promote or deter union organizing by employees who are performing work on a service contract, including a public works contract, for the state or a state agency.[588] Any contractor who violates this requirement is liable for a civil penalty of $1,000 per employee per violation.[589]
- A *contractor that receives funds of $50,000 or more* under a state contract shall not use those funds to assist, promote, or deter union organizing during the life of the contract or any extensions or renewals of the contract.[590] All contracts in excess of $50,000 awarded by the state or a state agency must include this prohibition.[591] In addition, a contractor who makes any expenditures to assist, promote or deter union organizing must maintain records sufficient to demonstrate that no state funds were used for such expenditures and, upon request, provide those records to the Attorney General.[592] A contractor is liable to the state for the amount of any funds expended in violation of the prohibition, plus a civil penalty equal to twice the amount of those funds.[593]
- An *employer conducting business on state property* pursuant to a contract or concession agreement with the state, or subcontractor on such a contract, shall not use state property to hold a meeting with any employees or supervisors if the purpose of the meeting is to assist, promote or deter union organizing.[594] However, this restriction does *not* apply if the state property is equally available, without charge, to the general public for holding a meeting.[595] Any employer that violates this prohibition on the use of state property is liable to the State of California for a civil penalty of $1,000 per employee per meeting.[596]
- A *public employer* receiving state funds shall not use any of those funds to assist, promote or deter union organizing.[597]
- A *private employer receiving state funds in excess of $10,000 per calendar year* shall not use those funds to assist, promote or deter union organizing.[598] Private employers must also provide a certification to the state that none of the state funds it has received will be used to assist, promote or deter union organizing.[599] If the employer makes any expenditures to assist, promote or deter union organizing, it must maintain records sufficient to demonstrate that no state funds were used for such expenditures and, upon request, provide those records to the Attorney General.[600] The employer is also liable to the State of California for the amount of any funds expended in violation of the prohibition, plus a civil penalty equal to twice the amount of those funds.[601]

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[588] CAL. GOV'T CODE § 16645.3(a).
[589] CAL. GOV'T CODE § 16645.3(b).
[590] CAL. GOV'T CODE § 16645.4(a).
[591] CAL. GOV'T CODE § 16645.4(b).
[592] CAL. GOV'T CODE § 16645.4(c).
[593] CAL. GOV'T CODE § 16645.4(d).
[594] CAL. GOV'T CODE § 16645.5(a).
[595] CAL. GOV'T CODE § 16645.5(a).
[596] CAL. GOV'T CODE § 16645.5(b).
[597] CAL. GOV'T CODE § 16645.6(a).
[598] CAL. GOV'T CODE § 16645.7(a).
[599] CAL. GOV'T CODE § 16645.7(b).
[600] CAL. GOV'T CODE § 16645.7(c).
[601] CAL. GOV'T CODE § 16645.7(d).

On September 16, 2002, a U.S. District Court held that certain provisions of A.B. 1889 that bar private employers from using state funds "to assist, promote or deter union organizing"[602] were preempted by the National Labor Relations Act[603] (NLRA) because they attempt to regulate employer speech about union organizing under specified circumstances, even though Congress intended free debate as to unionization issues unrestricted by state regulation under federal labor policy.[604] Accordingly, the district court enjoined the State of California and the AFL-CIO from taking any actions to enforce California Government Code sections 16645.2 and 16645.7 against an employer covered by the NLRA.

The district court's decision was affirmed by the U.S. Court for the Ninth Circuit, which held that A.B. 1889, as written, is preempted by the NLRA because the restrictions it imposed on the use of state funds by private employers undermined federal labor policy by altering Congress' design for the collective bargaining process, which was to be free from state regulation and left "to be controlled by the free play of economic forces."[605] However, the Ninth Circuit subsequently withdrew its opinion upon the granting of a petition for rehearing.[606] On rehearing, a divided three-judge panel issued a second opinion,[607] which was in turn vacated and withdrawn from publication upon the granting of a petition for reconsideration *en banc*.[608]

On September 21, 2006, the U.S. Court of Appeals for the Ninth Circuit sitting *en banc* reversed the district court's judgment that the NLRA preempts certain provisions of A.B. 1889 and vacated the district court's injunctive order.[609] The Ninth Circuit held that the restrictions imposed by A.B. 1889 on the use of state funds by contractors do not undermine federal labor policy, are not preempted by the provisions of the NLRA and do not violate the First Amendment. The *en banc* decision concluded that "California had not intruded on conduct meant to be left to the free play of economic forces, an area free from all government regulation" under the so-called *Machinists* preemption doctrine,[610] because an employer has and retains the freedom to spend its own funds however it wishes; it simply may not spend state grant and program funds on its union-related advocacy."[611] The *en banc* decision also concluded that "California's refusal to subsidize employer speech for or against unionization does not regulate an activity that is 'arguably protected or prohibited' by the NLRA" under the so-called *Garmon* preemption doctrine,[612] nor infringe on employers' First Amendment rights to speak against unionization, "because employers remain free to use their own funds to advocate for or against unionization and are not required to accept neutrality as a condition of receipt of state grants and program funds."[613]

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[602] CAL. GOV'T CODE §§ 16645.2, 16645.7.

[603] 29 U.S.C. §§ 151–169.

[604] *Chamber of Commerce of the United States v. Lockyer*, 225 F. Supp. 2d 1199, 1205 (C.D. Cal. 2002).

[605] *Chamber of Commerce of the United States v. Lockyer*, 364 F.3d 1154 (9th Cir. 2004).

[606] *Chamber of Commerce of the United States v. Lockyer*, 408 F.3d 590 (9th Cir. 2005).

[607] *Chamber of Commerce of the United States v. Lockyer*, 422 F.3d 973 (9th Cir. 2005).

[608] *See Chamber of Commerce of the United States v. Lockyer*, 435 F.3d 999 (9th Cir. 2006); *Chamber of Commerce of the United States v. Lockyer*, 437 F.3d 890 (9th Cir. 2006).

[609] *Chamber of Commerce of the United States v. Lockyer*, 463 F.3d 1076 (9th Cir. 2006).

[610] *Lodge 76*, *Int'l Ass'n of Machinists v. Wisconsin Emp't Relations Comm'n*, 427 U.S. 132 (1976).

[611] *Chamber of Commerce of the United States v. Lockyer*, 463 F.3d at 1087-88. The *en banc* decision noted that the spending restrictions imposed by A.B. 1889 "are modeled precisely on those that Congress has enacted when prohibiting the use of federal funds to assist, promote or deter organizing." 463 F.3d at 1089.

[612] *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

[613] *Chamber of Commerce of the United States v. Lockyer*, 463 F. 3d at 1092.

The U.S. Supreme Court subsequently granted *certiorari* in *Chamber of Commerce of the United States v. Brown*[614] and issued an opinion that significantly impacts the applicability of A.B. 1889. The Supreme Court unequivocally rejected each of the bases relied upon by the Ninth Circuit Court of Appeals and, in overturning the Ninth Circuit decision, held that California's neutrality law is preempted by the NLRA.[615] In reaching its ruling, the Supreme Court reviewed the history of the NLRA and noted that section 8(c) of the NLRA manifests Congress' intent to encourage free debate on labor relations issues, and that Congress explicitly intended that noncoercive employer speech was to remain unregulated. The Supreme Court then reviewed the policy statement of A.B. 1889, which indicated that partisan employer speech necessarily interferes with employee free choice, and held that California was engaging in "the same policy judgment that the NLRB advanced under the Wagner Act that Congress renounced in the Taft-Hartley Act."[616] The Supreme Court also rejected the Ninth Circuit's finding that A.B. 1889 did nothing more than Congress did in enacting three federal statutes involving grant monies. The Court noted that Congress has the authority to create narrow exceptions to otherwise applicable federal policies; the states, however, do not.[617]

As a result of this Supreme Court decision, California employers no longer have to choose between foregoing their free speech right to communicate with their employees during union-organizing drives in exchange for continued receipt of state-provided funds. They also need not deal with the accounting nightmare of maintaining separate accounts for state funds and all other funds. However, employers should still be mindful that the Supreme Court's decision only dealt with two sections of a larger statutory scheme and that other portions of California's neutrality law have not been challenged in the courts. Nevertheless, the Supreme Court's ruling casts doubt on the enforceability of the remaining portions of the statute.

§ 3.3

III. LEAVES UNDER CALIFORNIA LAW

§ 3.3.1

A. INTRODUCTION

One of the most challenging tests facing employers today is understanding and administering the plethora of statutes that provide eligible employees with the right to take a leave of absence. For example, an eligible employee may be entitled to a leave due to a pregnancy disability, an industrial injury or illness, or a nonwork-related disability. An employee may also take time off to serve in the military, to serve on jury duty, to serve as a volunteer firefighter, to vote, or to visit his or her child's school or day care center.

This section covers leave obligations mandated by California law other than family and medical leave, which is discussed in more detail in the following section. Such leaves include: sick leave, vacation, holidays, bereavement leave, organ and marrow donor leave,

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[614] *Chamber of Commerce of the United States v. Brown*, 128 S. Ct. 645 (2008).

[615] *Chamber of Commerce of the United States v. Brown*, 128 S. Ct. 2408, 2418-19 (2008).

[616] 128 S. Ct. at 2414.

[617] 128 S. Ct. at 2418.

personal leave, literacy leave and religious leave. For a discussion of the federal Family and Medical Leave Act, see THE NATIONAL EMPLOYER®.

§ 3.3.2

B. OBLIGATIONS WITH RESPECT TO SPECIFIC TYPES OF LEAVES

§ 3.3.2(a)

Disability & Rehabilitation Leave

Consideration of disability leave under the federal Family and Medical Leave Act (FMLA) and the California Family Rights Act (CFRA); the federal Vocational Rehabilitation Act ("Rehabilitation Act");[618] the Americans with Disabilities Act (ADA);[619] and the California Fair Employment and Housing Act (FEHA) may all be required.[620] While none of these laws articulates a specific obligation to provide disability leave, an employee may be entitled to leave as a reasonable accommodation under these statutes.

§ 3.3.2(a)(i)

Employers Obligated to Provide Leave

FEHA covers employers that regularly employ five or more full-time or part-time employees, including the state, its municipalities, and political subdivisions.[621] For the purposes of protecting disabled individuals, however, the FEHA has different coverage specifications. Private employers with one or more employees are prohibited from *harassing* an individual based on his or her physical or mental disability.[622] In contrast, employers with five or more employees are prohibited from *discriminating* against physically or mentally disabled individuals.[623] Finally, the state-imposed obligation to accommodate employees with drug and alcohol problems applies to all private employers regularly employing 25 or more employees.[624]

§ 3.3.2(a)(ii)

Employees Who Qualify to Take Leave

Generally, to qualify for disability leave, an employee must be found to be disabled and otherwise qualified for the position. Any requested leave must be a reasonable accommodation that poses no undue hardship for the employer.[625] For a discussion of who is

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[618] 29 U.S.C. §§ 706-794(a).

[619] 42 U.S.C. §§ 12101-12213.

[620] CAL. GOV'T CODE §§ 12900-12996.

[621] CAL. GOV'T CODE § 12926(d).

[622] CAL. GOV'T CODE § 12940(j)(1) and (j)(4)(A).

[623] CAL. GOV'T CODE § 12940(a).

[624] CAL. LAB. CODE § 1025.

[625] *See*, *e.g.*, *Prilliman v. United Air Lines*, *Inc.*, 53 Cal. App. 4th 935, 952 (1997) (pilot's medical disability leave was a reasonable accommodation where the pilot's AIDS-related illnesses rendered him incapable of performing any alternative job placement).

a covered individual with a disability see Chapter 1 of THE CALIFORNIA EMPLOYER. Because the FEHA parallels the ADA, THE NATIONAL EMPLOYER® should be reviewed as well.

Under California law, employers also have an affirmative duty to reasonably accommodate employees who wish to voluntarily enter and participate in an alcohol or drug rehabilitation program as long as the reasonable accommodation does not impose an undue hardship on the employer.[626] An alcohol or drug rehabilitation leave must be long enough to reasonably accommodate the employee who requests the leave.

An employer, however, does not have to continue to accommodate an employee who repeatedly relapses into drug or alcohol addiction. In *Gosvener v. Coastal Corp*.,[627] a California Court of Appeal ruled that the employer of an alcoholic employee in a safety-sensitive position could legally discharge the employee after reasonably accommodating the employee's condition on previous occasions. The employee in question was a safety supervisor at a chemical refinery. The employer twice granted the employee leave to deal with his alcoholism. After two separate leaves, the employee again relapsed, and the employer terminated his employment. The court held that "the employer's duty to accommodate such a disabling condition is not unlimited, and an employer cannot be an insurer of recovery. Nor should an employer be required to tolerate unsafe conditions, or be forced to enable substance abuse to continue indefinitely."[628]

§ 3.3.2(a)(iii)

Verification Requirements & Options

If an employee requests accommodation, an employer may require the employee to provide documentation describing the employee's functional limitations. Under the California Confidentiality of Medical Information Act (CMIA), however, an employer is generally prohibited from learning the nature of an employee's disability from a provider of health care services unless the employee has voluntarily consented to a release of such information by executing a form that is prescribed by the Act.[629] If an employer uses unauthorized confidential information to the detriment of the employee, the employer can be liable for damages.[630] If an employee fails to authorize the release of information necessary to provide an accommodation to an employee, then the accommodation obligation may be excused.[631]

An employer must establish appropriate procedures to ensure the confidentiality of employee medical information and its protection from unauthorized use and disclosure. Such procedures may include instructions to employees regarding the confidentiality of files or the use of security systems to restrict access to such files.[632] Similarly, employers must make a reasonable effort to safeguard the privacy of individuals who are enrolled in an alcohol or drug rehabilitation program.[633]

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[626] CAL. LAB. CODE § 1025.

[627] 51 Cal. App. 4th 805 (1996), *overruled in part on other grounds*, *Colmenares v. Braemar Country Club*, *Inc*., 29 Cal. 4th 1019 (2003).

[628] 51 Cal. App. 4th at 813.

[629] CAL. CIV. CODE §§ 56 *et seq*.

[630] *See Pettus v. Cole*, 49 Cal. App. 4th 402 (1996) (finding an employer is liable to terminated employee because employer used unauthorized confidential medical information to make employment decision).

[631] CAL. CIV. CODE § 56.20(b).

[632] CAL. CIV. CODE §§ 56 *et seq*.

[633] CAL. LAB. CODE § 1026.

§ 3.3.2(a)(iv)

Reinstatement Obligations

The obligation to reinstate individuals after disability or rehabilitation leave is not clearly defined under the FEHA or the California Labor Code. Employers must also remember that disability leaves may qualify as family and medical leave. The family and medical leave laws have very strict reinstatement requirements.

Apart from the family and medical leave laws, disabled employees returning from a leave must, at a minimum, receive the same consideration as other employees who return from other temporary leaves. An employer must reinstate an employee at the conclusion of a disability or rehabilitation leave to any opening for which the employee is qualified, provided no other employee has a greater right to the job.

An employer may be required to accommodate an employee by offering the employee the next available position for which the employee is qualified. The duty to accommodate a disabled employee may, in a given circumstance, require an employer to make a greater effort to keep available a job for a disabled employee than the employer would make to keep a job open for employees with temporary disabilities.

Employees may be disciplined after their return for job deficiencies or other problems, but if such problems relate to the employee's disability, the employer may have a duty to offer further accommodation.

§ 3.3.2(a)(v)

Impact of Collective Bargaining Obligations

There is a risk an employer's obligations under a collective bargaining agreement will conflict with an employer's obligation to grant leaves under the FEHA. In April 2002, the U.S. Supreme Court held that the ADA does not require an employer to violate an "established seniority system" in order to accommodate a disabled employee.[634] Prior to that decision, the Ninth Circuit Court of Appeals adopted similar holdings as to both the ADA and the FEHA.[635] Courts have also adopted this reasoning in religious discrimination cases.[636] In light of these federal rulings, employers are advised to consult with the employee's union representative prior to granting a leave and attempt to resolve any conflict in advance. If the conflict cannot be resolved, the employer should consult counsel.

§ 3.3.2(a)(vi)

Protection of Employees Against Discharge or Discrimination

Under the FEHA, an employer may not coerce, intimidate, threaten or interfere with the exercise of an individual's protected rights, including taking a leave. Furthermore, an employer may take no action in retaliation for an employee's opposition to any act or

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[634] *See US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002).

[635] *See Willis v. Pacific Maritime Ass'n*, 236 F.3d 1160, 1164 (9th Cir. 2001), *as amended*, 244 F.3d 675 (9th Cir. 2001); *see also Lujan v. Pacific Maritime Ass'n*, 165 F.3d 738, 743 (9th Cir. 1999) (holding a plaintiff is barred from asking for a proposed accommodation that interferes with a *bona fide* seniority system under the ADA and the FEHA).

[636] *See Balint v. Carson City*, 180 F.3d 1047 (9th Cir. 1999); *Hussein v. Hotel Employees & Rest. Union, Local 6*, 108 F. Supp. 2d 360 (S.D.N.Y. 2000), *aff'd*, 2002 U.S. App. LEXIS 22808 (2d Cir. Oct. 31, 2002).

practice of the employer, such as a failure to provide an accommodation, which is made unlawful under these statutes.[637] It is important to note, however, that nothing prohibits employers from disciplining or discharging disabled employees for reasons unrelated to their disabled status. An employer must be sure that the discipline or termination is consistent with the employer's past practices and its treatment of other employees without disabilities.

§ 3.3.2(a)(vii)

Employees' Remedies & Enforcement

The California Department of Fair Employment and Housing (DFEH) can sue employers for claims of employment discrimination in administrative hearings before the Fair Employment and Housing Commission (FEHC). The FEHC may, in addition to reinstatement and back pay, assess an administrative fine and award actual damages, including damages for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses up to $150,000 per aggrieved person per respondent.[638] The FEHC may also assess a civil penalty of up to $25,000.[639] An employee who feels he or she has been denied reasonable accommodation to enroll and participate in a drug or alcohol rehabilitation program may file a complaint with the Labor Commissioner.[640] If the Labor Commissioner determines that an employer has violated the code, the commissioner can order an employer to cease and desist its unlawful conduct, reinstate an employee, reimburse wages with interest, and pay reasonable attorneys' fees associated with hearings before the Labor Commissioner.[641]

§ 3.3.2(a)(viii)

Relationship to Other Types of Leaves

An employer must provide disabled employees with the same leave benefits it provides to other similarly situated employees. An employer must also provide disabled employees with other types of leave that are required by laws such as the federal FMLA, CFRA, pregnancy disability leave pursuant to California Government Code section 12945 and the Workers' Compensation Act.[642]

§ 3.3.2(b)

Pregnancy Leave

Employees who are disabled due to pregnancy-related conditions are entitled to a leave of absence under the FEHA.[643] This right is reinforced by the federal Civil Rights Act ("Title VII"), which provides broad protection against discrimination because of pregnancy-related conditions.[644]

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[637] CAL. GOV'T CODE § 12940(h).

[638] CAL. GOV'T CODE § 12970(a)(3), (c).

[639] CAL. GOV'T CODE § 12970(e).

[640] CAL. LAB. CODE § 1028.

[641] CAL. GOV'T CODE § 98.7(c).

[642] CAL. GOV'T CODE §§ 3200 *et seq.* For a discussion on the FMLA, see THE NATIONAL EMPLOYER®. For a summary of the CFRA, pregnancy leaves, and workers' compensation disability leave, see the discussions below.

[643] CAL. GOV'T CODE §§ 12945 *et seq.*; *see California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (upholding pregnancy provisions of FEHA as distinct from federal law provisions).

[644] 42 U.S.C. § 2000e(k).

Under California law, all employers with five or more employees, including state, county, city and local governmental entities, must comply with the state's pregnancy-leave provisions.[645] Part-time employees are counted in the minimum-employee calculation where they are employed on a regular basis.[646]

Effective January 1, 2012, the pregnancy disability provisions in the FEHA mandate that employers provide pregnant employees the same level of insurance benefits during their pregnancy-related leave as they were provided prior to taking the leave. In regulations that became effective December 30, 2012, California employers received additional guidance on leaves of absence for employees disabled by pregnancy, childbirth or a related medical condition.[647]

§ 3.3.2(b)(i)

Employees Who Qualify to Take Leave

All female employees, regardless of length of service, who are disabled by pregnancy or pregnancy-related medical conditions are eligible to take a pregnancy disability leave.[648]

An employee is eligible to receive accommodation by her employer where she is affected or disabled by pregnancy-related conditions.[649] An employee *affected* by pregnancy means that because of pregnancy, childbirth, or a related medical condition, or "a condition related to pregnancy, childbirth, or a related medical condition," it is medically advisable for an employee to transfer or otherwise be reasonably accommodated by her employer.[650] An employee is *disabled* by pregnancy if, in the opinion of her health care provider, she is unable because of pregnancy to perform any one or more of the essential functions of her job or to perform any of these functions without undue risk to herself, to her pregnancy's successful completion, or to other persons. An employee also may be considered to be *disabled* by pregnancy if, in the opinion of her health care provider, she is suffering from severe "morning sickness" or needs to take time off for: prenatal or postnatal care; bed rest; gestational diabetes; pregnancy-induced hypertension; preeclampsia; post-partum depression; childbirth; loss or end of pregnancy; or recovery from childbirth, loss or end of pregnancy.[651] The distinction between the terms *affected* and *disabled* becomes important in determining the type of accommodation to which the employee is entitled. An employee affected by pregnancy may be entitled to a job transfer, while an employee disabled by her pregnancy would be entitled to a leave of absence.[652]

§ 3.3.2(b)(ii)

Employee Notice Requirements

Employers may require female employees to provide reasonable notice of the approximate date a pregnancy leave is expected to commence and the estimated duration of the leave.[653] If the need for the leave is foreseeable, an employee must provide 30 days' advance

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[645] CAL. CODE REGS. tit. 2, §§ 7291.2(h), 7291.7.

[646] *Robinson v. Fair Emp't & Hous. Comm'n*, 2 Cal. 4th 226 (1992).

[647] CAL. CODE REGS. tit. 2, §§ 7291.1 *et seq.*

[648] CAL. CODE REGS. tit. 2, § 7291.7(c).

[649] CAL. GOV'T CODE § 12945(b).

[650] CAL. CODE REGS. tit. 2, § 7291.2(a).

[651] CAL. CODE REGS. tit. 2, § 7291.2(f).

[652] CAL. CODE REGS. tit. 2, §§ 7291.8, 7291.7.

[653] CAL. GOV'T CODE § 12945(a).

notice.[654] If 30 days' advance notice is not possible, then an employee must give notice as soon as practicable.[655] However, an employer may not deny a pregnancy disability leave or transfer, where the need arises because of an emergency or other unforeseeable circumstance on the basis that advance notice was not given.[656]

§ 3.3.2(b)(iii)

Verification Requirements & Options

As a condition of granting reasonable accommodation, transfer or pregnancy disability leave, the employer may require written medical certification. The employer must notify the employee of the need to provide medical certification; the deadline for providing certification; what constitutes sufficient medical certification; and the consequences for failing to provide medical certification.[657] Likewise, employers may condition return from a pregnancy leave upon a written medical release if the same policy is applied to similarly situated employees returning from other non-pregnancy-related disability leaves or transfers.[658]

§ 3.3.2(b)(iv)

Duration & Timing of Leaves

The obligation to provide a pregnancy-related leave takes two independent forms: (1) a temporary transfer of the employee to a less hazardous or strenuous position; and (2) an actual leave of absence. The duration and timing of each obligation are described below.

Employers must reasonably accommodate employees for conditions related to pregnancy, childbirth or related medical conditions when an employee requests such an accommodation with the advice of her health care provider.[659] Where an employer has a policy, practice or collective bargaining agreement that authorizes the transfer of temporarily disabled employees, it must abide by those terms and grant transfers to all pregnant employees on an equal basis.[660]

Any employer with at least five employees must make a reasonable effort to provisionally transfer a female employee who is temporarily disabled by pregnancy to a less strenuous or hazardous position regardless of whether the employer has a temporary transfer policy. Such a transfer is required, however, only where:

1. the employee has requested a transfer;
2. the employee's request is based on the advice of her health care provider that a transfer is medically advisable; and
3. the transfer can be reasonably accommodated by the employer.[661]

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[654] CAL. CODE REGS. tit. 2, § 7291.17(a)(2).

[655] CAL. CODE REGS. tit. 2, § 7291.17(a)(3).

[656] CAL. CODE REGS. tit. 2, § 7291.17(a)(4).

[657] CAL. CODE REGS. tit. 2, § 7291.170(b).

[658] CAL. CODE REGS. tit. 2, § 7291.17(d).

[659] CAL. GOV'T CODE § 12945(b)(1).

[660] CAL. GOV'T CODE § 12945(b)(2); *see also Spaziano v. Lucky Stores*, *Inc.*, 69 Cal. App. 4th 106, 110-12 (1999).

[661] CAL. GOV'T CODE § 12945(b)(3); CAL. CODE REGS. tit. 2, § 7291.8(a).

In accommodating an employee's request for a temporary job transfer, an employer need not create additional employment that the employer would not otherwise have created, discharge another employee, violate the terms of a collective bargaining agreement, transfer another employee with more seniority, or promote or transfer any employee who is not qualified to perform the new job. An employer may accommodate a pregnant employee's transfer request by transferring another employee, but there is no obligation to do so.[662]

The duration of a job transfer will depend upon the physical condition of the employee before and after childbirth. As long as the employee is capable of working at a less strenuous or hazardous position, she is eligible to request and receive a job transfer.[663] A temporary transfer of employment may not be counted toward the four-month maximum leave required under FEHA.[664]

Generally, all employers covered by the FEHA must allow a pregnant employee a leave of absence for a "reasonable period of time not to exceed four months."[665] *Four months* means the number of days the employee would normally work within four calendar months (1/3 of a year equaling 17⅓ weeks) if the leave is taken continuously, following the date the pregnancy disability leave commences. If an employee's schedule varies from month to month, a monthly average of the hours worked over the four months prior to the beginning of the leave shall be used for calculating the employee's normal work month.[666] For a full-time employee who works 40 hours per week, "four months" (693 hours) of leave entitlement, based on 40 hours per week times 17⅓ weeks.[667] For employees who work more or less than 40 hours a per week, or who work on variable work schedules, the number of working days that constitutes "four months" is calculated on a pro rata or proportional basis.[668] For example, for an employee who works 20 hours per week, "four months" means 346.5 hours of leave entitlement. For an employee who normally works 48 hours per week, "four months" means 832 hours of leave entitlement.[669] A *reasonable period of time* is the period during which the employee is disabled by pregnancy-related conditions, as defined above. The medical opinion of a licensed health care practitioner will determine the existence and the duration of the employee's disability.

Pregnancy leave does not have to be taken in one consecutive period of time, and accumulated periods of leave may be totaled in computing up to four months of leave.[670] A pregnant employee cannot be disciplined for intermittent pregnancy-related absences that may begin to occur shortly after the employee becomes pregnant.

Employers should be aware that, under certain circumstances, they may be required to extend an employee's pregnancy leave beyond a four-month period. For example, if the employer's general policy or the terms of a collective bargaining agreement regarding temporarily disabled employees are more generous than the provisions described above, the employer must provide equal benefits to pregnant employees.[671] As discussed above, an employee's

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[662] CAL. GOV'T CODE § 12945(b)(3); CAL. CODE REGS. tit. 2, § 7291.8(a)(2)(B).

[663] CAL. CODE REGS. tit. 2, § 7291.8(a)(2).

[664] CAL. CODE REGS. tit. 2, § 7291.9(a)(2)(B).

[665] CAL. GOV'T CODE § 12945(a).

[666] CAL. CODE REGS. tit. 2, § 7291.9(a)(1).

[667] CAL. CODE REGS. tit. 2, § 7291.9(a)(1).

[668] CAL. CODE REGS. tit. 2, § 7291.9(a)(2).

[669] CAL. CODE REGS. tit. 2, § 7291.9(a)(2)(A).

[670] CAL. CODE REGS. tit. 2, § 7291.9(a)(2)(B), (a)(3).

[671] CAL. CODE REGS. tit. 2, § 7291.9(b).

continued disability may entitle an employee to additional leave or some other reasonable accommodation. Also, employees eligible for family and medical leave may be entitled to an additional 12 workweeks of leave following the birth of a child under the CFRA.[672]

§ 3.3.2(b)(v)

Reinstatement Obligations

When an employee's pregnancy disability leave or transfer ends, she is entitled to return to the same or a comparable position.[673] An employer is excused from reinstating an employee to the same position, however, if the employee would not otherwise have been employed in the same position at the time reinstatement is requested because of legitimate business reasons unrelated to the employee's pregnancy disability leave or transfer (*e.g.*, a layoff pursuant to plant closure).[674]

If an employer is excused from returning an employee to her original job, the employer may still be obligated to provide the employee with a comparable job.[675] A *comparable job* is one that is virtually identical to the employee's original position in terms of pay, benefits and working conditions, including privileges, prerequisites and status. It must involve the same or substantially the same duties and responsibilities and skill requirements, effort, responsibility and authority.[676]

Generally, an employer will be excused from reinstating an employee to a comparable job if there is no comparable position available (however, a position is "available" if there is a position open on the employee's scheduled date of reinstatement or within 60 calendar days for which the employee is qualified, or to which the employee is entitled by company policy, contract, or collective bargaining agreement).[677]

Additionally, under the new regulations, an employer has an *affirmative duty* to provide notice of available positions to the employee by means reasonably calculated to inform the employee of comparable positions during the requirement period. Examples include notification in person, by letter, telephone or e-mail, or by links to postings on the company's website if there is a section for job openings.[678] If an employer and an employee have agreed upon a definite date of return from pregnancy disability leave, the employer must reinstate the employee on that date of return.[679] If the length of a leave has not been established or if it differs from the original agreement, the employer must, where feasible, reinstate the employee within two business days after notification of her readiness to return.[680]

Where an employee takes longer than the four-month period for a pregnancy disability leave, she is not entitled to automatic reinstatement under the FEHA. However, the employer must treat her in the same manner it would treat other employees returning from temporary disability leave with regard to reinstatement.[681] The maximum statutory leave entitlement for

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[672] CAL. CODE REGS. tit. 2, § 7291.13(c).

[673] CAL. CODE REGS. tit. 2, § 7291.10(a).

[674] CAL. CODE REGS. tit. 2, § 7291.10(c)(1).

[675] CAL. CODE REGS. tit. 2, § 7291.10(c)(2).

[676] CAL. CODE REGS. tit. 2, § 7291.2(j).

[677] CAL. CODE REGS. tit. 2, § 7291.10c)(2).

[678] CAL. CODE REGS. tit. 2, § 7291.10(c)(2)(B).

[679] CAL. CODE REGS. tit. 2, § 7291.10(b)(1).

[680] CAL. CODE REGS. tit. 2, § 7291.10(b)(2).

[681] CAL. CODE REGS. tit. 2, § 7291.10(d).

California employees, provided they qualify for CFRA leave, for both pregnancy disability leave and CFRA leave for reason of the birth of the child and/or the employee's own serious health condition is the working days in 29⅓ workweeks. This assumes that the employee is disabled by pregnancy for four months (the working days in 17⅓ weeks) and then requests, and is eligible for, a 12-week CFRA leave for reason of the birth of her child.[682]

§ 3.3.2(b)(vi)

Compensation During the Leave & Benefit Implications of the Leave

Pregnancy disability leaves need not be paid leaves of absence. However, if an employer provides paid leave for other temporarily disabled employees, then paid leave must also be provided to pregnant employees.[683] The regulations provide that an employer may require an employee to use, or an employee may elect to use, any accrued paid sick leave during the unpaid portion of the pregnancy disability leave.[684] Employers are advised to consult employment counsel before charging pregnant employees with sick leave to discuss the possible discriminatory impact of such a practice. In addition, an employee may elect, at her option, to use any vacation time or other accrued personal time off (including undifferentiated paid time off (PTO)) that she is otherwise entitled to take during the unpaid portion of the leave.[685] An employer may not, however, require that an employee use any vacation time or other accrued personal time off during a pregnancy disability leave.

An employer must provide pregnant employees with the same benefits granted to other temporarily disabled employees.[686] For example, fringe benefits that are provided for employees with temporary disabilities must also be provided to employees who are temporarily disabled due to pregnancy-related conditions. In addition to paying any disability benefits for pregnant workers who are on leave, health and life insurance premium payments, pension accrual, and profit-sharing plans must be maintained for women on pregnancy disability leave if those options are made available for employees on disability leave for other medical conditions.[687] Likewise, private employers covered by Title VII that sponsor medical benefit plans must cover pregnancy-related conditions on the same basis as other medical conditions.[688] The new regulations require that if the employee is eligible for FMLA/CFRA leave, then the employer may be obligated to continue the employee's health insurance coverage for up to 29-1/3 workweeks.[689] This assumes that the employee is disabled by pregnancy for four months (the working days in 17-1/3 weeks) and then requests, and is eligible for, a 12-week CFRA leave for reason of the birth of her child to the same extent as if the employee had continued working.

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[682] CAL. CODE REGS. tit. 2, § 7291.10(d).

[683] CAL. CODE REGS. tit. 2, § 7291.11(a)(1).

[684] CAL. CODE REGS. tit. 2, § 7291.11(b)(1).

[685] CAL. GOV'T CODE § 12945(a); CAL. CODE REGS. tit. 2, § 7291.11(b)(2).

[686] CAL. GOV'T CODE § 12945(b)(2); *see also* 42 U.S.C. § 2000e(k); *Spaziano*, 69 Cal. App. 4th at 110–12.

[687] CAL. CODE REGS. tit. 2, § 7291.11(c).

[688] CAL. CODE REGS. tit. 2, § 7291.5(a)(5), (d).

[689] CAL. CODE REGS. tit. 2, § 7291.11(c)(1).

§ 3.3.2(b)(vii)

Protection of Employees Against Discharge or Discrimination

A female employee is protected from discrimination due to pregnancy under the FEHA.[690] Generally, as noted above, pregnant women who are able to work must be permitted to work the same as other employees, and women who are not able to work because of pregnancy-related conditions must be accorded the same rights, leave privileges and other benefits as other workers who are temporarily disabled from working.[691] This protection also prohibits discrimination based upon an employer's *perception* that an employee is pregnant or is affected by pregnancy-related conditions.[692] Therefore, an employer must have a legitimate, nondiscriminatory reason, such as unsatisfactory job performance or business necessity, for discharging or disciplining pregnant employees.[693]

§ 3.3.2(b)(viii)

Remedies & Enforcement

An employee who is denied a pregnancy disability leave is entitled to all of the remedies provided by the FEHA.[694] These remedies are discussed in this section, in conjunction with disability leaves.

§ 3.3.2(b)(ix)

Record-keeping & Posting Obligations

Employers must give notice to their employees of their right to request pregnancy disability leave or transfer.[695] Employers may use the sample notice provided by the DFEH or draft their own comparable notice.

§ 3.3.2(b)(x)

Relationship to Other Types of Leaves

An employer's obligation to provide pregnancy disability leave is closely related to its obligation to provide other medical-related leaves. Employers should be aware of the interrelationship between the obligation to provide leave for pregnancy-related conditions and the provisions of the federal FMLA and CFRA.[696] If an employer is not covered by the FMLA or the CFRA, or if an employee is not eligible for such leave, then the employee would be entitled to the basic four-month pregnancy disability leave. An employee who incurs an enduring disability as a result of pregnancy may be entitled to an extended leave or other accommodation(s) under the FEHA disability protections, or the Americans with Disabilities Act.[697]

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[690] CAL. GOV'T CODE § 12945.

[691] *See*, *e.g.*, *Carr v. Barnabey's Hotel Corp.*, 23 Cal. App. 4th 14, 18–19 (1994).

[692] CAL. CODE REGS. tit. 2, § 7291.2(q).

[693] *Carr*, 23 Cal. App. 4th at 19.

[694] CAL. CODE REGS. tit. 2, § 7291.15.

[695] CAL. CODE REGS. tit. 2, § 7291.16.

[696] An exhaustive discussion of these provisions can be found in THE NATIONAL EMPLOYER® and in § 3.4 of this Chapter.

[697] See THE NATIONAL EMPLOYER®.

§ 3.3.2(c)

Industrial Injury Leave

Employees who are unable to work due to an injury that arises out of and in the course of their employment are entitled to benefits and leave under the California Workers' Compensation Act ("Act").[698] Volunteer firefighters are included within the definition of "employment" and "employee" for purposes of eligibility for workers' compensation benefits from local agencies.[699] At the same time, California Labor Code section 132a prohibits discrimination against employees who suffer an industrial injury or file a workers' compensation claim. Thus, industrially injured employees may be entitled to the same leave and benefits provided to employees on other types of unpaid disability leave.[700]

California Labor Code section 3600(a) requires employers to provide compensation for any injury or death of an employee "arising out of and in the course of the employment." While leave is not expressly included in the compensation for an industrial injury, leave is required when an employee is temporarily totally disabled from performing his or her usual or customary work, though injured employees may be required to use sick and vacation time when away from the workplace seeking treatment for workplace injuries.[701] An injury may be either a specific injury such as a fall, or a cumulative injury, such as repetitive activities or cumulative trauma over a period of time.[702]

All industrially-injured employees are eligible for leave if they are temporarily totally disabled and unable to perform their usual and customary jobs. The duration of an employee's industrial injury leave depends upon the opinion of the physician selected to treat the employee's medical condition. An industrial injury leave ends when the employee is declared medically able to return to work. This condition is called *maximum medical improvement* (MMI). If the employee is declared permanently disabled and unable to return to work, the employee will receive permanent disability benefits.[703] However, an injured employee is not entitled to temporary disability indemnity for time off from work after the employee has reached MMI—even if the medical treatment is for the permanent workplace injury.[704]

As a general rule, an employee cannot be terminated because the employee has been industrially injured or is on industrial injury leave. However, in certain instances an employer may be justified in terminating an employee for reasons related to the industrial injury, such as if the employee is no longer qualified for the job or the position is no longer available.[705] To prevail on a California Labor Code section 132a charge of discrimination, injured employees must prove that they were subject to *differential treatment* by their employers as a result of the workplace injury—not just that the employee experienced detrimental conduct.[706] Once the employee has met this burden, an employer must demonstrate a reasonable basis for

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[698] CAL. LAB. CODE §§ 3200 *et seq.*

[699] CAL. LAB. CODE §§ 6303(c), 6304.1(b).

[700] For a comprehensive discussion of California workers' compensation, see § 3.5 below.

[701] *Department of Rehab. v. Workers' Comp. Appeals Bd.* (*Lauher*), 30 Cal. 4th 1281, 1286 (2003).

[702] CAL. LAB. CODE §§ 3208, 3208.1.

[703] For a comprehensive discussion of permanent disability benefits and California workers' compensation, see discussion below in § 3.5.

[704] *Lauher,* 30 Cal. 4th at 1286.

[705] *Judson Steel Corp. v. Workers' Comp. Appeals Bd.*, 22 Cal. 3d 658, 667 (1978).

[706] *Lauher,* 30 Cal. 4th at 1300.

believing the employee is no longer qualified for the job such that termination is supported by a reasonable "business necessity."[707] A decision to terminate an employee due to the employee's physical or mental incapacity to perform a job must be based upon a physician's or other expert's opinion. An employer-sponsored policy or collective bargaining provision that requires the automatic termination of an injured employee after a specific amount of time, without regard for the individual circumstances, can expose the employer to liability under California Labor Code section 132a.[708]

§ 3.3.2(c)(i)

Compensation During Leave

The temporary disability benefit paid to an industrially injured employee varies depending on the severity of the injury (whether it is temporary total or temporary partial disability) and the employee's wages. Any payment, allowance, or benefit received by the employee from the employer during the period of incapacity may be taken into account by the Workers' Compensation Appeals Board (WCAB) in fixing the amount of compensation to be paid.

Some carriers/employers provide compensation to the injured employee in excess of the required temporary disability benefit. However, the WCAB has discretion to allow a credit for wage payments voluntarily made by an employer with no agreement as to the purpose of the payments.[709] If the WCAB finds that the payments were not gratuitous and exceeded the potentially available benefit amount, it may deny a claim for temporary disability indemnity against the carrier during that period.[710]

§ 3.3.2(c)(ii)

Benefit Implications of Leave

Employers are required to provide employees who are injured on the job with all medical care that is reasonably necessary to cure or relieve the employee from the effects of the injury.[711] In addition, employers are required to provide the same benefits to employees on industrial injury leave as are provided to employees on other types of leave.[712] Otherwise, such disparate treatment would constitute discrimination under California Labor Code section 132a. Likewise, employees eligible for family and medical leave should be given continued health insurance coverage for up to 12 workweeks to the same extent as if they had continued working.[713]

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[707] *Judson Steel Corp.*, 22 Cal. 3d at 667.

[708] *See Vons Cos. v. Workers' Comp. Appeals Bd.*, 64 Cal. Comp. Cas. 930 (1999) (employer violated California Labor Code section 132a by terminating employee pursuant to policy in the collective bargaining agreement that required termination when an industrial disability leave exceeded more than one year; employer should have considered making exception since employee was able to return to work within 18 months after injury).

[709] CAL. LAB. CODE § 4909; *Sea-Land Serv., Inc. v. Workers' Comp. Appeals Bd.*, 14 Cal. 4th 76, 86 (1996).

[710] *Herrera v. Workers' Comp. Appeals Bd.*, 71 Cal. 2d 254, 258 (1969).

[711] CAL. LAB. CODE § 4600.

[712] *Judson Steel Corp.*, 22 Cal. 3d at 667. The Division of Workers' Compensation posted a series of fact sheets for injured workers, which provide answers to frequently asked questions related to benefits. The fact sheets are available at http://www.dir.ca.gov/dwc/iwguides.html.

[713] See THE NATIONAL EMPLOYER® and § 3.4 of this Chapter.

§ 3.3.2(c)(iii)

Relationship to Other Types of Leaves

The ADA and the FEHA may protect an industrially injured employee even further if the employee qualifies as disabled under those statutes. An employee's absence due to industrial injury may also be protected under the Family and Medical Leave Act and the California Family Rights Act.[714] An employee eligible for family and medical leave may also be entitled to up to 12 workweeks of continued group health insurance coverage as well as other rights provided by those statutes.[715]

§ 3.3.2(d)

Vacation Leave

An employer usually has the discretion to determine whether it will offer its employees vacation compensation. However, once paid vacation is offered, it is subject to substantial regulation by the state.[716]

There are limited exceptions to the general rule that an employer need not provide vacation benefits. For example, employers that contract with the state government to provide more than $1,000 in construction work or that contract with the federal government to provide more than $2,000 in construction work must pay locally prevailing wages and benefits as determined by the state's Division of Labor Statistics and Research or the federal Department of Labor. The obligation to provide locally prevailing benefits may include the obligation to provide paid-vacation leave or pay in lieu of leave.[717]

If an employer provides vacation compensation, then an employer will, with two exceptions, be obligated to comply with California's rules regarding vacation compensation. The first exception arises where an employee is employed pursuant to a collective bargaining agreement.[718] The second exception arises when vacation compensation is provided through a trust fund regulated by the Employment Retirement Income Security Act (ERISA).[719] ERISA does not require an employer to pay accrued but unused vacation compensation at the end of an individual's employment and does not prohibit the forfeiture of vacation compensation that has gone unused during an individual's employment.

§ 3.3.2(d)(i)

Accrual of Vacation Leave

Vacation compensation accrues as an employee provides services.[720] In order to calculate an employee's vacation accrual, an employer should set a rate of accrual based on months, weeks, days, or hours worked. An accrual rate may differ between employees based on length

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[714] 29 U.S.C. §§ 2601 *et seq.*; CAL. GOV'T CODE § 12945.2.

[715] See THE NATIONAL EMPLOYER®, Chapter 1 of THE CALIFORNIA EMPLOYER and § 3.4 of this Chapter for a more complete discussion of this subject.

[716] CAL. LAB. CODE § 227.3; *Suastez v. Plastic Dress-Up Co.*, 31 Cal. 3d 774 (1982).

[717] CAL. LAB. CODE §§ 1771, 1771.5, 1772; 40 U.S.C. § 276a.

[718] CAL. LAB. CODE § 227.3.

[719] *California Hosp. Ass'n v. Henning*, 770 F.2d 856, 859 (9th Cir. 1985).

[720] *Sequeira v. Rincon-Vitova Insectaries, Inc.*, 32 Cal. App. 4th 632, 636 (1995).

of service and/or job classification. An employer should specify whether vacation will or will not accrue during the time an employee takes vacation and other leaves.

Vacation benefits will, unless otherwise provided, accrue indefinitely. Employers may limit accrual by *cashing out* any unused vacation benefits at the end of each year or at some other fixed time. California also allows employers to establish a *cap* or *ceiling* on the amount of vacation that an employee can accrue.[721] Once an employee accrues vacation up to the cap, no more vacation will accrue until the employee uses some of the vacation. The cap, however, must be "reasonable."[722] Although *reasonable* is not defined, a cap at twice an employee's annual vacation would likely be found reasonable by the California Labor Commissioner because it would give an employee an entire year to use his or her accrued vacation before the cap limited further accrual.

An employer may allow an employee to take paid vacation in advance of its accrual. An employer may recover any such advance by making deductions from the employee's paycheck, but only if the employee has provided a voluntary written agreement.

§ 3.3.2(d)(ii)

Use of & Payment for Vacation

In general, an employer has the right to schedule vacation leave.[723] However, an employer scheduling employee vacation time must not frustrate vacation benefits for the employer's own economic advantage.[724]

Upon an employee's termination, all unused, accrued vacation pay must be paid or cashed out, in the form of wages at the employee's final rate of pay.[725] Thus, so-called "use it or lose it" policies that revoke an employee's accrued vacation or that forfeit an employee's vacation upon termination of employment are unlawful.[726]

§ 3.3.2(e)

Sick Leave

Although most employers provide sick leave, they are not required to do so by law (except for employers in San Francisco). Thus, employers that elect to provide sick leave have the discretion to establish which employees are eligible, how much leave will be allowed, and whether it will be paid leave. For example, provisions for sick leave may differ between full-time and part-time employees, as well as between hourly and salaried employees.

An employer should implement a clear policy setting forth when leave may be taken. Some sick leave policies are written narrowly and cover only employees who need time to recover from a personal illness or injury. Other policies are written broadly so as to provide time off

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[721] *Kistler v. Redwoods Cmty. Coll. Dist.*, 15 Cal. App. 4th 1326, 1334 (1993).

[722] *See Henry v. Amrol, Inc.*, 222 Cal. App. 3d Supp. 1 (1990); *see also* DLSE Opinion Letters 1986.10.28, 1986.11.04, 1986.12.30, 1988.08.04, 1991.01.07, 1993.08.18, 1998.09.17.

[723] *Kistler*, 15 Cal. App. 4th at 1334; *Henry*, 222 Cal. App. 3d Supp. at 5.

[724] *Bonn v. California State Univ. at Chico*, 88 Cal. App. 3d 985, 991 (1979) (finding a public employer could not order an employee to take vacation to lessen the economic impact of the lump-sum payment the employer was required to make upon the employee's retirement).

[725] CAL. LAB. CODE § 227.3; *Suastez*, 31 Cal. 3d at 784.

[726] DLSE ENFORCEMENT POLICIES AND INTERPRETATIONS MANUAL (rev. Mar. 2006) § 15.1.4, *available at* http://dir.ca.gov/dlse/Manual-Instructions.htm.

to attend doctors' appointments or to care for an ill spouse or child. Employers are cautioned, however, that sick leave that can be used for any reason may be treated the same as vacation leave by the California Labor Commissioner.[727]

Sometimes employees take advantage of sick leave policies to take extra days off. One means of preventing an employee from abusing sick leave is to require a doctor's certification of illness as a condition of receiving pay for the leave. Employers that require medical certification should be aware of the California Confidentiality of Medical Information Act (CMIA),[728] which generally prohibits a doctor from disclosing any information about an employee's medical condition other than whether an employee is able to work.[729] In addition, employers covered by the federal Family and Medical Leave Act and the California Family Rights Act should implement medical certification requirements in accordance with those statutes.

Both public and private employers that provide accrued sick leave for their employees must permit their employees to use such sick leave to attend to an illness of a child, parent, domestic partner, or spouse.[730] In any calendar year, an employee who accrues sick leave must be permitted to use no less than the amount of sick leave he or she accrues in six months for such purposes.[731] *Sick leave* in this context refers to the accrued increments of compensated leave provided by an employer as a benefit of the employment that arises from any of the following reasons:

- the employee is physically or mentally unable to perform his or her duties due to illness, injury, or a medical condition;
- the absence is for the purpose of obtaining a professional diagnosis or treatment for a medical condition of the employee; or
- the absence is for other medical reasons, such as pregnancy or obtaining a physical examination.[732]

Such *sick leave* does not include any benefit provided pursuant to an employee welfare benefit plan subject to ERISA, any insurance benefit, any workers' compensation benefit, or any unemployment compensation disability benefit.[733]

Employers that provide employees with unlimited sick leave are not required to permit employees to use sick leave for those purposes.[734]

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[727] See discussion below.

[728] CAL. CIVIL CODE §§ 56 *et seq.*

[729] For a complete discussion of the CMIA and its ramifications, see Chapter 7 of THE CALIFORNIA EMPLOYER.

[730] CAL. LAB. CODE § 233(a). A.B. 25, which prompted the amendment of Labor Code section 233 and governs *kincare*, may generate confusion because, unlike the other provisions of A.B. 25, it did not define *domestic partner*. This omission is most likely an oversight that should not cause concern to employers. The legislature undoubtedly intended the definition of *domestic partner* used throughout other provisions of A.B. 25 (*i.e.*, a party to a domestic partnership registered with the Secretary of State) to apply to kincare under amended Labor Code section 233. A definition of *domestic partner* appears at California Family Code section 297. It is unclear whether this definition applies to Labor Code section 233.

[731] CAL. LAB. CODE § 233(a).

[732] CAL. LAB. CODE § 233(b)(4).

[733] CAL. LAB. CODE § 233(b)(4).

[734] *McCarther v. Pacific Telesis Group*, 48 Cal. 4th 104 (2010).

Employers with accrual-based sick leave policies may not deny an employee the right to use sick leave to attend to an illness of a child, parent, spouse, or domestic partner of the employee and may not discharge or threaten to discharge, demote, suspend or in any manner discriminate against an employee who uses sick leave for such purposes.[735] Employers may not use absence control policies to count sick leave taken pursuant to Labor Code section 233 as an absence that may lead to or result in discipline, discharge, demotion, or suspension.[736] Any employee who has been discharged or discriminated against for using sick leave for such purposes is entitled to reinstatement and either actual damages or one day's pay, whichever is greater.[737] An employee can seek such relief either by filing a complaint with the Labor Commissioner or by filing a civil action. If an employee prevails in such a civil action, he or she may recover reasonable attorneys' fees.[738]

§ 3.3.2(e)(i)

Accrual of Sick Leave

Employers may determine the manner in which sick leave is accrued. For example, sick leave can be accrued indefinitely or an employer may place a cap on the accrual of sick leave. A *cap* limits the number of days an employee can accrue and thereby limits an employer's potential costs.

Accumulated unused sick leave, unlike vacation leave, does not have to be cashed out when an employee is terminated or voluntarily quits his or her job. One exception to this rule arises if an employer allows sick leave to be taken for any reason or if an employer has consolidated sick leave with vacation, holiday, and/or bereavement leave, as a single paid-time-off (PTO) benefit. In these circumstances, any sick leave or PTO leave that remains at the end of employment must be cashed out because California considers such leave to be subject to the same rules as vacation leave.[739]

§ 3.3.2(e)(ii)

Relationship with Other Leaves

Employees may receive State Disability Insurance (SDI) benefits for nonwork-related illnesses or injuries that preclude an employee from working. An employer can limit sick leave benefits to the difference between SDI benefits and an employee's regular compensation.[740]

Employers covered by either the federal or state family and medical leave laws must evaluate and even investigate whether an employee's stated need for sick leave qualifies as a *serious health condition* triggering the benefits and protections of these laws.[741]

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[735] CAL. LAB. CODE § 233(c).

[736] CAL. LAB. CODE § 234.

[737] CAL. LAB. CODE § 233(d).

[738] CAL. LAB. CODE § 233(e).

[739] See "Vacation Leave" at § 3.3.2(d) above.

[740] CAL. UNEMP. INS. CODE § 2656.

[741] 29 U.S.C. § 2612(d)(2)(B).

§ 3.3.2(f)

Military Leaves of Absence

The California Military and Veterans Code[742] creates similar rights and obligations as the federal Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). California employees are entitled to the rights and the protections offered by both the state code and USERRA. An employer must independently assess each request for leave with respect to the circumstances at issue and with respect to the specific federal and state statutes involved.

The following is a summary of an employer's principal obligations under California law and should only be used as a supplement to the chapter on federal military leaves.[743]

§ 3.3.2(f)(i)

Employers Obligated to Provide Leave

Every public and private employer located in the State of California (without regard to the size of the workforce, the type of industry, or the size and scope of the operation) is required by state law to provide a temporary military leave of absence without pay.[744] Although the state code does not impose express reemployment obligations on successor enterprises, such obligations exist under USERRA.[745]

§ 3.3.2(f)(ii)

Reasons for Taking Leave

The following events trigger an employer's military leave obligations under the state code:

- the involvement of any public or private employee who is a member of the Reserve Corps of the U.S. Armed Forces, the National Guard or the Naval Militia in military duty or in military training, drills, encampments, cruises, special exercises or similar activities;[746]
- the participation of an officer or enlisted member of the California National Guard in the military service of the State of California while in attendance at drills, camps, or special exercises sponsored by federal authority or by the U.S. Department of Defense, as a member of the National Guard of the United States;[747]
- the performance by any public employee member of the National Guard of ordered military or naval duty during a time when the Governor of California has issued a proclamation of a state of extreme emergency, or during such time as the National Guard may be on active duty in one or more of the situations described in section 146 of the California Military and Veterans Code, which includes everything from war to responding to a call to quell a public disturbance, or a service member called to active service or duty under chapter 7.5 (commencing with section 400);[748]

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[742] CAL. MIL. & VET. CODE §§ 394.5 *et seq*.

[743] For a discussion of federal military leave obligations under USERRA, see THE NATIONAL EMPLOYER®.

[744] CAL. MIL. & VET. CODE § 394.5.

[745] 38 U.S.C. § 4303(4)(A)(iv).

[746] CAL. MIL. & VET. CODE §§ 394.5, 395.

[747] CAL. MIL. & VET. CODE § 395.04.

[748] CAL. MIL. & VET. CODE § 395.05, 395.06.

- the departure from public office or public employment to serve at the behest of the President of the United States, the U.S. Congress or the United Nations, either as an initial enlistee or as a reserve unit member, during a period of war or national emergency or United Nations military or police action;[749]
- the entrance of school board trustees or noncertified employees of a board of education upon active military service of the United States or of California, including active service in any uniformed auxiliary, or in the American Red Cross during any period of national emergency as declared by the President of the United States, or during any war in which the United States is involved;[750]
- the resignation from public office of certain designated public officers or officials (such as members of the state legislature, judges, and state officers and employees who are not covered by state civil service rules) in order to serve or to continue serving in either the Armed Forces of the United States or in the militia of this state;[751]
- a public employee's entrance into the Armed Forces of the United States in response to the United States' engagement in war or whenever the Governor of the State of California finds and proclaims that an emergency exists in the state's preparation for the national defense;[752]
- a city officer's departure from public office in order to enter upon active service with the U.S. Armed Forces;[753]
- a public or private employee's participation as a state Military Reservist in military duty for purposes of training, drills, unit training assemblies, or similar inactive duty training;[754] and
- the participation of either a nontemporary or a part-time employee in active duty, as an officer or enlisted member of the California National Guard in response to the governor's declaration of a state of insurrection, during a state of extreme emergency, or when the California National Guard is on "active duty" pursuant to section 146 of California Military and Veterans Code.[755]

§ 3.3.2(f)(iii)

Verification Requirements & Options

Both the state and federal statutes allow an employer to request evidence that establishes the length and character of military service and the timeliness of an application for reemployment.[756]

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[749] CAL. MIL. & VET. CODE § 395.1(a).

[750] CAL. MIL. & VET. CODE § 395.2.

[751] CAL. MIL. & VET. CODE § 395.3.

[752] CAL. MIL. & VET. CODE § 395.4.

[753] CAL. MIL. & VET. CODE § 395.8.

[754] CAL. MIL. & VET. CODE § 395.9.

[755] CAL. MIL. & VET. CODE § 395.06(a), (b).

[756] CAL. MIL. & VET. CODE § 395.06; 38 U.S.C. § 4312(f).

§ 3.3.2(f)(iv)

Duration of Leave

Under USERRA, the cumulative length of an individual's absences from employment for military service may not exceed five years.[757]

§ 3.3.2(f)(v)

Reinstatement Obligations

Under USERRA and the state code, if an employee has met the requirements for reinstatement, his or her former employer (or that employer's successor in interest) has an affirmative obligation to reemploy the employee subject only to very limited exceptions. An employer's reinstatement obligations vary depending upon an employee's length of military service. In general, an employer must reinstate an employee to the position the employee would have attained had the employee not gone on military leave.[758]

§ 3.3.2(f)(vi)

Compensation During Leave

Private employers are under no legal obligation to compensate employees on military leave. However, the state code requires that public employees on temporary military leaves of absence be paid their normal salary for the first 30 calendar days while engaged in the performance of ordered military duty.[759] Some companies have adopted more flexible policies for compensating employees in the service. For example, some employers pay their employees the difference between what they receive from the armed forces, and their regular company salaries. Others continue a full payment of wages for at least a limited period of time.

§ 3.3.2(f)(vii)

Impact of Collective Bargaining Obligations

A collective bargaining agreement may not waive an employee's military leave rights.[760] However, the state code provides an exception for employees of public institutions of higher learning, who may enter into a collective bargaining agreement waiving such compensation.[761]

§ 3.3.2(f)(viii)

Benefit Implications of Leave

USERRA protects an employee's benefits while on military leave. Employers must provide employees on leave the option to continue their health-plan benefits, at the employee's expense, for up to 24 months.[762] Additionally, reemployed persons are entitled to pension

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[757] 38 U.S.C. § 4312(a)(2), (c).

[758] Employers are advised to consult THE NATIONAL EMPLOYER® for a complete discussion of this issue.

[759] CAL. MIL. & VET. CODE §§ 395.01, 395.02, 395.04, 395.05. *See generally Bowers v. City of San Buenaventura*, 75 Cal. App. 3d 65 (1977).

[760] CAL. MIL & VET. CODE §§ 395.01(c), 395.05(b), 395.1(e), 395.3(d); *see Wright v. City of Santa Clara*, 213 Cal. App. 3d 1503, 1506 (1989).

[761] CAL. MIL & VET. CODE §§ 395.01(b), 395.05(b), 395.1(e), 395.3(d); *see Wright*, 213 Cal. App. 3d at 1506-507.

[762] 38 U.S.C. § 4317.

plan benefits that accrued during military service, regardless of whether a plan is a defined benefit plan or a defined contribution plan.[763]

§ 3.3.2(f)(ix)

Protection of Employees Against Discharge or Discrimination

The California Military and Veterans Code prohibits discrimination against any individual in the military services of the State of California or the United States because of his or her membership in the service. Additionally, the state code holds that no individual may be disqualified from or denied employment by virtue of his or her membership or service in the military forces of the State of California or of the United States.[764] Officers and enlisted members of the California National Guard are also protected against discharge and discrimination.[765]

§ 3.3.2(f)(x)

Remedies Enforcement

Any person who violates the leave and nondiscrimination provisions of the state code will be guilty of a misdemeanor.[766] In addition, any person who discriminates against a member of the armed forces in violation of this section shall be liable for actual damages and reasonable attorneys' fees incurred by the injured party.[767] These remedies are not intended to be exclusive but are in addition to the remedies provided for by other California laws.[768]

§ 3.3.2(g)

Civic Duty Leave

An employee who fulfills his or her civic duty by responding to a summons to serve as juror or to a subpoena to serve as a witness is protected by state law and, in many cases, federal law. Attendance at a variety of administrative hearings is also protected by state and federal law.[769]

Because all citizens must serve as jurors or witnesses when ordered and employees must participate in administrative agency proceedings when summoned, all employers are obligated to provide jury-duty and witness-duty leaves.[770] However, employers are not required to compensate employees for time taken off of work for civic duty leave.[771] Service may be in either state or federal proceedings. An employer may also be required to grant leave to employees who are summoned to testify, to assist, or to participate in hearings conducted by federal and state administrative agencies such as the Equal Employment Opportunity Commission, the Fair Employment and Housing Commission, and the National Labor Relations Board.

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[763] For a complete discussion of the benefit implications of military leave, see THE NATIONAL EMPLOYER®.

[764] CAL. MIL. & VET. CODE § 394.

[765] CAL. MIL. & VET. CODE § 395.06.

[766] CAL. MIL. & VET. CODE § 394(g).

[767] CAL. MIL. & VET. CODE § 394(g).

[768] CAL. MIL. & VET. CODE § 394(h).

[769] For a discussion of federal civic duty leave, see THE NATIONAL EMPLOYER®.

[770] CAL. LAB. CODE § 230.

[771] *See People v. Kwee*, 39 Cal. App. 4th 1, 5 (1995). *But see Burns Int'l Sec. Servs. Corp. v. County of Los Angeles*, 123 Cal. App. 4th 162 (2004) (Los Angeles County ordinance that precludes the county from contracting with companies that do not pay their employees for at least five days of jury service does not violate the California Constitution).

Moreover, employers are required to grant leave to employees who are victims of domestic violence, sexual assault or stalking and need to take time off from work to obtain such relief as a temporary restraining order, restraining order or other injunctive relief to help ensure the health, safety, or welfare of themselves or their child.[772]

To receive jury- or witness-duty leave under California law, an employee should give his or her employer reasonable notice of impending service.[773] Most employers also require the submission of a copy of the actual jury summons or the subpoena. An employee who is a victim of domestic violence need not give the employer reasonable notice to attend an unscheduled or emergency court appearance that is required for the health, safety, or welfare of the victim or his or her child so long as the employee, within a reasonable time of such an appearance, provides evidence from either the court or the prosecuting attorney that he or she appeared in court.[774]

Upon completion of jury or witness duty, an employee is entitled to reinstatement.[775] Because discharge, retaliation, and discrimination for participation at a variety of administrative hearings are prohibited, reinstatement after attendance at such hearings should be considered mandatory as well. A temporary employee may not be entitled to reinstatement, however, if there was a pre-established period of employment and that period ended before the completion of the employee's civic-duty service. A collective bargaining agreement may not diminish an employee's right to leave for jury or witness duty or an employee's right not to be discharged, discriminated, or retaliated against for taking such leave.[776]

Employers that elect to compensate employees for civic-duty leave are cautioned to distinguish between compensation for nonexempt and exempt salaried employees. An employer cannot reduce the weekly salary of its overtime-exempt executive, administrative, and professional employees who are absent for part of a week due to jury duty or attendance at an administrative hearing.[777] On the other hand, an employer need not pay an employee his or her salary if the employee is absent for a complete workweek due to jury duty or attendance at an administrative hearing. Nonexempt employees are entitled to compensation only for actual hours worked. Employers that elect to compensate employees may set off the jury duty fees paid by the court from both an exempt and a nonexempt employee's regular compensation.[778]

An employee who is discharged, threatened with discharge, demoted, suspended, or discriminated or retaliated against in the terms or conditions of his or her employment because of jury or witness duty is entitled to reinstatement and reimbursement for any lost wages and work benefits caused by such discrimination.[779] Any employer that willfully refuses to obey a reinstatement order or other remedial order that has been issued by an arbitrator or "hearing authorized by law" is guilty of a misdemeanor.[780]

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[772] CAL. LAB. CODE § 230(c).

[773] CAL. LAB. CODE § 230(a), (d).

[774] CAL. LAB. CODE § 230(d).

[775] CAL. LAB. CODE § 230(a), (e).

[776] CAL. LAB. CODE § 230(g).

[777] 29 C.F.R. § 541.118.

[778] *See*, *e.g.*, *Kwee*, 39 Cal. App. 4th at 4.

[779] CAL. LAB. CODE § 230(e).

[780] CAL. LAB. CODE § 230(e).

§ 3.3.2(h)

Election Leave

The State of California encourages employees to participate in statewide elections by providing up to two hours of paid leave to vote.[781] Every employee is entitled to time off to vote in a statewide election, regardless of whether he or she is a full-time, part-time or temporary employee. Employees are also entitled to unpaid leave to serve as an election officer. To qualify for election-officer leave, an employee must be an election official who is charged with conducting a local, special or statewide election.[782] Although employees are entitled to receive time off to vote only in statewide elections, election-officer leave is also available for local and special elections.

An employee is eligible for voting leave if he or she does not have sufficient time outside of working hours to vote in a statewide election.[783] *Sufficient* time to vote is not defined, but some factors that might be considered include the amount of off-duty time available for an employee to vote, the amount of time needed to vote and an employee's familial and other off-duty responsibilities. The California Elections Code provides that an employee shall be allowed enough time as needed to vote, and that time shall be "only at the beginning or end of the regular working shift, whichever allows the most free time for voting and the least time off from the regular working shift, unless otherwise mutually agreed."[784] In providing voting leave, an employer must not reduce the salary of overtime-exempt employees for any partial day of absence for voting.

If an employee as of the third working day prior to the day of election knows or has reason to believe that he or she will need time off to vote, the employee must give at least two working days' notice to his or her employer.[785] However, the statute does not address the situation where the employee does not recognize his or her need for voting leave in time to provide two days' notice. In such a case, notice will probably be deemed proper if given contemporaneously with the employee's knowledge or reason to know of his or her need for voting leave. Failure to provide proper notice eliminates the employee's right to paid leave, but the employee is still entitled to unpaid leave. There is no explicit requirement that election officers give advance notice of their need to be absent from work.

Employers are prohibited from suspending or discharging an employee because of his or her absence while serving as an election officer on Election Day.[786] In *Kouff v. Bethlehem-Alameda Shipyard*, *Inc*., the court held that an employee's termination for absence on Election Day, due to service as an election officer, stated a cause of action for wrongful discharge.[787] Moreover, retaliation against an employee for seeking leave to vote could give rise to a claim that the employer has violated the state's public policy.[788]

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[781] CAL. ELEC. CODE §§ 14000-14002.

[782] CAL. ELEC. CODE § 12312 (prohibits termination/suspending an employee because of their role as an election officer on election day).

[783] CAL. ELEC. CODE § 14000(a).

[784] CAL. ELEC. CODE § 14000(a), (b).

[785] CAL. ELEC. CODE § 14000(c).

[786] CAL. ELEC. CODE § 12312.

[787] 90 Cal. App. 2d 322, 324 (1949).

[788] *See Gantt v. Sentry Ins*., 1 Cal. 4th 1083 (1992), *overruled on other grounds*, *Green v. Ralee Eng'g Co.,* 19 Cal. 4th 66, 80 (1998).

There is no specific statutory penalty for violating California Election Code section 14000, but this may be due to legislative error. Previous statutes made a willful violation of any election laws punishable by fine or imprisonment.[789] The state courts will likely be very protective of an employee's right to vote. For example, state courts have held that a collective bargaining provision that waives an employee's right to pay for time taken off to vote is invalid as against public policy.[790]

Notices setting forth the requirements of voting leave must be posted not less than ten days before a statewide election in a conspicuous location in the workplace where employees are likely to see it.[791]

§ 3.3.2(i)

Volunteer Firefighter Leave

Most employers must allow employees who are volunteer firefighters to take time off to perform emergency firefighting duty.[792] Public-safety-agency employers and providers of emergency medical services are exempt from this obligation if such leave would hinder the availability of public-safety or emergency medical services.[793] Most employers must also allow volunteer firefighters to take temporary leaves of absence for the purpose of fire, law enforcement or emergency rescue training.[794]

A *volunteer firefighter* is any person who is registered as a volunteer member of a regularly organized fire department of a city, county, city and county, or district, that is officially recognized by the local government in which the department is located.[795]

An employee who is found to have been discriminated against by his or her employer for taking time off to perform emergency duty as a volunteer firefighter is entitled to reinstatement and reimbursement for any lost wages and work benefits.[796] If an employer is found to have failed to properly restore an employee to his or her employment, then the employer is guilty of a misdemeanor.[797]

§ 3.3.2(j)

Parents' Leave for Children in School

All public and private employers, other than the State of California, who employ 25 or more employees at the same location must allow employees time off to visit their children's school or licensed day care center.[798] All California employers are obligated to provide employees with time off to attend to school disciplinary matters.[799]

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[789] *See*, *e.g.*, *Benane v. International Harvester Co.*, 142 Cal. App. 2d Supp. 874 (1956).

[790] 142 Cal. App. 2d Supp. 874.

[791] CAL. ELEC. CODE § 14001.

[792] CAL. LAB. CODE § 230.3.

[793] CAL. LAB. CODE § 230.3.

[794] CAL. LAB. CODE § 230.4.

[795] CAL. GOV'T CODE § 50952(k), (p).

[796] CAL. LAB. CODE § 230.3(b).

[797] CAL. LAB. CODE § 230.3(b).

[798] CAL. LAB. CODE § 230.8.

[799] CAL. LAB. CODE § 230.7(a).

An employee who is the parent or guardian of a child in a licensed day care center or in kindergarten through 12th grade, inclusive, may take up to 40 hours each year (but not exceeding eight hours in any calendar month) to visit the child's school or licensed day care center.[800] The employee does not have to be residing with the child in order to be entitled to the leave. It does not matter what type of school function the employee is attending.

To be eligible for a school discipline leave, an employee must be the parent or guardian of the child, must be actually living with the child, and must have received a written notice from the principal of the school requesting his or her attendance at a conference to discuss the child's suspension from school.[801] The school discipline leave is not available to employees who voluntarily consult with school administrators regarding a child's performance in school.

An employer may require that the employee give reasonable notice prior to taking the time off from work.[802] Employers may request that employees provide a copy of the notice received from the school prior to granting school discipline leave and may require documentation from the school that the visit took place.

There is no prohibition against an employer asking the employee or the principal to reschedule the conference if the employee's attendance at work is essential at the time the meeting was originally scheduled. Unlike leave for school visits, which are limited to 40 hours per year, there is no limit to how frequently an employee must be provided leave for school discipline. Moreover, employers are obligated to return employees to their regular positions after school-visit or school-discipline leave.[803]

If both parents of a child are employed by the same employer at the same worksite, the parent who first gives notice to the employer is entitled to leave for participating in school activities.[804] The other parent may not take time off at the same time to participate in school activities without the employer's consent.[805]

Private and public sector employers may not demote, suspend, threaten to terminate, or terminate an employee for taking time off to appear at a school conference pursuant to a written request from the school's principal.[806] An employee who is discriminated against as a result of taking time off to visit a child's school or to attend a school conference involving a child's suspension is entitled to reinstatement and reimbursement for any lost wages and work benefits.[807] An employer that willfully refuses to rehire, promote, or otherwise restore an employee who takes a leave to visit a child's school is subject to a civil penalty in an amount equal to three times the amount of the employee's lost wages and work benefits.[808]

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[800] CAL. LAB. CODE § 230.8(a)(1).

[801] CAL. EDUC. CODE § 48900.1(c).

[802] CAL. LAB. CODE §§ 230.7(a), 230.8(a)(1).

[803] CAL. LAB. CODE §§ 230.7(b), 230.8(d).

[804] CAL. LAB. CODE § 230.8(a)(2).

[805] CAL. LAB. CODE § 230.8(a)(2).

[806] CAL. LAB. CODE § 230.7(a).

[807] CAL. LAB. CODE §§ 230.7(b), 230.8(d).

[808] CAL. LAB. CODE § 230.8(d).

§ 3.3.2(k)

Literacy Leave

California's Employee Literacy Education Assistance Act applies to every private employer in California that regularly employs 25 or more employees.[809] The Act provides that any employee who reveals a literacy problem and requests assistance to enroll in an adult literacy education program is entitled to reasonable accommodation and assistance by his or her employer. Assistance includes, but is not limited to, providing the employee with the location of local literacy programs or arranging for a job-site visit by a literacy education provider.[810] An employer cannot terminate an employee who reveals a literacy problem because of the employee's disclosure of illiteracy if the employee's performance is satisfactory.[811] However, an employer need not pay the employee for time taken as literacy leave.[812]

An employer may request proof of enrollment in an adult literacy education program. An employer must make reasonable efforts, however, to keep an employee's literacy problem confidential.[813]

Reasonable accommodation and undue hardship standards govern the amount of time an employee can be on leave for purposes of enrollment in an adult literacy education program.[814] These standards have not yet been defined. However, because most adult literacy programs are scheduled in short blocks of time, for example, one to two hours, three times a week, it is unlikely that leaves of an extended duration (weeks or months at a time) would be necessary. Depending upon an employee's scheduled work hours, an employer might provide accommodation by allowing the employee to leave work early, arrive later, or take an extended lunch period to attend the literacy program.

An employee who feels he or she has been denied reasonable accommodation, or has suffered discrimination due to a literacy problem, may file a complaint with the Labor Commissioner.[815] If the Labor Commissioner determines that an employer has violated the Act, the commissioner can order reinstatement, reimbursement of wages and interest thereon, and payment of reasonable attorneys' fees.[816]

§ 3.3.2(l)

Religious Leave

Title VII of the Civil Rights Act and the California Fair Employment and Housing Act (FEHA) require an employer to reasonably accommodate an employee's religious beliefs or observances, unless undue hardship would result.[817] This section is concerned exclusively with an employee's rights under the FEHA.[818]

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[809] CAL. LAB. CODE § 1041(a).

[810] CAL. LAB. CODE § 1041(b).

[811] CAL. LAB. CODE § 1044.

[812] CAL. LAB. CODE § 1043.

[813] CAL. LAB. CODE § 1042.

[814] CAL. LAB. CODE § 1041(a).

[815] CAL. LAB. CODE § 98.7(a).

[816] CAL. LAB. CODE § 98.7(c).

[817] 42 U.S.C. § 2000e(j); CAL. GOV'T CODE § 12940(l).

[818] For a discussion of an employer's obligations under Title VII of the Civil Rights Act, see THE NATIONAL EMPLOYER®.

The FEHA provision governing religious leaves applies to private and public employers with five or more full- or part-time employees.[819] Programs or activities funded directly by the state or that receive financial assistance from the state are also subject to antidiscrimination provisions.[820] Religious associations or religious corporations not organized for private profit are exempt from the Act's coverage.[821]

A *religious belief* is defined narrowly under the FEHA. Under the statute, a religious belief or observance includes, but is not limited to, observance of the Sabbath or other religious holy days, and reasonable time necessary for travel to and from a religious observance.[822] While this definition is more limited than the federal definition in Code of Federal Regulations title 29, section 1605.1, California employers must accommodate religious beliefs as described under both federal and state law.

The duration and timing of religious leave is controlled by the religious observance or practice itself. An employer's obligation to provide such leave is governed by the reasonable accommodation and undue hardship standards. An employer must look to federal law to interpret these standards. State law also prohibits discrimination or retaliation against an employee who seeks a religious leave or an accommodation.[823]

There are no special reinstatement requirements for an individual returning from a religious leave. However, it is implicit in the state and federal statutes that reasonable accommodation includes reinstatement at the end of the leave. It is unclear how much flexibility an employer has with regard to its reinstatement obligation, but reasonable changes that have a *de minimis* impact on an employee's job are likely to withstand scrutiny.

An employer's duty to accommodate an employee for religious leave purposes does not require an employer to take steps inconsistent with a valid collective bargaining agreement.[824] At the same time, the terms of a collective bargaining agreement cannot shield an employer from its statutory obligation to reasonably accommodate an employee who needs a religious leave.

A California Court of Appeal decision is indicative of the type of problems that an employer can face if it does not accommodate an employee's request for religious leave. In *Soldinger v. Northwest Airlines*,[825] the court ruled that federal law and a collective bargaining agreement did not preempt a claim of religious discrimination under state law. In *Soldinger*, a Jewish airline stewardess wished to take a day off for the Jewish holiday of Passover. The employee attempted to procure her day off through the methods established through the collective bargaining agreement. When the employee could not get the time off due to her lack of seniority, she went to her employer to request the time off for her religious observance. The employer denied the employee the day off. When the employee took the day off anyway, she was terminated.[826]

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[819] CAL. GOV'T CODE § 12926(d).

[820] CAL. GOV'T CODE § 11135.

[821] CAL. GOV'T CODE § 12926(d).

[822] CAL. GOV'T CODE § 12940(1).

[823] CAL. GOV'T CODE § 12940(h).

[824] *Trans World Airlines v. Hardison*, 432 U.S. 63, 79 (1977); *see also US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002).

[825] 51 Cal. App. 4th 345 (1996).

[826] *Soldinger*, 51 Cal. App. 4th 345.

The court held that the federal law governing her collective bargaining agreement did not preempt her claims of religious discrimination under FEHA.[827] Moreover, the court ruled that the employer was not justified in its refusal to grant the leave because it followed the collective bargaining agreement's bidding procedure for acquiring days off.[828] Because of this, the court allowed the employee to proceed with a claim of religious discrimination under the FEHA. Additionally, the court allowed the employee to proceed with a claim of intentional infliction of emotional distress.[829]

§ 3.3.2(m)

Holiday Leave

Time off for holidays such as Christmas and Thanksgiving are a common feature of employment relationships, but few employers are actually obligated to provide holidays. While certain holidays have been declared legal holidays by the federal and state governments, a legal holiday results in the closing of certain government offices but does not guarantee all employees a day off.[830] Moreover, employers that do provide holidays are not obligated to pay employees for the holiday.

The general rule that an employer need not provide holiday pay has limited exceptions. Where an employer provides services in excess of $2,500 to the federal government, the employer must pay locally prevailing wages and benefits. This may include an obligation to provide paid holidays, or pay in lieu of holidays, as determined by the Department of Labor. A similar obligation exists with respect to employers that contract to provide $2,000 in construction work to the federal government or provide $1,000 or more in construction work to the state.[831]

Much more common, though less widely known, is the obligation to provide days of rest. In California, employers are generally obligated to provide one day's rest in every seven days worked.[832] days of rest may be accumulated when the nature of the employment reasonably requires the employee to work seven or more consecutive days, provided that the employee receives in each calendar month the equivalent of one day's rest out of every seven days.[833] In addition, the Labor Commissioner may grant exceptions from the day-of-rest requirement in cases of hardship.[834]

If an employer elects to provide paid time off or premium pay for work performed on a holiday, the employer's policy should specify which holidays are paid holidays, any conditions for receiving holiday pay, and any conditions for receiving premium pay for work on a holiday. An employer has complete discretion to set these terms and conditions.

Some employers provide floating holidays. A *floating holiday* is, generally, a day off that the employee can schedule independently of any other calendar event. Accrued but unused floating holidays are subject to the same restrictions as vacation time, including that such time must be cashed out at the time of an employee's termination.[835]

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[827] 51 Cal. App. 4th at 353.

[828] 51 Cal. App. 4th at 368.

[829] 51 Cal. App. 4th at 376.

[830] The California state holidays can be found at CAL. GOV'T CODE § 6700.

[831] 41 U.S.C. §§ 351 *et seq.*

[832] CAL. LAB. CODE § 551.

[833] CAL. LAB. CODE § 554(a).

[834] CAL. LAB. CODE § 554(b).

[835] For a more complete discussion of cashing out, see "Vacation Leave" at § 3.3.2(d) above.

§ 3.3.2(n)

Bereavement Leave

A death in an employee's family can have a very traumatic effect on the employee's personal and professional life. While employers are not legally obligated to provide bereavement leave, bereavement policies allow an employee to take time off to deal with funeral and personal matters and to grieve privately before making the transition back to work. Employers have complete discretion to set the terms and conditions applicable to bereavement leave.

An employer should define which family members' or relatives' deaths will qualify an employee for bereavement leave. Employers may limit bereavement leave to deaths in the *immediate* family, including an employee's current spouse, parents, children and siblings. The employer may also consider including relatives outside of the immediate family such as in-laws, aunts and uncles. Whether the employer grants leave for deaths in the immediate family or for other relatives, these terms should be defined and applied consistently to avoid any confusion or disputes over whether the leave should be granted.

§ 3.3.2(o)

Personal Leave

Employers often provide personal leave to accommodate employees who encounter unexpected circumstances that necessitate an absence from work. Ordinarily, personal leave policies are stated in broad terms and do not restrict leave to specific circumstances. An employer has complete discretion to set the terms and conditions for taking personal leave.

Personal leave policies tend to be catchall policies for those employees whose need for leave cannot be accommodated by the employer's other policies. For example, typically a bereavement leave policy provides only a few days off to attend a funeral. If an employee needs additional time off to organize the affairs of a deceased relative, he or she may apply for a personal leave. Because it is impossible to predict all the possible reasons an employee might apply for a leave, most employers simply state that personal leave may be granted at the employer's discretion. However, employers must grant and deny personal leave in a nondiscriminatory manner.

One of the major issues that arise when administering personal leaves is the reinstatement of employees. Some personal leave policies contain provisions that an employee will be guaranteed his or her former position or its equivalent upon returning from leave. Other policies simply provide a general right to reemployment or a right to return to the next available position. Because personal leaves are discretionary, employers may determine an employee's reinstatement rights.

§ 3.3.2(p)

Civil Air Patrol Leave

Employees who are members of the California Wing of the Civil Air Patrol and are authorized to respond to an emergency operational mission of the California Wing of the Civil Air Patrol are entitled to an unpaid leave of absence.[836] California companies employing more than 15 people must provide not less than 10 days per year of leave, beyond any leave benefits otherwise available, to employees who have been employed by that employer for at least 90 days immediately preceding the commencement of leave.

[836] CAL. LAB. CODE §§ 1500-1507.

§ 3.3.2(q)

Organ & Bone Marrow Donor Leave

Labor Code section 1508 *et seq*. requires private employers to permit employees to take a leave of absence with pay, not exceeding 30 days, for the purpose of organ donation, and not exceeding five days for bone marrow donation, as prescribed within a 12-month period.[837] The days of leave are business days rather than calendar days, and the one-year period is measured from the date the employee's leave begins and consists of 12 consecutive months Additionally, the leave of absence cannot be considered a break in the employee's continuous service for the purpose of his or her right to paid time off. The employer may condition the leave upon the employee's use of a specified number of earned but unused days for paid time off (five days for bone marrow leave; two weeks for organ donation).

The law requires a private employer to restore an employee returning from leave for organ or bone marrow donation to the same position held by the employee when the leave began, or an equivalent position.[838] The law prohibits a private employer from interfering with an employee taking organ or bone marrow donation leave and from retaliating against an employee for taking that leave, or opposing an unlawful employment practice related to organ or bone marrow donation leave.[839] The law also creates a private right of action for an aggrieved employee to seek enforcement of these provisions.[840]

§ 3.4

IV. FAMILY & MEDICAL LEAVE UNDER THE CALIFORNIA FAMILY RIGHTS ACT

§ 3.4.1

A. INTRODUCTION

When the federal FMLA[841] became effective for most employers in 1993, California employers were already subject to the California Family Rights Act (CFRA).[842] The FMLA and the CFRA differed in several respects, most notably with regard to the reasons for which leave could be taken, as well as the duration and timing of the leave. The CFRA has since been amended to conform, for the most part, to the FMLA. In addition, the regulations implementing the CFRA have been revised in light of the FMLA.[843] California has also adopted the FMLA regulations to the extent they are consistent with the CFRA.[844]

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[837] CAL. LAB. CODE § 1510.

[838] CAL. LAB. CODE § 1511.

[839] CAL. LAB. CODE § 1512.

[840] CAL. LAB. CODE § 1513.

[841] 29 U.S.C. §§ 2601-2654.

[842] CAL. GOV'T CODE § 12945.2.

[843] CAL. CODE REGS. tit. 2, §§ 7297.0 -7297.2, 7297.5.

[844] CAL. CODE REGS. tit. 2, § 7297.0.

The Department of Labor (DOL) published revised FMLA regulations, effective January 16, 2009. The revisions were compelled primarily by two developments: (1) court decisions, including the U.S. Supreme Court decision striking down or seriously questioning certain aspects of the prior FMLA regulations; and (2) the addition of family military leave provisions to the FMLA from the National Defense Authorization Act for Fiscal Year 2008 (FY 2008 NDAA).[845] The revised regulations clarified many of the ambiguities created by the FY 2008 NDAA and addressed several uncertainties resulting from court decisions pertaining to the prior regulations. The DOL also published new regulations, effective March 8, 2013, to implement the FMLA amendments made by the National Defense Authorization Act for Fiscal Year 2010 (FY 2010 NDAA), which expanded the military leave provisions that had been added to the FMLA by the FY 2008 NDAA.

California courts look to the decisions of the federal courts in interpreting the FMLA when construing the CFRA to the extent that they are persuasive, but the courts are not bound to follow them.[846] While California's CFRA requirements largely track the FMLA, understanding family and medical leave requirements can be a daunting task. This section discusses the CFRA statutory language, the CFRA regulations and the FMLA regulations, as revised.

While the CFRA and the FMLA parallel each other to a large degree, California employers must refer to both the CFRA and the FMLA when making family and medical leave determinations. Employers must also keep abreast of case decisions and legislative developments in this area. For a detailed discussion of the FMLA, please see THE NATIONAL EMPLOYER®. The discussion below also touches upon California's Family Temporary Disability Insurance (FTDI), a program intended to provide up to six weeks of paid family leave every 12 months through California's state-run State Disability Insurance program. The FTDI program is funded by a payroll tax paid by employees. Employees began paying the tax in 2004, with paid family leave benefits first available on July 1, 2004, for leaves beginning on or after that date.

§ 3.4.2

B. COVERED EMPLOYERS

The CFRA and the FMLA cover "[a]ny person who directly employs 50 or more persons to perform services for a wage or salary," as well as "[t]he state, and any political or civil subdivision of the state and cities" regardless of the number of employees employed.[847] Like the FMLA, the CFRA regulations define *directly employs* as employing 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.[848]

The federal regulations state that any employee whose name appears on an employer's payroll will be considered employed each working day of the calendar week and must be counted, whether or not any compensation is received for the week.[849] Additionally,

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[845] National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 585 (codified as amended at 29 U.S.C. §§ 2601-2619).

[846] *Dudley v. Department of Transp.*, 90 Cal. App. 4th 255, 261 (2001).

[847] CAL. GOV'T CODE § 12945.2(c)(2).

[848] CAL. CODE REGS. tit. 2, § 7297.0(d)(1); 29 U.S.C. § 2611(4)(A)(i); 29 C.F.R. § 825.104.

[849] 29 C.F.R. § 825.105(b). *But see Walters v. Metropolitan Educ. Enters., Inc.*, 519 U.S. 202, 207 (1997) (adopting the *payroll method*—which considers an employee to have an employment relationship with an employer if the employee appears on the employer's payroll—for purposes of determining whether an employer employs the minimum number of employees to trigger Title VII coverage).

employees on paid or unpaid leave or disciplinary suspension must be counted, if the employer has a reasonable expectation that the employees will return to active employment.[850] Employees on temporary, long-term, or indefinite layoff are not counted.[851]

The original CFRA applied to employers with more than 50 employees within California. The amended regulations eliminated this requirement.[852] An employer with ten employees in California but more than 50 employees nationwide is covered by the CFRA; however, as explained more fully in the next section, to be eligible for CFRA leave, the employee must work at a location with 50 or more employees within 75 miles of that location. Thus, although an employer may be technically "covered" by the CFRA, the employees may not be "eligible" for CFRA leave.

The FTDI program, which provides paid benefits to eligible employees for up to six weeks in a 12-month period, is not limited to employers with 50 employees, as is the CFRA. Although the FTDI law does not grant employees the right to time off or reinstatement, it remains to be seen whether the courts will imply such requirements as a matter of public policy.

§ 3.4.3

C. ELIGIBLE EMPLOYEES

To be eligible for CFRA leave, an employee must have worked for the employer for at least 12 months (the months need not be consecutive) and worked for the employer at least 1,250 hours during the 12 months prior to the commencement of the leave. In addition, there must be 50 or more employees employed at or within 75 miles (measured by surface road miles) of the employee's worksite, as of the date the employee gives notice of the need for the leave.[853]

The 1,250-hour requirement is based on actual hours worked.[854] Thus, vacation hours, sick leave hours, and other leave time do not count toward the 1,250-hour minimum. This requirement must be met under CFRA when leave is first taken, not when adverse action is later administered.[855] Employees who are exempt from the FLSA requirement that a record be kept of their hours (such as *bona fide* executive, administrative and professional employees), and who have worked for the employer for at least 12 months, will be deemed to have worked at least 1,250 hours during the previous 12 months, unless the employer can prove otherwise. The FMLA regulations also provide that full-time teachers of an elementary or secondary school system, or system of higher education, or other educational establishment or institution, are

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[850] 29 C.F.R. § 825.105(c).

[851] 29 C.F.R. § 825.105(c).

[852] CAL. CODE REGS. tit. 2, § 7297.0(d).

[853] CAL. CODE REGS. tit. 2, § 7297.0(e); CAL. GOV'T CODE § 12945.2(a), (b).

[854] 29 C.F.R. § 825.110(c); *see also Plumley v. Southern Container Inc.*, 303 F.3d 364, 372 (1st Cir. 2002) (hours of service includes those hours that are already worked); *Wells v. Wal-Mart Stores*, *Inc.*, 219 F. Supp. 2d 1197, 1208 (D. Kan. 2002) (employer not estopped from contesting eligibility of employee who had worked only 993.04 hours due to statement of the human resources manager that he was on "FMLA leave"); *Robbins v. Bureau of Nat'l Affairs*, 896 F. Supp. 18, 21 (D.D.C. 1995) (employee not eligible for FMLA leave because, excluding paid holiday time, vacation time, sick leave, and maternity leave, the employee actually worked only 875.75 hours in the 12 months preceding her leave).

[855] 29 C.F.R. § 825.110(d); *Dudley v. Department of Transp.*, 90 Cal. App. 4th 255, 262 (2001).

deemed to meet the 1,250-hour test.[856] Additionally, they provide that employees returning from military leave are considered to have continued to work during the leave for purposes of meeting the 1,250 hours requirement.[857]

Moreover, the employee must have at least 12 months of service with the employer, *at any time*.[858] The same is true under the FMLA except that employers generally do not need to include employment prior to a break in service of seven years or more in calculating the amount of an employee's service.[859] Since the CFRA regulations and FMLA regulations are inconsistent in this regard, California employers must adhere to the CFRA regulations and determine an employee's eligibility based on his or her months of service at any time.

The 12-month eligibility period for FMLA coverage is measured from the time the leave is taken, not from the date of any adverse employment action against the employee.[860] However, the CFRA regulations provide: "For an employee who takes a pregnancy disability leave which is also a FMLA leave, and who then wants to take CFRA leave for reason of the birth of her child immediately after her pregnancy disability leave, the 12-month period during which she must have worked 1,250 hours is that period immediately preceding her first day of FMLA leave based on her pregnancy, not the first day of the subsequent CFRA leave for reason of the birth of her child."[861]

Eligibility for FTDI benefits is determined by the California Employment Development Department (EDD). An employee may qualify for FTDI benefits without regard to the employee's length of service with the employer or the number of hours the employee worked in the year preceding the first day of the leave.

Employers are advised to consult employment law counsel for specific advice regarding whether or not an individual is an *eligible employee* under the FMLA or the CFRA.

§ 3.4.4

D. LEAVE AVAILABLE

Eligible employees are entitled to up to 12 workweeks of family and medical leave per 12-month period.[862] The CFRA differs from the FMLA in that the FMLA, as amended by the

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[856] 29 C.F.R. § 825.110(c).

[857] 29 C.F.R. § 825.110(c)(2).

[858] CAL. CODE REGS. tit. 2, § 7297.0(e).

[859] 29 C.F.R. § 825.110(b). The FMLA regulations now provide that employment prior to breaks in service of seven years or more need not be considered in meeting the "12 month of service" requirement unless: (1) the break in service was due to National Guard or Reserve military service obligations; or (2) there is a written agreement, including a collective bargaining agreement, documenting the employer's intent to rehire the employee after the break in service.

[860] 29 C.F.R. § 825.110(d).

[861] CAL. CODE REGS. tit. 2, § 7297.0(e)(2).

[862] A federal district court has held that employee requests short of actually taking *leave* from work are not protected by the CFRA. *Reid v. SmithKline Beecham Corp.*, 366 F. Supp. 2d 989, 997 (S.D. Cal. 2005). In *Reid*, the plaintiff had requested to be excused from an out-of-town training class due to the recent birth of her child. The court held, however, that an employee's request to be excused from training, but not to actually take time off from work, did not constitute a request for CFRA-protected leave. 366 F. Supp. 2d at 996-97.

FY 2008 and FY 2010 NDAA, now also provides eligible employees with up to 26 workweeks of FMLA-qualifying family military leave in a single 12-month period.[863]

Spouses employed by the same employer, however, may be limited to a total of 12 workweeks of leave (*e.g.*, each spouse can take six workweeks) in connection with the birth, adoption or foster care of a child.[864] Except for pregnancy-related serious health conditions and family military leave that does not also qualify as CFRA leave, FMLA and CFRA run concurrently.

This 12-week period may include accrued sick leave taken to care for a sick family member under California Labor Code section 233. This statute—commonly referred to as "kin care"—provides that an employee must be permitted to use up to one-half of the employee's annually accrued sick leave to care for a covered relative. *Sick leave* includes any time, such as vacation, personal time, or paid time off, that could be used by the employee for the employee's own personal illness. *Covered family members* include the employee's child, parent, spouse, domestic partner, and child of the employee's domestic partner. Under this statute, *domestic partner* means an employee's domestic partner under a domestic partnership registered with the California Secretary of State. The statute, which permits time off to care for nonserious illness, injury, or medical condition, as well as a CFRA-covered or FMLA-covered *serious health condition*, specifically provides that the use of such sick leave does not increase the maximum amount of leave available under the CFRA or the FMLA.

FTDI provides for up to six weeks of paid benefits, not leave, in a 12-month period.[865] The six weeks run concurrently with the employee's right to leave, if any, under the CFRA and the FMLA.[866]

§ 3.4.5

E. MEASURING THE 12-MONTH PERIOD

California employers should select one of the following four methods for measuring the 12-month period in which 12 workweeks of family and medical leave may be taken:

1. a calendar year;
2. any fixed 12-month "leave year," such as a fiscal year, a year required by state law, or a year starting on an employee's "anniversary" date;
3. the 12-month period measured forward from the date an employee's first FMLA leave begins (the *forward method*); or

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[863] 29 C.F.R. §§ 825.112(a), 825.126, 825.127. The FMLA now permits the family of regular Armed Forces, Reserve and National Guard members to take up to 12 weeks of job-protected leave in a 12-month period for a qualifying exigency arising out of the active duty or call to active duty status of a spouse, son, daughter or parent. Additionally, the FMLA provides up to 26 workweeks of FMLA leave in a 12-month period to care for a servicemember or certain veterans with a serious injury or illness either incurred in the line of duty on active duty or aggravated during the servicemember's active duty ("Military Caregiver Leave") or a combination of Military Caregiver Leave and other types of FMLA leave. 29 C.F.R. §§ 825.112(a), 825.126, 825.127.

[864] CAL. GOV'T CODE § 12945.2(q).

[865] CAL. UNEMP. INS. CODE § 3301(d).

[866] CAL. UNEMP. INS. CODE § 3303.1(b).

4. a rolling 12-month period measured backward from the date an employee first takes a family and medical leave (the *rolling method*).[867]

The rolling method is the most advantageous to employers because it prevents employees from stacking leave at year-end. However, it can be an administrative problem for California employers. The problem stems from the fact that FMLA and CFRA leaves do not run concurrently in the case of a pregnancy-related condition. Thus, a pregnant employee's rolling 12-month period would begin on a different date for FMLA leave than for CFRA leave. This discrepancy can create administrative problems.

The method that appears to be the most advantageous in terms of recordkeeping and limiting the potential for stacking leave at year-end is the forward method. Under this method, the 12-month period is measured forward from the date an employee first takes an FMLA-qualifying leave. For example, if an employee first took an FMLA-qualifying leave on June 15, 2013, then that employee has until June 15, 2014, to take up to 12 workweeks of leave. The next 12-month period would begin the next time the employee takes an FMLA leave. Thus, if this employee takes another FMLA-qualifying leave on August 1, 2013, then the next 12-month period runs until August 1, 2014. Stacking leave is still a potential problem with the forward measuring method, but it is not as serious a problem as with the calendar and fiscal year methods.

The Ninth Circuit Court of Appeals has held that under the FMLA, the employer must inform its employees of which method of calculating the 12-month period it employs. In the absence of this information, a court will select the method most advantageous to employees, generally considered the calendar year method.[868]

§ 3.4.6

F. QUALIFYING REASONS FOR TAKING LEAVE

Both the CFRA and the FMLA provide leave to eligible employees for any of the following reasons:

- the birth of a child of the employee;
- the placement of a child with the employee for adoption or foster care;
- to provide care for the employee's child, spouse or parent who has a serious health condition; and
- the serious health condition of the employee that prevents the employee from working.[869]

Unlike the CFRA, the FMLA provides eligible employees with leave for the following additional reasons:

- to care for a *covered servicemember* with a serious injury or illness if the employee is the spouse, child, parent or next of kin of the servicemember; or

[867] CAL. CODE REGS. tit. 2, § 7297.3(b); 29 C.F.R. § 825.200(b).

[868] *Bachelder v. America West Airlines*, *Inc.*, 259 F.3d 1112, 1128 (9th Cir. 2001).

[869] 29 C.F.R. § 825.112(a).

- for a *qualifying exigency* arising out of the fact that the employee's spouse, son, daughter or parent is a covered military member on active duty (or has been notified of an impending call or order to active duty) in support of a contingency operation.[870]

The CFRA also differs from the FMLA in two other important respects. First, the CFRA excludes leave taken for conditions associated with pregnancy or childbirth.[871] Second, the CFRA includes an employee's registered "domestic partner" to the same extent that it covers an employee's spouse.

Child means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis* (in place of a parent) who is either under 18 years of age or is 18 years of age or older and incapable of self-care because of a mental or a physical disability.[872]

Parent is defined as a biological, foster or adoptive parent, stepparent, a legal guardian, or someone who stood *in loco parentis* to an employee when the employee was a child.[873]

Spouse is defined as a husband or wife, as defined by state law.[874] The CFRA's definition of *spouse* also includes an employee's "domestic partner," and entitles an eligible employee to take family or medical leave for an employee's domestic partner to the same extent that an employee is entitled to take leave for a spouse.[875] The expansion of the CFRA to include *domestic partners*, however, only applies to employees who registered their domestic partnerships with the California Secretary of State.[876] Additionally, employers contracting with the City and County of San Francisco or in other jurisdictions with domestic partner ordinances, may be required to extend family and medical leave benefits to *registered domestic partners* to the same extent as spouses.[877]

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[870] 29 C.F.R. § 825.112(a); 29 U.S.C. § 2612.

[871] CAL. GOV'T CODE § 12945.2(c)(3). Pregnancy-related disabilities are protected by a different California statute that provides up to four months of leave. CAL. GOV'T CODE § 12945. As a result, it is possible for an employee in California to take as long as the four months for pregnancy leave allowed under the Fair Employment and Housing Act, plus the 12 workweeks of family and medical leave provided by CFRA.

[872] CAL. GOV'T CODE § 12945.2(c)(1). *Son or daughter* for purposes of family military FMLA leave under the FY 2008 NDAA was expanded by the 2009 revised federal regulations to include a covered servicemember's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the servicemember stood in *loco parentis*, and who is of any age. 29 C.F.R. § 825.122(g), (h).

[873] CAL. GOV'T CODE § 12945.2(c)(7).

[874] CAL. CODE REGS. tit. 2, § 7297.0(p).

[875] CAL. FAM. CODE § 297.5(a). As part of the California Domestic Partner Rights and Responsibilities Act of 2003, the statute provides: "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." CAL. FAM. CODE § 297.5(a). Also, when California law relies upon federal law, as is the case with the CFRA, the Act requires that "registered domestic partners shall be treated by California law as if federal law recognized a domestic partnership in the same manner as California law." CAL. FAM. CODE § 297.5(e).

[876] CAL. FAM. CODE §§ 297, 297.5. In some instances, a registered domestic partnership from outside of California also may qualify. California Family Code section 299.2 provides: "A legal union of two persons of the same sex, other than a marriage, that was validly formed in another jurisdiction, and that is substantially equivalent to a domestic partnership as defined in this part, shall be recognized as a valid domestic partnership in this state regardless of whether it bears the name domestic partnership."

[877] *See, e.g.*, S.F. CAL., ADMIN. CODE ch. 12B *et seq.*; *see also Air Transport Ass'n of Am. v. City & County of S.F.*, 266 F.3d 1064, 1073 (9th Cir. 2001) (holding that federal law does not preempt local laws, such as the San Francisco ordinance that forbids employers from discriminating in the provision of employee benefits).

The FMLA and the CFRA permit an employee to take leave in order to provide care for a qualifying individual with a "serious health condition." They do *not* require an employee to demonstrate that no other caretakers are available before obtaining leave.[878] However, an employee is not eligible for California's FTDI benefits, available for leaves beginning on or after July 1, 2004, for a day when another family member is available to provide care.[879] Moreover, under the FMLA and the CFRA, the employee does not have to establish that the family member is unable to take care of *all* of his or her basic needs.[880]

The terms of the CFRA do not allow eligible employees to take leaves of absence for all emergencies involving family members.[881]

FTDI benefits will likely be available for time off because of the birth of a child to the employee or the employee's domestic partner, because of the placement of a child with the employee or the employee's domestic partner for adoption or foster care, or to care for a parent, child, spouse or domestic partner with a serious health condition. With FTDI, *domestic partner* also refers to a domestic partnership registered with the California Secretary of State.[882]

§ 3.4.7

G. WHAT QUALIFIES AS A SERIOUS HEALTH CONDITION?

Just about any medical condition can be a *serious health condition* as defined by the CFRA and the FMLA. As a result, employers are forced to determine whether an employee or an employee's covered relative has a serious health condition on a case-by-case basis. By definition, a *serious health condition* is an illness, injury, impairment or physical or mental condition that involves: (1) inpatient care (*i.e.*, an overnight stay) in a hospital, hospice or residential medical care facility; or (2) continuing treatment by (or under the supervision of) a health care provider.[883]

The CFRA incorporates the FMLA's definition of *serious health condition*, with one notable exception. Unlike the FMLA, the CFRA excludes pregnancy, childbirth and related medical conditions from the definition of a *serious health condition*.[884] A pregnant employee is thus

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[878] *Mora v. Chem-Tronics*, *Inc.*, 16 F. Supp. 2d 1192, 1206 (S.D. Cal. 1998) (rejecting the employer's argument that the employee/father was not needed to care for his son because his son's step-mother was a stay-at-home mom and/or hospice care may have sufficed).

[879] CAL. UNEMP. INS. CODE § 3302(e).

[880] *Scamihorn v. General Truck Drivers*, *Local 952*, 282 F.3d 1078 (9th Cir. 2002) (allowing claim to proceed when employee took leave to provide assistance and comfort to his severely depressed father following the murder of his sister). *Cf. Briones v. Genuine Parts Co*., 225 F. Supp. 2d 711 (E.D. La. 2002) (FMLA may protect the absence of a father to care for three healthy children to enable wife to visit hospitalized child).

[881] *Pang v. Beverly Hosp*., *Inc*., 79 Cal. App. 4th 986, 996 (2000) (absence of employee to assist elderly and ailing mother move to a new home not protected by CFRA because the assistance, *i.e.*, packing and instructing movers, was not providing or participating in medical care, and the psychological comfort offered by the employee's presence "was merely a collateral benefit"); *Marchisheck v. San Mateo County*, 199 F.3d 1068 (9th Cir. 1999) (mother who requested leave to take teen with history of emotional and behavioral issues, including recent drug use, to relative's house in the Philippines not entitled to FMLA-protected leave because she was not providing medical care).

[882] CAL. UNEMP. INS. CODE § 3302(d).

[883] CAL. GOV'T CODE § 12945.2(c)(8); CAL. CODE REGS. tit. 2, § 7297.0(o).

[884] CAL. GOV'T CODE § 12945.2(c)(8) and (s); CAL. CODE REGS. tit. 2, §§ 7297.0(o), 7297.6(b).

entitled to up to four months of pregnancy disability leave under California Government Code section 12945, plus an additional 12 workweeks of CFRA leave at the end of the employee's pregnancy disability leave or following the birth of the child, if she is eligible for leave under the CFRA.[885]

A serious health condition involving *continuing treatment* by a health care provider is defined by the CFRA regulations[886] as including: An illness, injury (including on-the-job injuries), impairment or physical or mental condition of the employee or a child, parent, spouse or domestic partner of the employee that involves either:

1. inpatient care (*i.e.*, an overnight stay) in a hospital, hospice or residential health care facility; or
2. continuing treatment or continuing supervision by a health care provider, as detailed in FMLA and its implementing regulations.[887]

The revised FMLA regulations clarified two of the six definitions that qualify as a serious health condition based on continuing treatment. First, the regulations provide that a serious health condition involving a period of incapacity of more than three consecutive, full calendar days must also include either: (1) two visits to a health care provider; or (2) treatment by a health care provider with at least one visit that results in a regimen of continuing treatment. The two visits to a health care provider must occur within 30 days of the start of the period of incapacity, and the first visit in either the "two visit" situation or the "regimen of continuing treatment" situation must occur within seven days of the start of the incapacity.[888]

Second, while the previous FMLA regulations provided that a serious health condition involving chronic conditions required periodic visits to a health care provider, they did not define *periodic visits*. The revised FMLA regulations clarify that *periodic visits* consist of at least two visits to a health care provider per year.[889]

The FMLA regulations also state that, unless complications arise, the common cold, the flu, earaches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems and periodontal disease are examples of conditions that do *not* meet the definition of a *serious health condition* and do *not* qualify for FMLA leave.[890] Additionally, the courts have ruled that individuals who quickly recovered from bronchitis or asthma were not incapacitated, and who received no continuing treatment by a health care provider did not have a serious health condition.[891] However, in determining whether a serious health

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[885] CAL. CODE REGS. tit. 2, § 7297.6(c).

[886] CAL. CODE REGS. tit. 2, § 7297.0(o).

[887] 29 C.F.R. § 825.114(a)(1)-(2).

[888] 29 C.F.R. § 825.115(a).

[889] 29 C.F.R. § 825.115(c).

[890] 29 C.F.R. § 825.113(d); *see also Flanagan v. Keller Prods*., *Inc*., 7 Wage & Hour Cas. 2d (BNA) 1087, 1088 (D.N.H. 2002) (employee who visited dentist seven times in one month for a chipped tooth and subsequent extraction not protected by the FMLA because her condition was a short-term, routine dental problem).

[891] *Cabrera v. Enesco Corp.*, 4 Wage & Hour Cas. 2d (BNA) 1592 (N.D. Ill. 1998); *Sakellarion v. Judge & Dolph, Ltd.*, 893 F. Supp. 800, 807 (N.D. Ill. 1995) (asthma is not a serious health condition).

condition exists, employers should exercise caution because the regulations do not present a hard and fast rule of conditions that do not meet the definition of a *serious health condition*.[892]

Courts have addressed the *period of incapacity* requirement under the FMLA, and correspondingly, the CFRA. The decisions held that, to satisfy the period-of-incapacity element, the employee must be required to remain off work based on a medical provider's assessment of the claimed condition.[893] This rule means that an employee's own judgment that he or she should not work is not sufficient to constitute a serious health condition under the FMLA. Rather, in order to have a serious health condition, a health care provider must determine that the employee cannot work (or could not have worked) because of the illness.[894] Uniformly, courts applying the FMLA have also required an actual showing of incapacity.[895]

A few cases have considered what conditions may constitute a "serious health condition" under the CFRA. In *Dudley v. Department of Transportation*,[896] the court observed that diabetes qualified as a serious health condition under the CFRA, in that the CFRA regulations incorporated the FMLA-implementing regulations by reference, and those regulations specifically included *diabetes* in their definition of *serious health condition*.[897] The court in *Waltmon v. Ecology and Environment, Inc.*,[898] determined that testimony by the plaintiff's doctor that the plaintiff had two diagnoses, "situationally induced depression with anxiety components" and "myofascial pain syndrome," demonstrated a genuine issue of material fact as to whether the plaintiff suffered from a serious health condition.[899] The definition of *serious health condition* under the FTDI is the same as under the CFRA.[900] An employee will likely be eligible for state paid benefits if the employee is providing psychological comfort or

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[892] *See*, *e.g.*, *Thorson v. Gemini*, *Inc.*, 998 F. Supp. 1034, 1038-39 (N.D. Iowa 1998), *judgment entered*, 96 F. Supp. 2d 882 (N.D. Iowa 1999), *aff'd*, 205 F.3d 370 (8th Cir. 2000) (holding that employee's peptic ulcer was a serious health condition because it caused the employee to miss at least four consecutive days of work, see a doctor at least two times during the absence, be prescribed medications, and undergo further testing, even though her diagnosis did not ultimately turn out to be a condition that is typically considered serious); *see also Miller v. AT&T Corp.*, 250 F.3d 820, 831-32 (4th Cir. 2001) (employee with flu had a serious health condition because she was incapacitated for more than three consecutive days and received treatment two or more times).

[893] *Olsen v. Ohio Edison Co.*, 979 F. Supp. 1159, 1166 (N.D. Ohio 1997); *Hodgens v. General Dynamics Corp.*, 963 F. Supp. 102, 106 (D.R.I. 1997), *aff'd on other grounds*, 144 F.3d 151 (1st Cir. 1998).

[894] *Olsen*, 979 F. Supp. at 1166.

[895] *Peterson v. Exide Corp.*, 123 F. Supp. 2d 1265, 1270 (D. Kan. 2000) (no "incapacity" where employee only missed two days of work, even though doctor's note said she would need to miss ten days); *Martyszenko v. Safeway*, *Inc.*, 120 F.3d 120, 123 (8th Cir. 1997) (where court held that consultation of an employee's child with a psychiatrist to determine the truth of sexual molestation allegations was not a serious health condition because the child was not incapacitated); *Hott v. VDO Yazaki Corp.*, 922 F. Supp. 1114, 1128 (W.D. Va. 1996) (noting incapacity requirement and granting employer summary judgment where condition would last ten days but where "the plaintiff was able to perform the functions of her position"); *Bauer v. Dayton-Walther Corp.*, 910 F. Supp. 306, 310 (E.D. Ky. 1996), *aff'd*, *Bauer v. Varity Dayton-Walther Corp.*, 118 F.3d 1109 (6th Cir. 1997) (no FMLA violation because employee was not incapacitated for more than three days).

[896] 90 Cal. App. 4th 255 (2001).

[897] 90 Cal. App. 4th at 263.

[898] 6 Wage & Hour Cas. 2d (BNA) 1588 (N.D. Cal. 2001).

[899] 6 Wage & Hour Cas. 2d (BNA) at 1599.

[900] CAL. UNEMP. INS. CODE § 3302(f).

arranging third-party care, as well as directly providing or participating in the family member's medical care.[901]

This summary should not be substituted for an actual reading of the complete definition of a *serious health condition* contained in the FMLA, the CFRA, their respective implementing regulations or under the FTDI program. Given the complexity in determining whether a serious health condition exists that qualifies for coverage under any of these provisions, the advice of employment law counsel is recommended when a determination is not clear.

§ 3.4.8

H. CERTIFICATION REQUIREMENTS & OPTIONS

When leave is requested for medical reasons, an employer may require that the employee provide certification from the health care provider of the person requiring care, whether the person with the medical condition is the employee or the employee's child, spouse, or parent.[902] The CFRA provides that a certification issued by a health care provider of an employee's spouse, child, or parent with a serious health condition shall be sufficient if it includes the following:

- certification that the patient has a *serious health condition* as defined by law;
- the date on which the serious health condition commenced;
- the probable duration of the condition;
- an estimate of the amount of time the health care provider believes the employee needs to care for the individual requiring care; and
- a statement that the serious health condition warrants the participation of the family member to provide care during a period of the treatment or supervision of the individual requiring care.[903]

The certification provided by a health care provider treating an employee's *own* serious health condition shall be sufficient if it includes the following:

1. certification that the employee has a *serious health condition* as defined by law;
2. the date on which the serious health condition commenced;
3. the probable duration of the condition; and
4. a statement that, due to the serious health condition, the employee is unable to perform the functions of his or her position.[904]

An employer is not permitted under the CFRA to ask the employee for more information.[905] One court has held that, if an employee's initial certification is sufficient to establish a serious health condition, then an employer may not deny leave based on a minor deficiency in the

[901] CAL. UNEMP. INS. CODE § 2708(b)(5).

[902] CAL. GOV'T CODE § 12945.2(j)(1) and (k)(1); CAL. CODE REGS. tit. 2, § 7297.0(a).

[903] CAL. GOV'T CODE § 12945.2(j)(1); CAL. CODE REGS. tit. 2, § 7297.0(a)(1).

[904] CAL. GOV'T CODE § 12945.2(k)(1); CAL. CODE REGS. tit. 2, § 7297.0(a)(2).

[905] CAL. CODE REGS. tit. 2, § 7297.4(b)(2)(A)(1).

certification form if the employer does not provide the employee with a reasonable opportunity to cure the deficiency.[906]

An employer may require that the employee submit the health care provider's certification within 15 calendar days, unless it is not practicable for the employee to do so, despite the employee's good faith efforts.[907] The FMLA-implementing regulations contain a similar provision.[908] However, the employer's deadline for submission of the completed certification may be equitably tolled.[909]

The federal regulations allow an employer to request, in addition to the information allowed by state law, a statement regarding the medical facts of the condition.[910] The CFRA does *not* allow an employer to request information that identifies the nature of the serious health condition involved.[911] This difference, no doubt, is a reflection of the California legislature's concern for an employee's privacy interests in his or her medical information.[912] Employers are thus advised to avoid requesting specific information concerning the nature or specific diagnosis of the medical condition.[913]

If the employer doubts the validity of the certification for leave due to a serious health condition of the employee, the employer may require a second opinion from a health care provider designated or approved by the employer.[914] Where the second opinion differs from the original certification, the employer may require the employee to obtain the opinion of a third health care provider designated or approved jointly by the employer and the employee.[915] Under the CFRA, an employer is not required to request a third opinion if the second opinion differs from the original certification. An employer that chooses not to utilize a third opinion does not forfeit any right to claim in subsequent litigation that the employee did not qualify for CFRA leave.[916] However, several federal courts have held otherwise under the FMLA,[917] and thus, employers also covered by the FMLA should

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[906] *See Sims v. Alameda-Contra Costa Transit Dist.*, 2 F. Supp. 2d 1253, 1266 (N.D. Cal. 1998); *see also* 29 C.F.R. §825.304(c).

[907] CAL. CODE REGS. tit. 2, § 7297.4(b)(3).

[908] 29 C.F.R. § 825.305(b) (". . . despite the employee's diligent, good faith efforts").

[909] *Waltmon Ecology & Environmental*, *Inc.*, 6 Wage & Hour Cas. 2d (BNA) 1588, 1597-98 (N.D. Cal. 2001) (deadline equitably tolled where the employee's doctor mailed the form and the employee telephoned daily for four days preceding the deadline to inquire whether it was received).

[910] 29 C.F.R. § 825.306(a)(3).

[911] CAL. CODE REGS. tit. 2, § 7297.0(a)(1), (2).

[912] *See*, *e.g.*, Confidentiality of Medical Information Act, CAL. CIV. CODE §§ 56 *et seq*.

[913] CAL. CODE REGS. tit. 2, § 7297.11.

[914] CAL. GOV'T CODE § 12945.2(k)(3); 29 U.S.C. § 2613(c); 29 C.F.R. § 825.307(b)(1); *see also* CAL. CODE REGS. tit. 2, § 7297.4(b)(2)(A).

[915] CAL. CODE REGS. tit. 2, § 7297.4(b)(2)(B); 29 C.F.R. § 825.307(c).

[916] *Lonicki v. Sutter Health Cent.*, 43 Cal. 4th 201, 212-13 (2008). However, the employer risks a lawsuit by the employee and the possibility that a court or jury may conclude that the employer violated the employee's rights under the CFRA and/or the FMLA.

[917] *See*, *e.g.*, *Sims v. Alameda-Contra Costa Transit Dist.*, 2 F. Supp. 2d 1253, 1260-63 (N.D. Cal. 1998) (employer that did not seek a second medical opinion after the employee submitted his certification form could not contest the certification's validity in a later civil action); *Wheeler v. Pioneer Dev. Servs., Inc.*, 349 F. Supp. 2d 158, 167 (D. Mass. 2004) (same); *Washington v. Fort James Operating Co.*, 110 F. Supp. 2d 1325, 1333-34 (D. Or. 2000) (certification from an employee's

seriously consider whether to seek the third opinion rather than face the risk of losing the right to contest the employee's eligibility under the FMLA.

If an employer requires a second or third opinion, the employer must bear the costs of those opinions. The opinion of the third provider is final and binding on both parties.[918] Upon the request of the employee, the employer must provide a copy of the second and third opinions, where applicable, without cost.[919] Unlike the FMLA, which allows an employer to request second and third opinions as to the serious health condition of the employee's family member, the CFRA permits an employer to require a second and third opinion only to verify the serious health condition of an employee.[920] Employers covered by the CFRA should thus only request second or third opinions to verify an employee's own serious health condition.

Both the CFRA and the FMLA provide that an employee on leave because of a serious health condition may be required to submit a release prior to reinstatement.[921] Like the federal regulations, the CFRA regulations provide that such a fitness-for-duty certification may be required only if the employer has a uniformly applied policy or practice.[922] The certification may only relate to the condition that was the basis for the leave.

Any requirement that an employee obtain a fitness-for-duty certification must be clearly explained to the employee in the employer's notice to the employee designating the leave as FMLA-qualifying ("designation notice"). The revised FMLA regulations provide that an employer may require that the certification address specifically the employee's ability to perform the essential functions of his or her job. In order for an employer to do so, the employer must provide notice of this requirement and provide the employee with a list of the essential functions of his or her job at the time the employee is provided with the designation notice.[923] However, if the employer's handbook or other written documents describing the employer's leave policies clearly provide that a fitness-for-duty certification will be required in specific circumstances (*e.g.*, by stating that fitness-for-duty certification will be required in all cases of back injuries for employees in a certain occupation), the employer need only provide oral notice of this requirement no later than at the time it provides the employee with the designation notice.[924]

A second or third fitness-for-duty certification may not be required.[925]An employer may require recertification of the serious health condition of the employee or the employee's spouse, child, or parent upon the expiration of the leave, if additional leave is required.[926]

The FMLA regulations allow employers to require recertification in connection with an absence no more than once every 30 days. Where the medical certification indicates that the

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physician, without a second or third opinion at the request of the employer, is *prima facie* proof that the employee's absence resulted from a serious health condition).

[918] CAL. CODE REGS. tit. 2, § 7297.4(b)(2)(C); 29 C.F.R. § 825.307(c).

[919] CAL. CODE REGS. tit. 2, § 7297.4(b)(2)(D); 29 C.F.R. § 825.307(d).

[920] CAL. GOV'T CODE § 12945.2(k)(3).

[921] 29 U.S.C. § 2614(a)(4); CAL. GOV'T CODE § 12945.2(k)(4).

[922] CAL. CODE REGS. tit. 2, § 7297.4(b)(2)(E); 29 C.F.R. § 825.312.

[923] 29 C.F.R. §§ 825.300(d)(3); 825.312(d).

[924] 29 C.F.R. § 825.300(d)(3).

[925] 29 C.F.R. § 825.312(b).

[926] CAL. GOV'T CODE § 12945.2(j)(2),(k)(2); CAL. CODE REGS. tit. 2, § 7297.4(b)(1), (2).

duration of the condition is more than 30 days, the employer must wait until that minimum time frame expires before requesting a recertification. However, an employer can request recertification more often than every 30 days if the employee requests an extension of leave or circumstances in the previous certification have changed significantly.[927] The California requirement, however, is arguably more favorable to employees. California employers should require recertification only when additional leave is needed.

§ 3.4.9

I. MINIMUM DURATION OF LEAVE

Another area where California and federal law diverge relates to the minimum duration of leave taken for the birth, adoption, or foster care placement of a child. The FMLA requires that such leave be taken in one block of time, unless the employer agrees otherwise.[928] The CFRA, on the other hand, states that the basic minimum duration of such leave is two weeks; however, an employer is required to grant a request for such leave in increments of at least one day, but less than two weeks, on any two occasions.[929] California employers should follow the CFRA as it is more generous in this regard. The FMLA and the CFRA do agree, however, that all such leave must be concluded within the 12-month period following the birth or placement of the child with the employee.[930]

§ 3.4.10

J. INTERMITTENT LEAVE & REDUCED SCHEDULES

Leave due to a serious health condition may be taken intermittently or on a reduced schedule only when medically necessary.[931] *Intermittent leave* is defined in the federal regulations as leave taken in separate blocks of time (rather than for one continuous period of time) because of a single illness or injury and may include leave periods from one hour or more to several weeks.[932] Intermittent leave includes leave taken on an occasional basis over a period of months to undergo chemotherapy treatments, or for prenatal treatments, or severe morning sickness.[933] When planning medical treatment requiring intermittent leave, the FMLA regulations require the employee to consult with the employer.[934] Additionally, the employee

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[927] 29 C.F.R. § 825.308.

[928] 29 C.F.R. § 825.202(c).

[929] CAL. CODE REGS. tit. 2, § 7297.3(d).

[930] CAL. CODE REGS. tit. 2, § 7297.3(d).

[931] CAL. CODE REGS. tit. 2, § 7297.3(e). *But see Reid v. Smithkline Beecham Corp*., 366 F. Supp. 2d 989, 996, n.5 (S.D. Cal. 2005) ("[w]hile a CFRA eligible employee may take reduced schedule leave for the employee's, parent's or child's serious health condition, leaves for reason of a child's birth are strictly limited and do not include reduced schedule leave. *But see* CAL. CODE OF REGS. tit. 2, §§ 7297.3(d), 7297.3(e)(1) (reduced schedule leave allowed for serious health conditions)").

[932] 29 C.F.R. § 825.202(a); s*ee also Mora v. Chem-Tronics*, *Inc.*, 16 F. Supp. 2d 1192, 1206 (S.D. Cal. 1998) (employee may take leave intermittently if care responsibilities are shared with another member of the family).

[933] 29 C.F.R. § 825.202(b)(1).

[934] *See Mora v. Chem-Tronics, Inc*., 16 F. Supp. 2d 1192, 1218 (S.D. Cal. 1998) (employee failed to comply with requirement to notify the employer within two business days of returning to work of the reason for the leave); *Kaylor v. Fannin Reg'l Hosp.*, 946 F. Supp. 988 (N.D. Ga. 1997) (employer did not violate FMLA by denying an employee with degenerative back disease the day off after receiving only four days notice of his doctor's appointment and requesting that the employee reschedule his appointment).

must make a reasonable effort to reschedule when an appointment may unduly disrupt the employer's operations, subject to the approval of the health care provider.[935] Both the text of the FMLA and its legislative history indicate that the cooperation of the employee and employer in scheduling intermittent leave is vital in implementing the goals of the FMLA.

A *reduced leave schedule* is a leave schedule that reduces an employee's usual number of working hours per workweek or hours per workday.[936] For example, an employee recovering from a serious health condition may only work part time because he or she is not yet strong enough to return to a full-time schedule.[937]

If an employee requests intermittent leave or leave on a reduced leave schedule based on planned medical treatment, an employer may require that the employee transfer temporarily to an available alternative position with equivalent pay and benefits that accommodates recurring periods of leave better than the regular position of the employee. While the alternative position must be one of equivalent pay and benefits, it is not necessary that it be one of equivalent duties.[938]

The FMLA contains special rules concerning the timing of leave for local educational agencies and elementary and secondary school instructional employees, which are discussed more fully in THE NATIONAL EMPLOYER®. The CFRA contains no specific restrictions on the duration or timing of leave taken by instructional employees.[939]

§ 3.4.11

K. EMPLOYEE NOTICE & REQUEST FOR LEAVE REQUIREMENTS

An employee requesting leave need not expressly assert rights or even mention the CFRA in order to be eligible for such leave.[940] An employee is obligated only to provide enough information for the employer to be able to determine that the need qualifies as CFRA leave.

While an employee requesting leave need not expressly assert rights under the CFRA, or even mention the FMLA/CFRA in order to be eligible for such leave, some notice is required. A California Court of Appeal has held that an employee must give his or her employer sufficient notice that he or she has a serious health condition in order to be entitled to leave.[941] In *Gibbs v. American Airlines, Inc.*,[942] the employee resigned after she was criticized for taking four days of sick time because of flu-like symptoms. Three months later, the plaintiff was diagnosed with fibromyalgia. The court held that the employer had not violated the CFRA because the employee had not provided management with sufficient notice that she

[935] 29 U.S.C. § 2612(e)(2)(A); 29 C.F.R. § 825.302(f).

[936] 29 C.F.R. § 825.202(a).

[937] An employee who cannot otherwise perform the essential functions of his or her job, apart from the inability to work a full-time schedule, is not entitled to intermittent or reduced schedule leave. *Hatchett v. Philander Smith Coll.*, 251 F.3d 670, 676-77 (8th Cir. 2001).

[938] CAL. CODE REGS. tit. 2, § 7297.3(e)(1).

[939] CAL. CODE REGS. tit. 2, § 7297.3(e)(2).

[940] CAL. CODE REGS. tit. 2, § 7297.4(a)(1).

[941] *Gibbs v. American Airlines, Inc.*, 74 Cal. App. 4th 1 (1999).

[942] 74 Cal. App. 4th 1.

was seeking a CFRA-covered leave. The court held that the employee's request for sick time because of flu-like symptoms did not place the employer on notice that the employee might have a serious health condition that would be covered by the CFRA.[943] However, in a case involving a medical emergency, notice on a preprinted form that an employee was hospitalized could be sufficient to inform an employer of a "serious medical condition."[944]

An employer is not expected to infer that an employee has a serious health condition because of past problems when the employee does not provide sufficient information to put the employer on notice that he or she is requesting FMLA-qualifying leave.[945] A request for leave to care for another family member must make clear that the request is for the purpose of providing care to that individual. In one case, the California Court of Appeal held that a written memo merely requesting vacation time to visit parents, even though the memo stated that their health had deteriorated, was insufficient to trigger the protection of the CFRA because it gave no indication that the leave was to provide care to the employee's parents.[946]

Where the employer does not have sufficient information about the reasons for an employee's need for leave, and the employee has not requested to use accrued paid time off (*e.g.*, sick leave or vacation), the employer should inquire further to ascertain whether the leave is potentially CFRA-qualifying.[947] If the employee requests paid time off, however, the CFRA regulations state that the employer may *not* ask whether the employee is taking the time off for a CFRA-qualifying purpose.[948] The FMLA regulations state that an employer may elicit information only as to the reasons for the employee's leave from the employee or the employee's spokesperson who notified the employer that leave was needed.[949] Employers must also be cognizant of an employee's privacy rights, as well as the protections afforded under the Americans with Disabilities Act and the disability provisions of California's Fair Employment and Housing Act (FEHA), when making such inquiries. However, an employee who refuses to provide further information to his employer about the purpose of a leave is not entitled to the protections of the FMLA or the CFRA.[950]

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[943] 74 Cal. App. 4th 1; *see also Boisvert v. Wal-Mart Stores*, *Inc.*, 6 Wage & Hour Cas. 2d (BNA) 1275 (D.N.H. 2001) (employee who never told his supervisor the reason for his tardiness and absences did not invoke the FMLA, even though he later claimed that the reason was to care for his ill, bed-ridden mother).

[944] *Avila v. Continental Airlines, Inc.*, 165 Cal. App. 4th 1237 (2008).

[945] *Niese v. General Elec. Co*., 6 Wage & Hour Cas. 2d (BNA) 1578, 1585 (S.D. Ind. 2001) (employee with a history of depression stated only that she needed a leave for "Personal Problems & Child Care issues" on the day she requested leave); *see also Collins v. NTN-Bower Corp*., 272 F.3d 1006 (7th Cir. 2001) (depressed employee did not provide sufficient notice where she reported that she would not be at work because she was "sick," and never mentioned to her employer that she suffered from depression). *But see Spangler v. Federal Home Loan Bank of Des Moines*, 278 F.3d 847, 852 (8th Cir. 2002) (employee who had taken FMLA-protected leaves in the past to obtain treatment for depression provided adequate notice to her employer when she reported she would be absent from work because of "depression again").

[946] *Stevens v. Department of Corr.*, 107 Cal. App. 4th 285, 293 (2003).

[947] CAL. CODE REGS. tit. 2, § 7297.4(a)(1).

[948] CAL. CODE REGS. tit. 2, § 7297.5(b)(2)(A).

[949] 29 C.F.R. § 825.301(a).

[950] *McCarron v. British Telecom*, 2002 U.S. Dist. LEXIS 15151 (E.D. Pa. Aug. 7, 2002) (employee left voicemail message for human resources manager that he needed time off to deal with a "family situation," and failed to respond to subsequent messages from manager requesting further information); *see also* CAL. CODE REGS. tit. 2, § 7297.5(b)(2)(A).

Under the FMLA, an employer may require that an employee needing family and medical leave follow the same rules and procedures that are required of employees taking other types of leave.[951] If an employee fails to comply with these rules and procedures, absent unusual circumstances, his or her employer may delay or deny FMLA-qualifying leave. The FMLA regulations provide that an example of an unusual circumstance would include a situation where the employer's policy requires requests for leave to be made by contacting a call-in number, and a requesting employee calls that number but it is not answered and the voice mail box is full.[952] However, the employee's FMLA-protected leave may not be delayed or denied if the employer's policy requires notice earlier than the 30-days' notice required under the FMLA for leave that is foreseeable.[953] Once an employee provides "verbal notice sufficient to make the employer aware" that the employee needs CFRA-qualifying leave, the anticipated timing of the leave, and the duration of the leave, the leave must be granted.[954]

Where the necessity for leave is foreseeable based on an expected birth, placement for adoption, or foster care of a son or daughter, or if the leave is foreseeable based on planned medical treatment, the employee is required to provide at least 30-days' notice. If the need for leave was not foreseeable, or there was a change in circumstances, then notice must be provided as soon as practicable.[955] The FMLA regulations provide that if an employee becomes aware of the need for FMLA-qualifying leave less than 30 days in advance, it should be practicable for him or her to provide notice the same day or the next business day. However, in all cases, the determination of when an employee may practicably provide notice must take into account the individual facts and circumstances.[956] Even if no advance notice is given, employers cannot deny leave if the need for leave is due to an emergency, or is otherwise unforeseeable.[957]

Family and medical leave may be granted absent 30-days' notice to the employer, if there is a change in circumstances that prevents the employee from providing such advance warning.[958] In interpreting *change in circumstances*, one court held that a change in circumstance need not be medically related or a medical emergency.[959] The federal regulations provide that if an employee fails to give 30-days' notice when the leave is foreseeable, the employer may delay the start of the leave until at least 30 days after the date the employee provides notice to the employer of the need for the leave.[960] If an employee's leave is to be delayed because of lack of required notice, the employee must have had actual notice of the CFRA notice requirements.[961]

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[951] 29 C.F.R. § 825.302(d).

[952] 29 C.F.R. § 825.302(d).

[953] 29 C.F.R. § 825.302(d).

[954] 29 C.F.R. § 825.302(c); CAL. CODE REGS. tit. 2, § 7297.4(a)(1).

[955] CAL. CODE REGS. tit. 2, § 7297.4(a)(2), (3).

[956] 29 C.F.R. § 825.302(b).

[957] CAL. CODE REGS. tit. 2, § 7297.4(a)(4).

[958] 29 C.F.R. § 825.302(a).

[959] *Hopson v. Quitman Country Hosp. & Nursing Home*, 126 F.3d 635, 639 (5th Cir. 1997) (holding that a straightforward reading of *change in circumstances* means that the change need not be medically-related where employer refused to reschedule leave when employee changed date of surgery so it would still be covered by her health insurance).

[960] 29 C.F.R. § 825.304(b).

[961] CAL. CODE REGS. tit. 2, § 7297.4(a)(5).

§ 3.4.12

L. DESIGNATION OF LEAVE & NOTICE TO EMPLOYEE

Under all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as CFRA-qualifying, based on information provided by the employee.[962] Under the 2009 revisions to the FMLA regulations, an employee must be notified that a leave will be charged as FMLA leave within five business days from the time the employer has enough information to determine whether the leave is being taken for an FMLA-qualifying reason.[963] The CFRA regulations allow an employer up to ten business days to respond to a leave request.[964] Because the five-business-day notice would likely be found to be the more generous provision, California employers should inform employees whether they will be charged with CFRA/FMLA leave within the FMLA's five-business-day requirement.

The designation notice must be in writing, absent extenuating circumstances.[965] The designation notice must include the following:

- If it is determined that the leave does not qualify as FMLA leave, the employer must inform the employee of that determination and the reasons for the determination.
- To the extent known at the time, the amount of leave time that will be counted against the employee's FMLA leave entitlement.
- Any mandatory substitution of paid leave, which will run concurrently with the employee's FMLA entitlement.
- If the employer will require the employee to present a fitness-for-duty certification upon return from FMLA leave, the employer must provide notice of this requirement.[966] Also, the employer must provide a list of the essential functions of the employee's job if the employer will require that the fitness-for-duty certification address the employee's ability to perform the essential functions of the employee's position.[967]

Employers are also responsible for communicating employee eligibility for FMLA leave (*eligibility notice*). When an employee requests FMLA leave or the employer becomes aware that an employee's leave may qualify as FMLA leave, the employer is required to inform the employee, "orally or in writing," of his or her FMLA eligibility within five business days, absent extenuating circumstances.[968] The eligibility notice must inform the employee whether

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[962] CAL. CODE REGS. tit. 2, § 7297.4(a)(1)(A).

[963] 29 C.F.R. § 825.300(d).

[964] CAL. CODE REGS. tit. 2, § 7297.4(a)(6).

[965] 29 C.F.R. § 825.300(d)(4).

[966] 29 C.F.R. § 825.300(d)(3). Only "oral notice" of this requirement is required at the time the employer provides the employee with the designation notice if the employer's handbook or other written document (if any) describing the employer's leave policies clearly provide that a fitness-for-duty certification will be required in specific circumstances (*e.g.*, stating that fitness-for-duty certification will be required in all cases of back injuries for all employees in a certain occupation).

[967] 29 C.F.R. § 825.300(d).

[968] 29 C.F.R. § 825.300(b).

he or she is eligible for FMLA leave, and if not, it must provide at least one reason why the employee is not eligible.[969]

The revised FMLA regulations also now require employers to separate the notice of rights and responsibilities from the eligibility notice, although its contents do not impose any additional substantive notice requirements on employers.[970] The notice of rights and responsibilities serves to inform employees of their obligations and expectations while on FMLA leave and must be provided to employees at the same time employees are provided their eligibility notice. This notice must be in writing and must be provided at the same time employees receive their eligibility notice. This notice must include, as appropriate:

- that the leave, if approved, will be counted against the employee's FMLA entitlement;
- whether the employee is required to provide certification of a serious health condition;[971]
- the employee's right to substitute paid leave, or whether the employee will be required to substitute paid leave;
- the employee's right to maintenance of benefits during the leave and restoration to the same benefits upon return from leave;
- any requirement for the employee to make premium payments for health care benefits, the process for making payments, and the consequences if the employee fails to make the payments;
- the employee's potential liability for payments of employer-paid health care premiums if the employee fails to return to work at the end of the leave; and
- if the employee is a *key employee*, the circumstances under which restoration of the employee's job may be denied.[972]

The CFRA regulation explaining employer notice requirements states that employers may not retroactively designate leave as CFRA leave after the employee has returned to work except under those same circumstances provided for in the FMLA and its implementing regulations.[973] Prior to the DOL's 2009 revisions of the FMLA regulations, the regulations and supporting case law held that if the employer failed to notify the employee that he or she is using FMLA leave, the leave could not count against the employee's FMLA entitlement. Moreover, they held that the employer could not retroactively designate the employee's leave as FMLA leave.

However, the U.S. Supreme Court rejected this expansive interpretation of the FMLA, holding that an employee is entitled to a maximum of 12 workweeks of leave, regardless of whether there was a timely designation by the employer.[974] The Supreme Court's ruling is reflected in the 2009 FMLA regulations, which provide that retroactive designation of leave

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[969] 29 C.F.R. § 825.300(b).

[970] 29 C.F.R. § 825.300(c).

[971] The notice must also inform employees that certification of a serious injury or illness or a qualifying exigency is required if family military leave is requested.

[972] 29 C.F.R. § 825.300(c).

[973] CAL. CODE REGS. tit. 2, § 7297.4(a)(1)(B).

[974] *Ragsdale v. Wolverine Worldwide*, *Inc.*, 535 U.S. 81, 89 (2002) (holding that 29 C.F.R. § 825.700(a) is contrary to the FMLA).

as counting towards an employee's FMLA entitlement can be appropriate in certain circumstances. If the employer's retroactive designation is accompanied by a notice to the employee (as specified elsewhere in the regulations),[975] and takes place only where it does not cause harm or injury to the employee, such retroactive designation is proper.[976] Alternatively, the federal regulations allow the employee and employer to mutually agree on the retroactive designation.[977]

The former FMLA regulations also appeared to grant FMLA eligibility to an otherwise ineligible employee (*e.g.*, the employee does satisfy the 12-month/1,250-hour requirement) where the employer failed to designate the leave in a timely manner. The revised regulations clarify that an employer's failure to designate leave does not grant an ineligible employee eligibility. Rather, if the employer's failure causes the employee harm, it may constitute an interference with, restraint of, or denial of the employee's FMLA rights. Consequently, such a failure can result in an award of compensation and wages lost as a result of the violation, for other actual monetary losses directly caused by the violation, and certain forms of equitable relief (*e.g.*, employment, reinstatement, promotion).[978]

§ 3.4.13

M. REINSTATEMENT OBLIGATIONS

An employer must reinstate an employee returning from family and medical leave to the same or to a comparable position.[979] This term has the same meaning as "equivalent position" under the FMLA.[980] *Equivalent* means that the position must be "virtually identical" to the original position in terms of pay, benefits, and working conditions.[981] It must also involve the same or substantially similar duties and responsibilities entailing substantially equivalent skills, effort, responsibility, and authority.[982] However, nothing in the FMLA indicates that an employer is required to hold open a position to which an employee on leave has unequivocally stated that he or she does not wish to return.[983] An employee on FMLA leave is also subject to layoff just as if the employee had not gone on leave. For a more detailed discussion regarding reinstatement obligations, see THE NATIONAL EMPLOYER®.

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[975] The requirements for proper notice are provided in 29 C.F.R. § 825.300.

[976] 29 C.F.R. § 825.301(d).

[977] 29 C.F.R. § 825.301(d).

[978] 29 C.F.R. § 825.301(e).

[979] CAL. GOV'T CODE § 12945.2(a). However, the California Court of Appeal held that there is no obligation under the CFRA that an employer provide accommodations to an employee in order to reinstate the employee to his or her former position within the 12-week period. *Neisendorf v. Levi Strauss & Co.*, 143 Cal. App. 4th 509, 518 (2006). This reasoning finds support in cases decided under the FMLA holding that an employer does not violate the FMLA when it terminates an employee who is unable to return to work at the conclusion of the 12-week period of statutory leave. *See*, *e.g.*, *Cehrs v. Northeast Ohio Alzheimer's Research Center*, 155 F.3d 775, 784-85 (6th Cir. 1998).

[980] 29 C.F.R. § 825.215(a); CAL. CODE REGS. tit. 2, § 7297.0(g).

[981] CAL. CODE REGS. tit. 2, § 7297.0(g); 29 C.F.R. § 825.215.

[982] CAL. CODE REGS. tit. 2, § 7297.0(g).

[983] *Santrizos v. Aramark Corp.*, 1998 U.S. Dist. LEXIS 15946, at **21-22 (N.D. Ill. Sept. 28, 1998) (employer did not violate FMLA by refusing to return employee to same position when employee expressed her intention not to return to same position and did not tell any of her managers that she would be willing to return to same position until her position was already filled by another employee).

An employer may refuse to reinstate certain highly compensated *key* employees from a family and medical leave if the following conditions are met:

1. the employer determines that denying restoration is necessary to prevent substantial and grievous economic injury to the operations of the employer;
2. the employer notifies the employee of its intent to deny restoration at the time the employer determines that substantial and grievous economic injury would occur; and
3. in any situation in which leave has commenced, the employee elects not to return to employment after receiving such notice.[984]

This exemption applies only to salaried employees who are among the highest paid 10% of employees employed by the employer within 75 miles of the facility at which the employee works.[985] The FMLA regulations provide that employees must be notified in writing of their status as key employees at the time the leave is requested.[986] Employers are advised to consult legal counsel before denying reinstatement to a *key* employee in order to be certain that the requirements of the regulations have been met.

The FMLA regulations provide that an employee is entitled to any unconditional pay increases that may have been given during the leave period, such as cost-of-living increases.[987] Other increases that are conditioned upon seniority and the like, must be granted only to the extent that it is the employer's policy to do so with respect to employees on other unpaid leaves. Additionally, at the end of an employee's family and medical leave, benefits must be resumed in the same manner and at the same level as were provided when leave began, subject to any changes in benefit levels that may have taken place during leave that affected the entire workforce.[988] These provisions provide employees with greater benefits than the CFRA and should therefore be followed by employers covered by both the CFRA and the FMLA.

The FTDI program does not contain an express requirement for a leave of absence or an automatic right to reinstatement when an employee's leave of absence is not covered by the FMLA or the CFRA. However, if a smaller employer terminated an employee for taking a leave of absence while receiving FTDI benefits, or failed to reinstate the employee following the leave, it is an open issue whether the employee might be able to state a claim for termination in violation of public policy.

§ 3.4.14

N. COMPENSATION DURING LEAVE

Family and medical leave may be unpaid under both the CFRA and the FMLA.[989] Indeed, the California Court of Appeal has recognized that the "only unconditional entitlement in the

[984] CAL. GOV'T CODE § 12945.2(r); CAL. CODE REGS. tit. 2, § 7297.2(c)(2).

[985] CAL. GOV'T CODE § 12945.2(r); CAL. CODE REGS. tit. 2, § 7297.2(c)(2).

[986] 29 C.F.R. § 825.219(a); *Panza v. Grappone Cos.*, 6 Wage & Hour Cas. 2d (BNA) 843 (D.N.H. 2000) (key employee defense unavailable due to lack of notice).

[987] 29 C.F.R. § 825.215(c).

[988] 29 C.F.R. § 825.215(d)(1); CAL. CODE REGS. tit. 2, § 7297.5(e).

[989] 29 U.S.C. § 2612(c); CAL. GOV'T CODE § 12945.2(d).

family leave act is for unpaid time off."[990] However, an employee taking a family or medical leave may elect, or the employer may require, that an employee substitute any of the employee's accrued vacation leave concurrently with the otherwise unpaid period of the leave.[991] Nonetheless, an employer may not unilaterally substitute an employee's accrued paid vacation for any part of the employee's FMLA leave without giving the employee notice of this substitution.[992] If an employee takes leave because of the employee's own serious health condition, the employee may elect, or the employer may require, that the employee substitute accrued sick leave during the period of the leave.[993]

Although the CFRA initially provided that an employee shall not use sick leave during a period of leave in connection with the birth, adoption, or foster care of a child or to care for a child, parent, or spouse with a serious health condition unless mutually agreed to by the employer and the employee,[994] under California Labor Code section 233, an employee has the right to use up to one-half of his or her annual accrued sick time to care for a sick child, parent, spouse, registered domestic partner, or child of the employee's registered domestic partner. Otherwise, whether or not an employee may be paid for any time off on CFRA leave depends on what has been agreed upon between the employer and employee.[995]

Employees eligible for FMLA/CFRA will likely also be eligible for paid benefits through California's SDI and FTDI benefit programs. Employees should apply for such benefits through the Employment Development Department.

§ 3.4.15

O. BENEFITS – CONTINUED HEALTH INSURANCE COVERAGE

Perhaps the greatest impact of family and medical leave relates to health benefits. Under both state and federal law, employers are required to maintain coverage under any group health plan[996] for up to 12 workweeks per 12-month period, at the level and under the conditions of coverage as if the employee had not taken leave.[997] This includes dental, eye care, family-member coverage, etc., if provided under the employer's group health plan.[998]

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[990] *Department of Fair Emp't & Hous. v. Verizon Cal., Inc.*, 108 Cal. App. 4th 160, 171 (2003); *accord Neisendorf v. Levi Strauss & Co.*, 143 Cal. App. 4th 509, 517 n. 4 (2006).

[991] CAL. GOV'T CODE § 12945.2(e); CAL. CODE REGS. tit. 2, § 7297.5(b).

[992] *Cline v. Wal-Mart Stores*, 144 F.3d 294, 301 (4th Cir. 1998) (in the absence of proper notice that the employer was substituting the employee's accrued vacation for part of his FMLA leave, the employee was entitled to 12 workweeks of FMLA leave plus five days of paid vacation leave, for a total of almost 13 weeks of protected leave).

[993] CAL. GOV'T CODE § 12945.2(e); CAL. CODE REGS. tit. 2, § 7297.5(b).

[994] CAL. GOV'T CODE § 12945.2(e); CAL. CODE REGS. tit. 2, § 7297.5(b).

[995] *Verizon Cal.*, 108 Cal. App. 4th at 171 (holding that CFRA only entitles an employee to unpaid leave and "if an employee wants to be paid for it, then someone must ascertain what has been negotiated between the employer and employee").

[996] Both Acts define *group health plan* by reference to section 5000(b)(1) of the Internal Revenue Code. That section provides that *group health plan* means "any plan of, or contributed to by, an employer (including a self-insured plan) to provide health care (directly or otherwise) to the employer's employees, former employees, or the families of such employees or former employees."

[997] 29 U.S.C. § 2614(c)(1); CAL. GOV'T CODE § 12945.2(f)(1).

[998] CAL. CODE REGS. tit. 2, § 7297.5(c)(3).

Employers must continue to pay health insurance premiums as though the employee had continued working. For example, if an employer pays 50% of the health insurance premium, then the employer must continue to pay 50% during an employee's family and medical leave. The employer may, however, recover the premium the employer paid for any coverage if the employee fails to return from leave at the expiration of the leave for reasons other than the continuation, recurrence, or onset of a serious health condition or because of "other circumstances beyond the control of the employee."[999] Employers that require premium payments from employees must notify an employee taking family and medical leave of the procedure for paying the premiums during the leave.[1000] If the employee fails to make the payment, then the employer may have the right to end the coverage. However, the health insurance must be reinstated immediately upon the employee's return to work.[1001] This requirement may pose practical problems with the insurance carrier. Thus, employers are advised to consult legal counsel if an employee fails to make insurance premium payments.

Employees on family and medical leave are entitled to any new health plans or benefits or changes in health benefits to the same extent as if they had continued working.[1002] Additionally, even if an employee chooses not to retain health coverage during CFRA leave, the employee is entitled to the reinstatement of health coverage on the same terms as existed prior to taking the leave.[1003]

As noted above, the pregnancy disability regulations require that if the employee is eligible for FMLA/CFRA leave, then the employer may be obligated to continue the employee's health insurance coverage for up to 29⅓ workweeks. This assumes that the employee is disabled by pregnancy for four months (the working days in 17⅓ weeks) and then requests, and is eligible for, a 12-week CFRA leave for reason of the birth of her child to the same extent as if the employee had continued working.[1004]

An employee is entitled to continue life, disability and/or accident insurance or other types of benefits during CFRA leave to the same extent and under the same conditions as apply to an unpaid leave taken for other reasons.[1005] If the employer has no policy with regard to the continuation of benefits, the employer may require an employee on family and medical leave to pay premiums as a condition of continued coverage.[1006] The nonpayment of premiums by an employee shall not constitute a break in service for purposes of any employee benefit plan.[1007]

Upon return from a family and medical leave, employees may not be required to requalify for any benefits for which the employee was qualified prior to the beginning of the leave.[1008] For example, an employee covered by a life insurance policy before taking leave whose coverage

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[999] CAL. CODE REGS. tit. 2, § 7297.5(c)(5).

[1000] 29 C.F.R. § 825.210(d).

[1001] 29 C.F.R. § 825.212(a)(1), (c).

[1002] 29 C.F.R. § 825.209(c).

[1003] CAL. CODE REGS. tit. 2, § 7297.5(f).

[1004] CAL. CODE REGS. tit. 2, § 7291.11(c)(1).

[1005] CAL. GOV'T CODE § 12945.2(f)(2); CAL. CODE REGS. tit. 2, § 7297.5(d).

[1006] CAL. GOV'T CODE § 12945.2(f)(2); CAL. CODE REGS. tit. 2, § 7297.5(e).

[1007] CAL. GOV'T CODE § 12945.2(f)(2).

[1008] CAL. CODE REGS. tit. 2, § 7297.5(f).

lapses pursuant to the terms of the policy during the period of unpaid family and medical leave may not be required to meet any qualifications such as a physical examination in order to requalify for life insurance upon return from leave. Employers should note that it may be necessary to modify the life insurance and other benefit programs in order to restore employees to equivalent benefits upon return from a family and medical leave. Employers may also need to make arrangements for continued payments to maintain such benefits during uncovered leave or make payments subject to recovery from the employee upon return from such leave.

With respect to pensions and other retirement plans, any period of family and medical leave will be treated as continued service for purposes of vesting and eligibility to participate.[1009] For example, if a plan requires an employee to be working on a specific date in order to be credited with a year of service for vesting or participation purposes, an employee on family and medical leave who subsequently returns to work shall be deemed to have been working on that date. An employer is not required to make plan payments during a leave and the leave shall not be required to be counted for purposes of time accrued under the plan.[1010] An employee may elect to make contributions during a leave.[1011]

§ 3.4.16

P. SENIORITY

CFRA leave does not constitute a break in service for purposes of seniority or any employee benefit plan.[1012] An employee returning from CFRA leave is entitled to reinstatement with the same seniority as when the leave commenced for purposes of layoff, recall, promotion, job assignment and other seniority-related benefits.[1013] The FMLA contains similar provisions.[1014] Thus, neither the CFRA nor the FMLA requires the continued accrual of seniority or other employment benefits during an unpaid family and medical leave, but both laws require that employees shall return to work with the same seniority and benefits as when leave commenced.

§ 3.4.17

Q. IMPACT OF COLLECTIVE BARGAINING OBLIGATIONS

All California employers with 50 or more employees, whether covered by a collective bargaining agreement or not, are subject to the CFRA and the FMLA. An employee's family and medical leave rights cannot be waived. Thus, collective bargaining representatives cannot trade off "the right to take FMLA leave against some other benefit offered by the employer."[1015] Additionally, provisions of a collective bargaining agreement that, for example, provide reinstatement from a leave to a position that is not equivalent, are superseded

[1009] CAL. GOV'T CODE § 12945.2(f)(2); CAL. CODE REGS. tit. 2, § 7297.5(e)(2); 29 C.F.R. § 825.215(d)(4).

[1010] CAL. GOV'T CODE § 12945.2(f)(2); CAL. CODE REGS. tit. 2, § 7297.5(e)(2); 29 C.F.R. § 825.215(d)(4).

[1011] CAL. GOV'T CODE § 12945.2(f)(2); CAL. CODE REGS. tit. 2, § 7297.5(e)(2); 29 C.F.R. § 825.215(d)(4).

[1012] CAL. GOV'T CODE § 12945.2(g); CAL. CODE REGS. tit. 2, § 7297.5(f).

[1013] CAL. GOV'T CODE § 12945.2(g).

[1014] 29 U.S.C. § 2614(a)(2).

[1015] 29 C.F.R. § 825.220(d).

by the FMLA. At the same time, any greater rights provided under a collective bargaining agreement must be observed. Thus, employers must administer leave policies in accordance with the terms of any applicable collective bargaining agreement, the FMLA and the CFRA.

At least two federal courts have addressed the interplay between the FMLA and collective bargaining agreements. In *Sepe v. McDonnell Douglas Corp*., the plaintiff, a union-represented employee, requested and was granted a 12-week leave of absence in connection with the birth of his daughter.[1016] Management terminated the plaintiff's employment when he returned to work because the plaintiff had worked for his wife's business during the leave period. The collective bargaining agreement prohibited employees from working another job while on leave. The court upheld the judgment for the employer, holding that the plaintiff was fired for violating the terms of the bargaining agreement, not in retaliation for exercising his rights under the FMLA. In reaching this conclusion, the court observed that the employer was *required* to fire the plaintiff under the terms of the bargaining agreement.

In *Gilliam v. United Parcel Service, Inc.*, the plaintiff, who was also a union-represented employee, likewise claimed he was fired for exercising his rights under the FMLA.[1017] The plaintiff asked for, and was granted, time off from work to visit with his wife and newborn child. Although the plaintiff requested time off for this purpose, his supervisor did not understand the plaintiff to be asking for FMLA leave and did not expect him to take more than a few days off from work. The plaintiff did not call his supervisor for a full week, and was discharged for violating the three-day no-show, no-call provision in the applicable collective bargaining agreement. The court held that the employer was entitled to hold the plaintiff to its "usual and customary" requirements for requesting leave,[1018] including the requirement in the collective bargaining agreement that an employee let the employer know, no later than the beginning of the third working day of leave, how much more leave is needed. The court explained that the FMLA does not prevent an employer from enforcing a rule requiring an employee on FMLA leave to keep the employer informed about the employee's plans.[1019]

§ 3.4.18

R. PROTECTION OF EMPLOYEES AGAINST DISCHARGE OR DISCRIMINATION

The CFRA provides that "it shall be an unlawful employment practice for an employer to refuse to hire, or to discharge, fine, suspend, expel or discriminate against, any individual because of any of the following:

- an individual's exercise of the right to family care and medical leave provided by [the CFRA]; or
- an individual's giving information or testimony as to his or her own family care and medical leave, or another person's family care and medical leave, in any inquiry or proceeding related to rights guaranteed under this section.[1020]

[1016] 176 F.3d 1113 (8th Cir. 1999).
[1017] 233 F.3d 969 (7th Cir. 2000).
[1018] 29 C.F.R. § 825.301(d).
[1019] *Gilliam*, 233 F.3d at 970.
[1020] CAL. GOV'T CODE § 12945.2(l).

Similarly, employers may not interfere with, restrain or deny the exercise of an eligible employee's right to obtain leave under the CFRA, in violation of California Government Code section 12945.2(a).[1021] Employers also may not interfere with, restrain or deny employees the right to exercise or attempt to exercise any rights provided by the FMLA, or discriminate against or discharge any individual for opposing any practice that is made unlawful by the FMLA.[1022] It is unlawful to discharge or otherwise discriminate against an individual for instituting proceedings, giving any information or testifying with regard to any inquiry or proceeding related to any right provided by the FMLA.[1023]

The federal regulations provide examples of employer actions that would constitute interfering with an employee's rights under the FMLA. Such examples include refusing to authorize FMLA leave, discouraging an employee from using such leave, and transferring employees from one worksite to another in order to keep worksites below the 50-employee threshold for employee eligibility under the FMLA.[1024] Prohibited employer actions have also been held to include the failure to rehire a former employee because of his past use of FMLA leave.[1025]

The California Court of Appeal held that an employee who was terminated after an absence of six months could state a claim for violation of the CFRA, notwithstanding the employer's claim that she exceeded her CFRA rights.[1026] The court explained that if any of the leave the plaintiff took qualified as CFRA leave, and if the employer took any "adverse employment action" against her because she exercised her right to take the leave, the plaintiff had established a *prima facie* case of retaliation in violation of the CFRA, regardless of whether she had exhausted her CFRA leave by the time of her termination. That decision further held that a ten-day suspension and salary reduction for absenteeism could constitute an "adverse employment action."[1027]Additionally, courts have held that, aside from a claim for direct violation of the CFRA, the CFRA provides a basis for a claim for wrongful discharge in violation of public policy.[1028]

Under the CFRA, however, employees may be terminated for misuse of CFRA leave. In a 2003 decision, the California Court of Appeal held that an employer did not violate the CFRA

[1021] CAL. GOV'T CODE § 12945.2(t).

[1022] 29 U.S.C. § 2615(a), (b).

[1023] 29 U.S.C. § 2615(a), (b).

[1024] 29 C.F.R. § 825.220; s*ee also Bachelder v. America West Airlines*, *Inc.*, 259 F.3d 1112, 1124 (9th Cir. 2001) (holding that employer unlawfully interfered with employee rights in taking FMLA-protected absences into account when terminating employee for excessive absences); *Nero v. Industrial Molding Corp.*, 167 F.3d 921 (5th Cir. 1999) (affirming verdict for employee discharged shortly after he returned from FMLA leave taken as a result of heart attack where the employee's evidence at trial suggested that employer fired him to avoid paying his medical benefits); *Mardis v. Central Nat'l Bank & Trust*, 173 F.3d 864 (10th Cir. 1999) (ordering trial where employer conditioned an employee's leave to care for her husband on her forfeiture of previously accrued vacation and sick leave, holding employer's policy may have interfered with the employee's FMLA rights, even though the employee never requested FMLA leave).

[1025] *Smith v. BellSouth Telecomms*., *Inc*., 273 F.3d 1303 (11th Cir. 2001).

[1026] *Dudley v. Department of Transp.*, 90 Cal. App. 4th 255 (2001).

[1027] 90 Cal. App. 4th at 264-66.

[1028] *See Ely v. Wal-Mart*, 875 F. Supp. 1422, 1426 (C.D. Cal. 1995) (holding that claim for wrongful discharge in violation of public policy could be based on the employer's alleged violation of the CFRA because the CFRA "inures to the benefit of the public at large rather than to a particular employer or employee"); *Nelson v. United Techs.*, 74 Cal. App. 4th 597 (1999) (same).

when it terminated an employee's employment after determining he had misused his CFRA leave and was dishonest with his employer.[1029] In that case, the employee gave adequate notice of the need for leave to care for his father. When the need for the leave ended, he remained out on leave and was observed golfing and working on his home sprinkler system. The employee disputed these points, and claimed that he needed to be on leave to care for his injured wife—a reason the employer determined was false.[1030] The court upheld the employee's termination and concluded that there had not been a violation of the CFRA. It concluded that: "An honest mistake may include a trivial misuse of family leave."[1031] However, "even if [the employee] was mistaken about when he should return to work, the [employer's] justifiable conclusion that he was untruthful allowed [the employer] to terminate him anyway."[1032] Likewise, where an employer's refusal to reinstate an employee following the end of CFRA leave was based on a legitimate, nondiscriminatory reason that had nothing to do with the leave, forfeiture of bonus payments, following the discharge for cause, is not an illegal withholding of earned wages.[1033]

§ 3.4.19

S. REMEDIES & ENFORCEMENT

The CFRA is part of the FEHA and, as with all provisions of the FEHA, may be enforced either administratively or through court action. If the Department of Fair Employment and Housing issues an accusation and litigates the matter before the Fair Employment and Housing Commission ("Commission"), the Commission may reinstate an employee with back pay. The Commission may also assess an administrative fine and award actual damages, including damages for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other nonpecuniary losses up to $150,000.[1034] Additionally, under certain circumstances, the Commission may assess a civil penalty of up to $25,000.[1035] In a court action, however, a claimant may obtain unlimited emotional distress damages, punitive damages and attorneys' fees, in addition to compensation for any monetary losses (*i.e.*, lost wages).

Individuals may seek enforcement of the FMLA by filing a complaint with the Department of Labor or by filing a private civil action in court. Under the FMLA, the statute of limitations is two years, and three years for willful violations.[1036]

Violators of the FMLA may be liable for damages equal to the amount of any wages, benefits or other compensation denied or lost. In a case where wages, salary, employment benefits or other compensation have not been denied, an employee may recover any actual monetary loss sustained as a direct result of the employer's violation, such as the cost of providing care, up to a sum equal to 12 workweeks of wages or salary for the employee.[1037] The court may also award equitable relief (*e.g.*, reinstatement or promotion, etc.), as well as costs and attorneys'

[1029] *McDaneld v. Eastern Mun. Water Dist. Bd.*, 109 Cal. App. 4th 702, 708 (2003).

[1030] 109 Cal. App. 4th at 704.

[1031] 109 Cal. App. 4th at 708.

[1032] 109 Cal. App. 4th at 708.

[1033] *Neisendorf v. Levi Strauss & Co.*, 143 Cal. App. 4th 509, 522 (2006).

[1034] CAL. GOV'T CODE § 12970(a)(3), (c).

[1035] CAL. GOV'T CODE § 12970(e).

[1036] 29 U.S.C. § 2617(a)-(c).

[1037] 29 U.S.C. § 2617(a)(1)(A)(i).

fees. However, the FMLA does not provide for recovery of nominal damages, and an employee who suffers no actual monetary losses as a result of the employer's violation of the FMLA, and has no grounds for equitable relief, has sustained no damages under the Act.[1038] Several courts have held that punitive damages are not available under the FMLA.[1039]

Finally, several courts have held that supervisors who exercise sufficient control over an employee's working conditions, including decisions regarding leave, can be held individually liable for violations of the FMLA.[1040]

§ 3.4.20

T. NOTICE & POSTING OBLIGATIONS

If an employer gives written guidance to employees concerning employee benefits or leave rights in an employee handbook, then the handbook must incorporate information on FMLA/CFRA rights and responsibilities and the employer's policies regarding the FMLA/CFRA.[1041] If the employer does not have such written policies, the employer must provide to each new employee at the time of hiring, a written notice explaining the FMLA/CFRA provisions and providing information concerning the procedures for filing complaints of violations of the FMLA/CFRA.[1042]

Failure to properly notify an employee of his or her rights under the FMLA can amount to interference with the employee's rights, and may give rise to liability.[1043] Under the former regulations, it was possible that an employer could not take any action against an employee

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[1038] *Farrell v. Tri-County Metro. Transp. Dist.*, 530 F.3d 1023 (9th Cir. 2008) (citing *Walker v. United Parcel Serv., Inc.*, 240 F.3d 1268, 1277 (10th Cir. 2001)).

[1039] *See Keene v. Rinaldi*, 127 F. Supp. 2d 770, 772 (M.D.N.C. 2000); *Zawadowicz v. CVS Corp.*, 99 F. Supp. 2d 518, 540 (D.N.J. 2000).

[1040] *See, e.g., Sutton v. Derosia*, 2012 U.S. Dist. LEXIS 147434 (E.D. Cal. Oct. 12, 2012) (noting that the question of individual liability remained unaddressed by the Ninth Circuit); *Knussman v. Maryland*, 272 F.3d 625, 642 (4th Cir. 2001) (state personnel officer who denied state trooper FMLA leave to care for newborn baby because he was a man was individually liable for FMLA violation, although $375,000 jury verdict held excessive); *Carpenter v. Refrigeration Sales Corp.*, 49 F. Supp. 2d 1028 (N.D. Ohio 1999) (human resources manager individually liable for FMLA violation because he was responsible for his company's compliance with the FMLA, he exercised control over the plaintiff's employment, he discussed her illness with her and, "most significantly," he made the decision to fire her); *Mercer v. Borden*, 11 F. Supp. 2d 1190, 1191 (C.D. Cal. 1998) (holding that management level individuals are potentially subject to liability under the FMLA).

[1041] 29 C.F.R. § 825.300(a)(3); CAL. CODE REGS. tit. 2, § 7297.9(a).

[1042] 29 C.F.R. § 825.300(a)(3).

[1043] *Mora v. Chem-Tronics, Inc.*, 16 F. Supp. 2d 1192, 1227 (S.D. Cal. 1998) (concluding, under the totality of the circumstances, that the employer's notice was insufficient because in addition to the deficient posting and handbook, the employer also failed to provide the employee with written notice of his rights and obligations under FMLA once he gave notice of his need for qualifying leave). However, "[a]n interference claim under the FMLA (and thus the CFRA) does not involve the burden-shifting analysis articulated by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792. As stated in *Bachelder v. America West Airlines, Inc.* (9th Cir. 2001) 259 F.3d 1112, 1131 . . ., 'there is no room for a *McDonnell Douglas* type of pretext analysis when evaluating an "interference" claim under this statute.' A violation of the FMLA 'simply requires that the employer deny the employee's entitlement to FMLA leave.' (*Xin Liu v. Amway Corp.* (9th Cir. 2003) 347 F.3d 1125, 1135)."); *see also* 29 C.F.R. § 825.300(e); *Faust v. California Portland Cement Co.*, 150 Cal. App. 4th 864, 879 (2007).

for failing to meet his or her obligations under the FMLA where the employer failed to provide the employee with written notification specifically addressing expectations and obligations and the consequences of failing to meet those obligations. However, the revised FMLA regulations eliminated this restriction on employers and now provide that such a failure may constitute an interference with, restraint of or denial of the employee's FMLA rights. Therefore, an employee who is harmed by an employer's failure to comply with the notice requirements could be entitled to an award of compensation and wages lost as a result of the violation, other actual monetary losses directly caused by the violation, or other forms of equitable relief (*e.g.*, employment, reinstatement, promotion, etc.).[1044]

However, where an employee enjoys the full benefits conveyed by the FMLA, an employer will not be found to have interfered with that employee's rights by failing to provide proper information to the employee as to what his or her rights were under the FMLA.[1045] Both the CFRA and the FMLA require the posting of notices in a conspicuous place.[1046] A sample CFRA notice is contained in section 7297.9 of the regulations. If more than 10% of the employees at any facility or establishment speak a language other than English as a primary language, the employer is required to translate the notice of the employees' rights into the language or languages spoken by this group of employees.[1047]

The federal regulations contain similar posting requirements.[1048] An employer that violates the federal posting requirement may be assessed a penalty of $110 for each offense.[1049] However, employers are *not* liable to employees for failing to post the required FMLA notices. The Secretary of Labor is the only party who can seek relief from posting notices.[1050]

§ 3.5

V. WORKERS' COMPENSATION OVERVIEW

§ 3.5.1

A. INTRODUCTION

The workers' compensation system is intended to deliver relatively expeditious compensation to employees who suffer injury or death arising out of and in the course of their employment. For its part of this *compensation bargain*, the employer is immunized from a civil action in which the employee might obtain a much larger recovery.[1051] It is a mandatory, generally

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[1044] 29 C.F.R. § 825.300(e).

[1045] *Sarno v. Douglas Elliman-Gibbons & Ives*, *Inc.*, 17 F. Supp. 2d 271, 275 (S.D.N.Y. 1998), *aff'd*, 183 F.3d 155 (2d Cir. 1999); s*ee also LaCoparra v. Pergament Home Ctrs., Inc.*, 982 F. Supp. 213 (S.D.N.Y. 1997) (an employer's failure to provide adequate notice of FMLA procedures does not constitute a violation of the FMLA if employee still receives the FMLA's intended benefits).

[1046] 29 U.S.C. § 2619; CAL. CODE REGS. tit. 2, § 7297.9(a).

[1047] CAL. CODE REGS. tit. 2, § 7297.9(c).

[1048] 29 C.F.R. § 825.300.

[1049] 29 C.F.R. § 825.300(a).

[1050] *Mora v. Chem-Tronics*, *Inc.*, 16 F. Supp. 2d 1192, 1227 (S.D. Cal. 1998) (holding that an eligible employee had no basis to seek injunctive relief by asserting a violation of the FMLA's posting requirement).

[1051] *Johns-Manville Prods. Corp. v. Superior Court* (*Rudkin*), 27 Cal. 3d 465, 474 (1980).

no-fault and self-executing system that provides medical care, temporary and permanent disability indemnity, and death benefits. Additionally, the employer is penalized for discriminating against injured workers, and for serious and willful misconduct. The law is to be liberally interpreted to protect employees who are injured in the course of their employment, and is administered statewide by judges assigned by the Workers' Compensation Appeals Board (WCAB).[1052]

For the second time in less than ten years, California passed legislation to overhaul its workers' compensation system when Governor Jerry Brown signed Senate Bill 863 into law on September 18, 2012. The provisions took effect and apply to all industrial injuries occurring on or after January 1, 2013. The laws appear to have been aimed at increasing compensation to injured workers who sustain legitimate work-related injuries, reducing litigation of workers' compensation disputes, reducing the epidemic of lien claims filed by secondary medical providers and resolving certain unintended consequences of the state's last major workers' compensation legislation that went into effect in 2004.[1053]

§ 3.5.2

B. INSURANCE

Workers' compensation insurance is mandatory. The insurance may be obtained from an insurance company, or by obtaining a certificate of self-insurance.[1054] Only the State of California may lawfully be uninsured.[1055] An employer may elect to cover employees who are otherwise not covered.[1056] All policies are required to provide all the benefits mandated by law. Certain employers engaged in construction work may enter into a collective bargaining agreement providing for a private workers' compensation system, but that system must provide essentially the same benefits as the public system.[1057] Nonexempt, nonunionized employers must provide in writing to new-hire employees the name, address and telephone number of the employer's workers' compensation insurance carrier.[1058] Through the State Compensation Insurance Fund (SCIF), a public enterprise fund created to provide workers' compensation insurance[1059] self-employed persons may insure themselves.[1060]

Being willfully uninsured is a crime that carries with it significant penalties,[1061] including an order that business operations cease until insurance is acquired.[1062] Failure to obey such a stop order is also a misdemeanor.[1063] Other penalties include an increase of 10% of the

[1052] CAL. LAB. CODE § 3202.5.

[1053] For further information, see the DIR's website, http://www.dir.ca.gov/dwc/SB863/SB863.htm.

[1054] However, "professional employer organizations," leasing employers, temporary services employers or any other employer in the business of providing employees to other employers cannot be self-insured. CAL. LAB. CODE § 3701.9(a).

[1055] CAL. LAB. CODE § 3700.

[1056] CAL. LAB. CODE §§ 4150-57.

[1057] CAL. LAB. CODE § 3201.5.

[1058] CAL. LAB. CODE § 2810.5. See discussion above in this Chapter at § 3.1.5(p)(i).

[1059] CAL. INS. CODE §§ 11770-11881.

[1060] CAL. INS. CODE § 11846.

[1061] CAL. LAB. CODE § 3700.5.

[1062] CAL. LAB. CODE § 3710.1.

[1063] CAL. LAB. CODE § 3710.2.

compensation awarded,[1064] attorneys' fees for the employee,[1065] a penalty of $1,000 per employee employed at the time of the stop order, and a penalty of $10,000 per employee, up to $100,000, in cases where a compensable injury is found.

The Uninsured Employers Benefits Trust Fund exists to provide benefits to injured employees of uninsured employers, but it is also empowered to sue the uninsured employer to recoup the payments it makes.[1066] If an employer is willfully uninsured, the injured employee may sue for damages in civil court, and it is presumed that the injury arose out of the negligence of the employer. In such a case, the employee's negligence is not a defense.[1067] Thus, employers should make diligent efforts to obtain and keep their workers' compensation insurance in force.

§ 3.5.2(a)

Workers' Compensation Coverage by Federally Recognized Indian Tribes

Federally recognized Indian tribes have been providing businesses in California an alternative to workers' compensation coverage. Generally, the WCAB does not have jurisdiction over federally recognized Indian tribes for the purposes of enforcing workers' compensation laws.[1068] Case law focuses on injuries to workers on Indian grounds being regulated solely by the Indian tribes based on the principle of sovereign immunity.

To get around California's workers' compensation laws, tribally-owned staffing companies hire an employer's workforce and leases it back to the employer. Under this arrangement, the staffing companies claim the workers are employees of the Indian tribe and not subject to California's workers' compensation laws due to the tribe's sovereign immunity.

This arrangement, however, has fallen under investigation by both the California Department of Insurance and the Department of Industrial Relations. In fact, the state has issued stop orders or shutdowns of several businesses in the state that were relying upon this arrangement. These stop orders were lifted once traditional workers' compensation coverage was purchased. The state takes the position that the sovereign immunity of the Indian tribes does not extend beyond its reservations. California requires all employers to hold workers' compensation insurance. Although it is legal to hire and lease back employees, this arrangement does not necessarily insulate employers from workers' compensation claims. Under this leasing arrangement, the leasing company and the employer can be considered joint or coemployers. Under California law, an injured worker can proceed directly against any coemployer under a joint and several liability theory. Thus, if the leasing company is found not to have the requisite insurance coverage, the employer will be liable for the workers' compensation costs and can incur penalties for not being properly insured.

[1064] CAL. LAB. CODE § 4554.

[1065] CAL. LAB. CODE § 4555.

[1066] CAL. LAB. CODE §§ 3710-32.

[1067] CAL. LAB. CODE §§ 3706, 3708.

[1068] *See Middletown Rancheria of Pomo Indians v. Workers' Comp. Appeals Bd.* (*Sherron*), 60 Cal. App. 4th 1340 (1998).

§ 3.5.2(b)

Antifraud Provisions

Making a knowingly false statement to obtain or deny workers' compensation benefits is a felony.[1069] A statement to this effect must appear prominently on WCAB documents.[1070] Injured workers are barred from receiving or keeping any compensation owed as a result of such statements.[1071] A successful fraud prosecution requires clear, affirmative misrepresentations, preferably under oath, not just vague memories or statements subject to interpretation.

Employees, insurers, employers and the attorneys for each party are required to sign a statement, under penalty of perjury, that they have not violated certain self-referral provisions, nor offered or taken anything of value in return for referral of cases.[1072] California Labor Code section 139.3 prohibits referral of an injured worker to a person with whom a physician has a financial interest, with a number of exceptions. This provision has had some impact on medical-legal advisers.

§ 3.5.3

C. EMPLOYEES

Not every worker is covered by workers' compensation. The California Labor Code defines who is and is not an employee for workers' compensation purposes, and who is an employee but nevertheless is not covered by the workers' compensation laws. Generally, anyone in the service of another is presumed to be an employee, even aliens, minors and prisoners.[1073] Independent contractors are excluded,[1074] as are a number of (but not all) volunteers.[1075] An independent contractor who does not have the required contractor's license is, as a matter of law, an employee of the person who hired him, as are any employees of the unlicensed contractor.[1076]

California Labor Code sections 3351(d) and 3352(h) together include as employees anyone employed by the owner or occupant of a residence whose duties are personal or incidental to ownership, maintenance, or use of the residence, but only if the person has worked at least 52 hours or earned at least $100 during the 90 calendar days before the injury, or if the person was employed during the 90 calendar days immediately before the last day of work in a job exposing the person to the hazards of the disease or injury. Thus, a roofer was a residential employee of the owners of an apartment building under section 3351(d), but was an excluded employee under section 3352(h), because he had not worked for 52 hours or more in the 90 days immediately preceding the injury, nor had he earned more than $100.[1077]

[1069] CAL. INS. CODE § 1871.4; CAL. LAB. CODE § 3820.

[1070] CAL. LAB. CODE § 5401.7.

[1071] CAL. INS. CODE § 1871.5.

[1072] CAL. LAB. CODE § 4906(g).

[1073] CAL. LAB. CODE §§ 3351, 3357, 3370.

[1074] CAL. LAB. CODE § 3353.

[1075] CAL. LAB. CODE § 3352.

[1076] *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.*, 40 Cal. 3d 5 (1985); *Blew v. Horner*, 187 Cal. App. 3d 1380 (1986).

[1077] *Aubry v. Workers' Comp. Appeals Bd.*, 60 Cal. Comp. Cas. 408 (1995).

The existence of an employment relationship usually is relatively clear, but odd situations can arise. For example, a decedent was found to be an employee of a business owned with his two brothers on the date he was shot and killed by one brother on defendant's premises.[1078] Generally, the WCAB resolves doubts in favor of covered employment.

§ 3.5.4

D. COMPENSABLE INJURIES

An *injury* for workers' compensation purposes is any specific or cumulative trauma resulting in disability (or death) or need for medical treatment.[1079] The injury may be physical or mental, and may include the lighting up of a preexisting and previously dormant or asymptomatic nonindustrial disease or condition. *Injury* includes certain adverse reactions to prophylactic care furnished by an employer to a health care worker to prevent blood-borne diseases, including hepatitis and HIV infections, but does not apply to a worker claiming HIV exposure who tests positive for HIV within 48 hours after the claimed exposure.[1080] The criteria for proving a psychiatric injury are more stringent and complex than for a physical injury, and defenses include an insufficient level of industrial causation, that the injury was a result of a lawful, nondiscriminatory, good faith personnel action, as well as employment for less than six months.[1081] Both the criteria and defenses vary, depending on the date of the psychiatric injury.

§ 3.5.4(a)

Injuries Arising Out of & in the Course of Employment

Only industrial injuries are covered by workers' compensation insurance. *Industrial injuries* are those "arising out of and occurring in the course of employment (AOE/COE)." This dual requirement is the cornerstone of workers' compensation, and is more specifically stated in California Labor Code sections 3600 and 3601. Those two sections together provide that when the conditions of compensation concur, workers' compensation is the exclusive remedy of an injured employee. The conditions of compensation are:

- Both the employer and employee are subject to workers' compensation law.[1082]
- At the time of the injury, the employee is performing service growing out of and incidental to the employment, and is acting within the course of the employment.[1083]
- The injury is proximately caused by the employment.[1084]
- The injury is not caused by the intoxication of the employee.[1085]

[1078] *Hopkins Pattern*, *Inc. v. Workers' Comp. Appeals Bd*., 60 Cal. Comp. Cas. 128 (1995).

[1079] CAL. LAB. CODE §§ 3208, 3208.1.

[1080] CAL. LAB. CODE § 3208.05.

[1081] CAL. LAB. CODE § 3208.3.

[1082] Some employees, such as voluntary ski patrol members who received no compensation other than meals or lodging and use of the ski facilities, are excluded by law. CAL. LAB. CODE § 3352.

[1083] This provision has been interpreted to include injuries occurring during meal breaks and restroom visits under the "personal comfort and convenience" doctrine.

[1084] Courts ask: But for the employment, would the injury have occurred?

[1085] The intoxication may be by alcohol or a controlled substance. This is one of the few exceptions to the no-fault rule.

- The injury is not intentionally self-inflicted.
- The employee has not willfully and deliberately caused his or her own death.
- The injured employee was not the initial physical aggressor in an altercation.
- The injury was not caused by the commission of a felony of which the employee has been convicted.
- The injury did not arise from participation in any off-duty recreational, social, or athletic activity, except where the activity is a reasonably expected part of the employment.
- The claim of injury is filed before termination or layoff, with certain exceptions.

Generally, an injury on the employer's premises during working hours is compensable, while an injury off the employer's premises or outside working hours could be compensable. An injury while going to or coming from work during an ordinary commute is not compensable,[1086] but so many exceptions have been created that they almost swallow the rule.

The WCAB and the courts have liberally interpreted the ten statutory provisions above. For example, an injury from a fall to the employer's floor caused by an idiopathic seizure is industrial.[1087] So are: the death of a traveling executive from a fire started by a cigarette while in bed with a "woman other than his wife,"[1088] aggravation of congenital spina bifida by a minor fall and disability resulting from treatment of that condition,[1089] and drowning while windsurfing at a school picnic.[1090]

An injury while performing authorized duties in an unauthorized, even criminal, fashion is also compensable,[1091] but an injury while performing unauthorized duties may not be. Even though the California Labor Code states that intentionally, self-inflicted injuries are not compensable, in at least one case the WCAB upheld a decision that an employee's suicide was industrial by stating that there was evidence of *industrial causation* that so overwhelmed the employee that he was unable to resist the strong impulse to kill himself.[1092]

Other cases illustrating the broad scope of the AOE/COE requirement include: a bank executive injured while playing golf with present and prospective clients of the bank at the client's expense and at the client's country club;[1093] a worker injured by the practical joke of a coworker (where a company supervisor testified that pranks and practical jokes were condoned and encouraged by management to improve employee morale).[1094]

[1086] *Hinojosa v. Workmen's Comp. Appeals Bd.*, 8 Cal. 3d 150 (1972).

[1087] *See Employers Mut. Liab. Ins. Co v. Industrial Accident Comm'n*, 41 Cal. 2d 676 (1953).

[1088] *See Wiseman v. Industrial Accident Comm'n of Cal.*, 46 Cal. 2d 570 (1956).

[1089] *See Miller v. Workers' Comp. Appeals Bd.*, 59 Cal. Comp. Cas. 610 (1994).

[1090] *See Smith v. Workers' Comp. Appeals Bd.*, 191 Cal. App. 3d 127 (1987).

[1091] *See Westbrooks v. Workers' Comp. Appeals Bd.*, 203 Cal. App. 3d 249 (1988).

[1092] *See F.D. Titus & Sons, AIG Claims Servs. v. Workers' Comp. Appeals Bd.*, 62 Cal. Comp. Cas. 1158 (1997).

[1093] *See Johnson v. Workers' Comp. Appeals Bd.*, 60 Cal. Comp. Cas. 690 (1995).

[1094] *See Oliva v. Heath*, 35 Cal. App. 4th 926 (1995).

Compensable injuries may even result from the negligence of an employer's examining physician during an evaluation,[1095] or from malpractice during mistakenly authorized treatment of a nonindustrial condition.[1096]

Whereas claims of injury filed after termination of employment are generally not compensable, the post-termination defense has been weakened by the courts since it was first enacted. A California appellate court has held that the defense did not apply when an employee resigned, since the purpose of the statute was to deter disgruntled employees from filing retaliatory claims.[1097] Also, the post-termination defense does not apply if the employee can demonstrate that medical treatment for the claimed industrial condition was obtained prior to the notice of termination.

Litigation continues to challenge the traditional boundaries of what constitutes an industrial injury.

§ 3.5.4(b)

Injuries Presumed Industrial

Some public safety officers hold a presumption that certain injuries were caused by their employment. Generally, law enforcement officers and firefighters may be entitled to a presumption that heart trouble, pneumonia, hernias, tuberculosis, and cancer are a result of their employment.[1098] The presumption may last for up to five years after the last date the employee actually works. With regard to the cancer presumption, if a designated safety officer or firefighter develops cancer while in service and demonstrates that he or she was exposed on the job to a known carcinogen as defined by the International Agency for Research on Cancer, the cancer will be presumed to be industrially related. However, the employer may rebut the presumption by evidence that the primary site of the cancer has been established and that the carcinogen to which the employee was exposed is not reasonably linked to the disabling cancer.[1099]

§ 3.5.4(c)

Procedural Presumption of Compensability

Employees may be able to satisfy the requirement that an injury arose out of and in the course of employment by relying on nothing more than a simple procedural presumption that a claimed injury is compensable. This presumption arises if a claim is not denied within 90 days of the filing of a claim form with the employer.[1100] The WCAB and the courts have handed down quite a number of decisions in this area. In some cases, employers' fears of unjustified adverse consequences have fully manifested themselves, while in others, some loopholes have been poked in the presumption wall. As part of the presumption of compensability, section 5402 bars the use of evidence that could have been obtained within those first 90 days with the exercise of due diligence.[1101] This provision was

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[1095] *See Mero v. Sadoff*, 31 Cal. App. 4th 1466 (1995).

[1096] *See Fairmont Ins. Co. v. Workers' Comp. Appeals Bd.*, 56 Cal. Comp. Cas. 392 (1991).

[1097] *CJS Co. v. Workers' Comp. Appeals Bd.*, 74 Cal. App. 4th 294 (1999).

[1098] CAL. LAB. CODE §§ 3212-12.7.

[1099] CAL. LAB. CODE § 3212.1.

[1100] CAL. LAB. CODE § 5402.

[1101] *Napier v. Royal Ins. Co.*, 20 Cal. Workers' Comp. Rep. (MB) 124 (1992).

invoked in *Finese v. American Motorists*[1102] to bar evidence of a nonindustrial cause of death, resulting in an award of an industrial death benefit. Evidence obtained after the expiration of the 90-day period may be admitted, though, if the employer shows due diligence in attempting to obtain it.[1103]

The presumption of compensability is *rebuttable*. It may be rebutted by an injured worker's own medical legal report;[1104] by an injured worker's own incredible testimony;[1105] and by evidence of prior injuries that the injured worker had concealed.[1106]

Many critical cases have found technical ways to escape the presumption. *Reynolds v. Lucky Stores, Inc.*,[1107] decided that the 90-day period in section 5402 is extended by five days to allow for mailing, and *Frausto v. Workers' Compensation Appeals Board*,[1108] did not apply the presumption when the 90th day fell on a Sunday and the denial issued on the following Monday. The denial or rejection of a claim need not be in writing,[1109] and need not even be communicated to the injured employee before the 90 days have elapsed, so long as the decision to reject was made before then.[1110]

The presumption also does not preempt other technical affirmative defenses, such as lack of employment of the injured worker[1111] or the statute of limitations.[1112]

Despite some successful defenses to the presumption, given the downside exposure of losing a potentially expensive case on a technicality when it could have been won with timely discovered evidence, all employers would be well advised to promptly report claims to their carriers or risk managers, to promptly investigate and cooperate fully in any investigation, and to ensure that evidence that can be obtained in the first 90 days after the filing of a claim form.

§ 3.5.4(d)

Exclusive Remedy

When there is an industrial injury, workers' compensation is the exclusive remedy for the injured employee with certain limited exceptions.[1113] This *exclusive remedy* provision prohibits the employee from suing civilly unless one of the exceptions exists. The exclusive remedy provisions of the Workers' Compensation Act are part of the compensation bargain noted above and immunize an employer, insurer, and adjusting agent from lawsuits by injured

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[1102] 20 Cal. Workers' Comp. Rep. (MB) 303 (1992).

[1103] *Pinson v. Workers' Comp. Appeals Bd.*, 60 Cal. Comp. Cas. 141 (1995).

[1104] *See Bowles v. Workers' Comp. Appeals Bd.*, 60 Cal. Comp. Cas. 874 (1995); *Witherell v. Workers' Comp. Appeals Bd.,* 59 Cal. Comp. Cas. 1128 (1994).

[1105] *See Davis v. Workers' Comp. Appeals Bd.*, 59 Cal. Comp. Cas. 1066 (1994); *Strange v. State Comp. Ins. Fund*, 22 Cal. Workers' Comp. Rep. (MB) 166 (1994).

[1106] *Robles v. Workers' Comp. Appeals Bd.*, 60 Cal. Comp. Cas. 536 (1995).

[1107] Case No. RDG 62093, Findings and Order (1995).

[1108] 59 Cal. Comp. Cas. 757 (1994).

[1109] *See McGoldrick v. Workers' Comp. Appeals Bd.*, 22 Cal. Workers' Comp. Rep. (MB) 119 (1994).

[1110] *Rodriguez v. Workers' Comp. Appeals Bd.,* 30 Cal. App. 4th 1425 (1994).

[1111] *See Bryant v. State Comp. Ins. Fund.*, 23 Cal. Workers' Comp. Rep. (MB) 192 (1995).

[1112] *See Memorial Hosp. Ass'n v. Workers' Comp. Appeals Bd.*, 60 Cal. Comp. Cas. 779 (1995).

[1113] CAL. LAB. CODE §§ 3601, 3602.

workers and even by spouses.[1114] A parent corporation was also considered immune from a civil suit brought by the heirs of employees of a subsidiary corporation, based on an alter ego theory.[1115] With regard to emotional distress claims, after a number of conflicting cases, the California Supreme Court finally held that the exclusive remedy of workers' compensation prevents an employee's lawsuit based on an employer's intentional or negligent infliction of emotional distress, even in the absence of any accompanying physical injury.[1116]

§ 3.5.4(e)

Subrogation

If a third party causes the employee's injury, the employer may bring or participate in a civil suit brought by the employee against that third party. The employer (or insurer) is entitled to recover from the third party the amount of compensation it paid to the employee on account of the injury. The employer also is entitled to a credit against its workers' compensation liability at the WCAB in the amount of the employee's net recovery.[1117] If the employer was negligent, however, the employer's recovery or credit may be diminished or eliminated.

§ 3.5.4(f)

Benefits

When an industrial injury is found or admitted to have occurred, the injured worker or his or her dependents may be entitled to receive various types of benefits.

§ 3.5.4(f)(i)

Temporary Disability

Temporary disability indemnity is designed as a wage replacement, and equals two-thirds of an employee's average weekly earnings that are subject to maximum caps depending upon the date of injury. Temporary disability may be total or partial.[1118] If it is *total* (*i.e.*, the employee cannot work at all), the entire prescribed benefit is paid to the employee. If it is *partial* (*i.e.*, the employee can work part time at some kind of job), payment is made on a wage-loss basis.[1119]

There are minimum and maximum rates set by law.[1120] The market value of board, lodging, fuel and other advantages of employment are included in the calculation of average weekly earnings.[1121] Whenever temporary disability indemnity is paid more than two years after the date of injury, it is paid at the maximum rate then in effect, provided

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[1114] *Williams v. Schwartz*, 61 Cal. App. 3d 628 (1976).

[1115] *Doney v. TRW, Inc.*, 33 Cal. App. 4th 245 (1995).

[1116] *Livitsanos v. Superior Court* (*Continental Culture Specialist, Inc.*), 2 Cal. 4th 744 (1992); *see also Miklosy v. Regents of Univ. of Cal.,* 44 Cal. 4th 876 (2008) (holding that plaintiff's intentional infliction of emotion distress claim was barred by the workers' compensation exclusive remedy provisions because the alleged wrongful conduct occurred at the worksite, in the normal course of the employer-employee relationship).

[1117] CAL. LAB. CODE §§ 3850-65.

[1118] CAL. LAB. CODE §§ 4653, 4654.

[1119] CAL. LAB. CODE § 4657.

[1120] CAL. LAB. CODE § 4453.

[1121] CAL. LAB. CODE § 4454.

that the injured worker's average weekly wages, including raises he would have received had he not been injured, justify the higher amount.[1122] One California appellate court held that an injured worker is not entitled to temporary disability benefits after her retirement date, when she indicated an intention to retire from all work, and thus had zero earning capacity after the retirement date.[1123]

The average weekly wage of volunteer firefighters, reserve peace officers and persons assisting peace officers in active law enforcement, and any firefighter or peace officer who suffers an injury after termination of active service that is presumed compensable (see above) is taken at the maximum for both temporary and permanent disability benefits.[1124]

Public safety officers (law enforcement officers and firefighters) are entitled to full salary in lieu of temporary disability benefits for up to one year. These benefits may end before one year if the employee retires on a permanent disability pension.[1125]

Increases in temporary disability after January 1, 2006, are equal to the percentage increase in the state average weekly wage as compared to the prior year. The *state average weekly rate* means the average weekly wage paid by employers to employees covered by the unemployment insurance as reported by the U.S. Department of Labor for California for the 12 months ending March 31 of the calendar year preceding the year in which the injury occurred. The maximum weekly temporary disability rate for 2014 injuries is $1,074.64, and the minimum rate is $161.19.

The law limits an employee to 104 weeks of total temporary disability within a period of two years from the date of commencement of temporary disability payment or five years from the date of injury.[1126] The two-year period commences upon the first payment of temporary disability. Where independent injuries result in concurrent periods of temporary disability, the 104-week limitation also runs concurrently.[1127] The 104-week limitation does not apply to specifically designated conditions that are of a more serious and long term nature including Hepatitis B and C, HIV, amputations, and/or pulmonary disease.[1128]

§ 3.5.4(f)(ii)

Permanent Disability

Temporary disability benefits end when an employee's condition is declared to have reached maximum medical improvement status, although continuing medical care may still be necessary. At this point, the employee may be entitled to permanent disability indemnity.

Permanent disability compensates an employee for his or her loss of earning capacity. The permanent disability for industrial injuries is first calculated as impairment under the *American Medical Association Guidelines for the Evaluation of Permanent Impairment*, 5th edition ("AMA Guides"). Once maximum medical improvement (MMI) status is reached,

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[1122] *Hofmeister v. Workers' Comp. Appeals Bd.*, 156 Cal. App. 3d 848 (1984).

[1123] *Gonzales v. Workers' Comp. Appeals Bd.*, 68 Cal. App. 4th 843 (1998).

[1124] CAL. LAB. CODE §§ 4458-58.5.

[1125] CAL. LAB. CODE §§ 4850-55.

[1126] CAL. LAB. CODE § 4656(c)(1) (commencement of payment), (c)(2) (date of injury).

[1127] *Foster v. Workers' Comp. Appeals Board*, 161 Cal. App. 4th 1505 (2008), *writ denied,* 2008 Cal. LEXIS 7746 (June 25, 2008).

[1128] CAL. LAB. CODE § 4656(c)(3).

subjective and objective factors of disability are described by one or more examining physicians according to the AMA Guides, as whole person impairment (WPI). This WPI is then modified for diminished future earning capacity ranking, age and occupation using the Schedule for Rating Permanent Disabilities.

Permanent partial disabilities are measured in percentages. Each percentage equates to a certain number of weeks of permanent disability indemnity. The value of the indemnity paid per week is two-thirds of the injured worker's average weekly earnings with minimums and maximums. The exact value paid each week varies with the date of injury and the percentage of disability.[1129]

If an injured worker's permanent partial disability is greater than 70%, the worker is entitled to a life pension. The pension is calculated based on the percentage of permanent disability and a maximum average weekly earnings rate set by law. The pension is usually much lower than the regular permanent disability indemnity.[1130]

S.B. 863 implemented permanent disability benefits rate increases for more seriously injured workers who sustain injuries on or after January 1, 2013, and provides that all permanent disability benefits will be paid at the maximum rate for injuries occurring on or after January 1, 2014. Effective on January 1, 2013, the minimum permanent disability rate was raised, creating a benefit to injured workers with low wages. Also effective January 1, 2013, former Labor Code section 4658(d), which affected permanent disability rates depending on whether an injured worker was able to return to his or her job, was abolished. In its place is the creation of a new fund of $120 million for the purpose of making supplemental payments to workers whose permanent disability benefits are disproportionately low in comparison to their earnings loss.[1131] The administration of this fund raises many questions, as the regulations governing its operation are to be adopted by the Administrative Director on a going-forward basis.

One of the ways that injured workers have managed to increase permanent disability ratings, and thus increase their monetary recovery, has been to claim so-called "add-on" injuries following a physical injury, such as sleep disorder, sexual dysfunction or psychiatric disorder. However, with some limited exceptions, this practice is no longer allowed for injuries occurring on or after January 1, 2013.[1132]

Employers are not liable for preexisting disability but only for the portion of the disability that is due to the industrial injury or disease.[1133] Nor are employers liable for disability resulting from a subsequent noncompensable injury that is unrelated to the previous industrial injury.[1134] This relief from liability is known as *apportionment*.

Apportionment

California permits apportionment to permanent disability by causation and requires physicians to comment upon causation.[1135] A preexisting injury, illness or pathology that causes some of the

[1129] CAL. LAB. CODE §§ 4453, 4658.

[1130] CAL. LAB. CODE § 4659.

[1131] CAL. LAB. CODE § 139.48.

[1132] CAL. LAB. CODE § 4660.1(c)(1). The increased impairment rating is not subject to these limitations if the compensable injury resulted from either a catastrophic injury or being a victim of a violent act. CAL. LAB. CODE § 4660.1(c)(2).

[1133] CAL. LAB. CODE §§ 4750, 4663.

[1134] CAL. LAB. CODE § 4750.5.

[1135] CAL. LAB. CODE § 4663(a) and (b).

permanent impairment will reduce the permanent disability award given to an industrially injured worker. Furthermore, a previous workers' compensation disability award, to the same part of the body, or resulting in overlapping disability, will be conclusively presumed to constitute a preexisting disabling condition for apportionment purposes.[1136]

Several decisions have sought to interpret and clarify the somewhat vague statutory rules on apportionment. In *Escobedo v. Marshalls*, *CNA Insurance Co*., the WCAB clarified that the employer is only liable for the percentage of disability directly caused by the industrial injury.[1137] However, the WCAB also found that, in order for apportionment to apply to nonindustrial pathology, there must be substantial medical evidence showing that such pathology caused permanent disability.

The California Supreme Court concluded in *Fuentes v. Workers' Compensation Appeals Board* that employers are charged only with that portion of permanent disability directly caused by the current injury.[1138] As a result, in *Benson v. Permanente Medical Group,* the WCAB held that a combined award of permanent disability in successive injury cases (*i.e*., the *Wilkinson* rule) was not consistent with the requirement that apportionment be based on causation.[1139] Instead, the WCAB must determine and apportion to the cause of disability for each industrial injury with consideration given to all potential causes of disability; whether from a current industrial injury, a prior or subsequent industrial injury, or a prior or subsequent nonindustrial injury or condition.

If an employee is *permanently and totally disabled*, he or she receives permanent disability benefits for life at the applicable temporary disability rate.[1140] Current case law makes it difficult for employees to claim they are permanently and totally disabled if they are unable to be vocationally rehabilitated as a result of their injury.[1141] Preexisting nonindustrial handicaps (such as lack of education or inability to speak English) are not the responsibility of the employer,[1142] and will not produce a 100% disability.

§ 3.5.4(f)(iii)

Medical Treatment

Subject to the treatment guidelines, an injured employee is entitled to all medical, surgical, chiropractic, and hospital treatment, including nursing, medicine, medical and surgical supplies, crutches and apparatus, including orthotic and prosthetic devices that are reasonably required to cure or relieve the effects of the industrial injury.[1143] This entitlement may extend to a lifetime award of medical care related to the injury. Disputes frequently arise over what form or duration of treatment is required. For example, employers often contest a prescription for a hot tub or swimming pool, lifetime health-club memberships, and extended chiropractic care. The need for surgery is also frequently challenged.

[1136] CAL. LAB. CODE § 4664(b).

[1137] 70 Cal. Comp. Cas. 604 (2005) (*en banc*).

[1138] *Fuentes v. Workers' Comp. Appeals Bd.*, 70 Cal. Comp. Cas. 856 (2005) (*en banc*).

[1139] *Benson v. Permanente Med. Group,* 72 Cal. Comp. Cas. 1620 (2007) (*en banc*).

[1140] CAL. LAB. CODE § 4659.

[1141] *Benson v. Permanente Med. Group,* 72 Cal. Comp. Cas. 1620 (2007) (en banc).

[1142] *See Espinoza v. Workers' Comp. Appeals Bd*., 59 Cal. Comp. Cas. 753 (1994).

[1143] CAL. LAB. CODE § 4600.

In an effort to reduce medical costs, California limits chiropractic and physical therapy treatments to 24 visits of each type for the life of the entire claim for injuries occurring on or after January 1, 2004.[1144] The cap does not apply if an insurance carrier or self-insured employer agrees to additional visits in writing. All providers are required to make greater use of generic drugs.[1145] Medical bills must also be paid within 45 working days from billing instead of the previous 60-day time limit. Failure to pay billing on time can result in a late payment penalty of 15% of the charge.[1146]

If an employer or its insurer disputes the need for a particular medical treatment recommended by the employee's physician, they must first use the utilization review process rather than the procedures under Labor Code section 4062 providing for the selection of an Agreed Medical Examiner or Panel Qualified Medical Examiner.[1147] The utilization review process may be implemented through the industrial carrier.[1148] The plan must also be in writing and consistent with the schedule filed by the Administrative Director.[1149] All utilization review must be performed by a licensed physician who is competent to evaluate the specific clinical issues involved.[1150]

Utilization review (UR) was the result of legislative changes that went into effect in 2004, and the wrath of subsequent litigation challenging UR determinations was an unintended and costly consequence of the system. Senate Bill 863 addresses this issue for injuries occurring on or after January 1, 2013, or for decisions communicated to the requesting physician after July 1, 2013, regardless of the date of injury, by enacting an administrative appeal system for UR determinations.[1151] Once a UR determination has issued, an injured worker or their designee may appeal the decision to the Administrative Director within 30 days. There is no corollary provision allowing an employer to appeal a UR decision authorizing treatment. The appeal process through the Administrative Director is mandatory, and Labor Code section 4062 includes a provision that specifically prohibits the use of an agreed medical evaluator or qualified medical evaluator to resolve a UR dispute.

The focus of the UR appeal process is to ensure that medical decisions are being made expeditiously and by medical professionals rather than through a protracted litigation process. Thus, upon receipt of a UR appeal, the Administrative Director shall submit the treatment request to an independent medical review (IMR) organization. Upon being provided with notice of the IMR organization conducting the review, the employer is to provide them within ten days with all of the documentation necessary for them to conduct the review, including information submitted by the employee and any other relevant documents, so long as they are also provided to the injured worker. The IMR organization shall assign one or more medical professionals to conduct the review, and reviews are to be completed within 30 days.[1152] If more than one medical professional reviews the case, a recommendation in the majority shall

[1144] CAL. LAB. CODE § 4604.5 (c)(1).

[1145] CAL. LAB. CODE § 4600.1.

[1146] CAL. LAB. CODE § 4603.2.

[1147] *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Brice Sandhagen)*, 10 WCAB Rptr. 10 (July 3, 2008),

[1148] CAL. LAB. CODE § 4610.

[1149] CAL. LAB. CODE § 4610.

[1150] CAL. LAB. CODE § 4610.

[1151] CAL. LAB. CODE § 4610.5.

[1152] CAL. LAB. CODE § 4610.6.

prevail. If the reviewers are evenly split over the disputed health care, ties are resolved in favor of the injured worker.[1153]

The IMR consultant determination is binding on all parties. An appeal to the WCAB of the IMR's determination is allowed by either party within 30 days, but the IMR determination is presumptively correct and shall only be set aside upon proof of one of the following:[1154]

- the Administrative Director acted without or in excess of his or her powers;
- the determination of the Administrative Director was procured by fraud;
- the IMR reviewer was subject to a material conflict of interest;
- the determination was the result of bias on the basis of race, national origin, ethnic group identification, religion, age, sexual orientation, color or disability; or
- the determination was the result of a plainly erroneous express or implied findings of fact provided that the mistake of fact is a matter of ordinary knowledge based upon the information submitted for review and not a matter that is the subject of expert opinion.

If any of these grounds for reversal of the IMR determination is found to exist, the matter shall be returned to the Administrative Director for assignment of another IMR.[1155]

Employers should keep in mind that, while there sometimes may appear to be an abuse of medical care, if care is unreasonably refused or delayed, the WCAB may assess against the employer a penalty of 25% of the unreasonably delayed amount up to a maximum of $10,000.[1156] Disputes over medical care, therefore, should be well grounded in sound medical opinion. There is a $100 filing fee for any liens of a medical provider excluding Medi-Cal, VA and public hospitals although this filing fee is currently subject to legal challenge. If the WCAB finds that the employer is responsible for any part of a medical lien, the employer can be liable for the filing fees associated with that lien. Abuses by medical providers within the system have been prevalent, however, and S.B. 863 addressed some of those problems by raising the filing fees for lien claimants to $150 for liens filed on or after January 1, 2013 and by implementing a $100 lien activation fee.[1157] These provisions are intended to discourage the filing of frivolous liens and to encourage resolving low-dollar liens outside of the litigation system. The statute of limitations for filing medical liens has also been shortened to 18 months after the date the services were provided if the services were provided on or after July 1, 2013.[1158]

An employer is required to commence providing treatment within one day of receipt of the claim form and is required to pay for all treatment up to a maximum of $10,000 until liability for the claim has been accepted or denied. These provisions are designed to ensure that the employee receives appropriate medical care during this initial investigation period and also to encourage employers and carriers to act quickly to accept or deny a claim of industrial injury. Accordingly, it behooves carriers and employers to investigate claims as quickly as possible to identify those claims that can be legitimately denied before incurring unnecessary medical benefits payments.

[1153] CAL. LAB. CODE § 4610.6.
[1154] CAL. LAB. CODE § 3610.6(h).
[1155] CAL. LAB. CODE § 3610.6(h).
[1156] CAL. LAB. CODE § 5814.
[1157] CAL. LAB. CODE §§ 4903.05, 4906.06.
[1158] CAL. LAB. CODE § 4903.5(a).

California employers are entitled to designate a *medical provider network* (MPN), which is a selection of doctors and other health care providers from which all its workers' compensation claimants are to receive medical treatment.[1159] Creation of an MPN is optional. Employers can adopt the MPN that has been created by their insurance carrier or select the medical providers that will comprise its MPN. The potential advantages to creating an MPN for California employers, irrespective of their size, are many. With medical expenses accounting for more than 50% of the total cost of a workers' compensation case on average, the most significant benefit is economic. The more workers' compensation claims an employer faces, the greater the benefit. For employers with large deductibles, or those faced with recurrent workers' compensation abuse, implementation of a well-thought-out provider network may provide direct, immediate relief. Additional potential benefits to employers who select their own medical providers include: lower medical treatment costs, increased control over return to work issues, elimination of medical provider abuse, and more reasonable disability awards.

The consequences of failing to create an MPN can be significant. If an employer does not enact an MPN, then workers and their attorneys may select their own doctors and predesignated treaters for any industrial injuries. It should be noted that, even if an employer has an MPN, employees may use predesignation as a means to avoid being subject to it if they predesignate the primary treating physician in writing before any industrial injury occurs. The predesignated physician must not only agree to the predesignation but must have previously directed the medical treatment of the employee and retained the employee's medical records, including a medical history.[1160]

For California employers that have established an MPN, medical treatment must be obtained within the network. Treatment obtained from a non-network provider without authorization from the employer, insurance carrier or workers' compensation judge, will not have to be paid for by the employer or carrier.[1161] The law provides an employee the opportunity to seek second and third opinions but must do so within the employers' preselected network. To date, the majority of provider networks, at least for insured employers, have been created by insurance carriers. Unfortunately, in some instances, larger carriers have flatly refused to allow policyholders to determine the members of the provider network. This will likely be an ongoing source of tension between certain carriers and their insured until the legislature intervenes.

§ 3.5.4(f)(iv)

Death Benefits

If an employee dies from or as a result of an industrial injury or disease, the employee's dependents (not necessarily heirs) at the time of the injury (not death, unless injury and death are virtually simultaneous) are entitled to a death benefit. An industrial accident or exposure need only have hastened an employee's death, and need not be the principal cause, to entitle the dependents to a death benefit.

The amount of the benefit varies with the number of dependents and the extent of their dependency, as well as with the date of injury. California Labor Code section 4702(b) also provides that the payments to dependents shall be made in the same manner and amounts as temporary disability indemnity payments would have been made to the employee. Since

[1159] CAL. LAB. CODE § 4616.

[1160] CAL. LAB. CODE § 4600(d).

[1161] CAL. LAB. CODE § 4603.2.

two years after the date of injury, temporary disability indemnity may increase to the maximum rate applicable, it appears that the death benefits may also.

§ 3.5.4(g)

Sealing Documents

Electronic Adjudication Management System (EAMS) Regulation, California Code of Regulations title 8, section 10272, provides the procedure a presiding workers' compensation administrative law judge (PWCJ) should follow when sealing the record in order to guarantee an injured worker's right to privacy. The PWCJ or Workers' Compensation Appeals Board (WCAB) may order the record sealed on his or her own motion. Alternatively, a party may request that the record be sealed by filing a petition with the district office.

For a record to be filed under seal or sealed, the PWCJ or the WCAB must first establish the following:

1. that there exists an overriding public interest that overcomes the right of public access to the record;
2. the overriding public interest supports sealing the record;
3. a substantial probability exists that the overriding public interest will be prejudiced if the record is not sealed;
4. the proposed sealing is narrowly tailored; and
5. no less restrictive means exists to achieve the overriding public interest.[1162]

If the PWCJ approves the applicant's request, and makes findings of fact required by law, the record will be sealed and unavailable for public inspection.

§ 3.5.5

E. PENALTIES

§ 3.5.5(a)

Automatic Increases

When any indemnity payment is not timely made, an employer or insurer is required to increase the amount of that payment by 10%.[1163]

§ 3.5.5(b)

Unreasonable Delay

California Labor Code section 5814 provides that there is a single 25% penalty on just the amount of the benefit unreasonably delayed or refused up to a maximum of $10,000, whichever is less. The penalty is reduced to 10% if the employer pays a self-imposed 10% penalty prior to the employee claiming a penalty under section 5814. Prior law provided that a 10% penalty was assessed on the entire class of benefit unreasonably delayed. Many times

[1162] CAL. CODE REG. tit. 8, § 10272(d).

[1163] CAL. LAB. CODE § 4650(d).

this had harsh and unfair results, since a single unexplainable or inexcusable failure to make a timely payment of compensation could result in a very significant penalty despite an otherwise unbroken string of conscientiously provided benefits.

Section 5814 further provides that if the carrier/employer pays an automatic self-imposed penalty of 10% within ten days of their discovery of the delay of a payment of temporary or permanent disability benefits, there will be no further penalty assessed. Finally, where payment for medical services is delayed solely because of a dispute over the amount a physician charged there can be no assessment of a penalty for unreasonable delay.

§ 3.5.5(c)

Serious & Willful Misconduct

An employer's *serious and willful misconduct* occurs when an employer deliberately disregards a dangerous condition that is likely to cause serious injury to an employee, and an injury is proximately caused by the dangerous condition.[1164] Serious and willful misconduct is far more than mere negligence, and more than gross negligence.[1165] The penalty is a 50% increase in compensation, with no upper limit, and the employer alone is responsible for payment of the award. No insurance company may insure against that risk.[1166] An insurer may provide the cost of a defense to a serious and willful misconduct claim, but that cost rarely is offered.

In *Ferguson v. Workers' Compensation Appeals Board*,[1167] the court of appeal held that the 50% increase for an employer's serious and willful misconduct applies to all compensation under the California Labor Code, including medical benefits. Interestingly, the same argument that prevailed in *Ferguson* previously failed in *Townsend v. Workers' Compensation Appeals Board.*[1168] There, the full WCAB considered and rejected the idea and the court of appeal denied review. Despite this conflict and the inconsistency of *Ferguson* with previous case law, the California Supreme Court inexplicably chose to deny review and let the decision stand.

The *Ferguson* case presents a potentially large problem for employers. Frequently, the cost of medical care provided in a case exceeds the amount of indemnity provided, particularly where a serious injury—as might be expected in a case of serious and willful misconduct—has occurred. The monetary exposure to employers involved in serious and willful misconduct cases now may have an upper limit just short of what an employee might recover in a normal civil suit.

§ 3.5.5(d)

Labor Code Section 132a Discrimination

Employers and insurers are prohibited from taking any action because of an industrial injury that works toward the detriment of the injured worker.[1169] Such actions may range from

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[1164] An employee may be guilty of serious and willful misconduct also, resulting in a possible 50% reduction in compensation, *see* CAL. LAB. CODE § 4551, but such cases are extremely rare.

[1165] CAL. LAB. CODE § 4553; *Johns-Manville Sales Corp. Private Carriage v. Workers' Comp. Appeals Bd.,* 96 Cal. App. 3d 923 (1979).

[1166] CAL. INS. CODE § 11661.

[1167] 33 Cal. App. 4th 1613 (1995).

[1168] 59 Cal. Comp. Cas. 1116 (1994).

[1169] CAL. LAB. CODE § 132a; *Smith v. Workers' Comp. Appeals Bd.*, 152 Cal. App. 3d 1104 (1984).

outright termination to a reduction in grade, even where the employee cannot perform the duties of the higher grade,[1170] or the discontinuance of severance pay.[1171] When the employee proves that the detriment occurred, the burden shifts to the employer to prove that the detriment was not related to the industrial injury and was necessitated by the realities of doing business.[1172]

An employee's remedy for illegal discrimination is a 50% increase in benefits up to a maximum penalty of $10,000 and costs up to $250, plus reinstatement, lost wages and work benefits. In calculating the exposure of a discrimination claim, employers and insurers sometimes overlook the value of the lost wages and work benefits, which often may be more than the 50% increase in compensation benefits. There is no specific bar against insuring against this risk, but such insurance is almost never offered, while insurers may sometimes provide the cost of defense against such a claim.

No case has held yet that the 50% increase in compensation applies to any benefits other than indemnity, as the *Ferguson* case did with regard to claims of serious and willful misconduct of the employer. Given the $10,000 cap in section 132a, however, the impact would be far less than in a serious and willful misconduct case. A successor employer may be liable for a discriminatory act committed by its predecessor.[1173]

In 2003, the California Supreme Court in the case of *Department of Rehabilitation v. Workers' Compensation Appeals Board (Lauher)*, determined that in order to make a *prima facie* showing of discrimination under the statute, a worker must show that he or she had a legal right to the deprived benefit or status, and moreover, that the employer had an obligation to provide that benefit or status.[1174] In essence, this decision requires more than mere detrimental conduct by the employer—the worker must also show that he or she was subject to differential treatment as a result of the industrial injury. In *Gelson's Markets, Inc. v. Workers' Compensation Appeals Board,* the California Court of Appeal, applying *Lauher*, reversed a finding of by the WCAB of unlawful discrimination under Labor Code section 132a, and specifically found that section 132a requires a *prima facie* showing of disparate treatment.[1175] In that case, the court of appeal held that an industrially injured claimant failed to establish a *prima facie* case of discrimination under section 132a when the employer did not allow the claimant to return to work because he had submitted contradictory medical releases.[1176] Following surgery, the claimant's first medical release limited his work to the use of a forklift. After a risk manager telephoned the treating physician to seek clarification on the scope of the restrictions, the claimant obtained another release stating that he could return to work without restriction. The employer did not accept the releases because they were contradictory, and did not return claimant to work until receiving the opinion of an agreed medical examiner several months later. The claimant failed to establish the *prima facie* case of discrimination under section 132a because he made no showing that the employer would have returned to work a non-industrially injured employee whose physician had provided the same releases.

[1170] *See County of Santa Barbara v. Workers' Comp. Appeals Bd*., 109 Cal. App. 3d 211 (1980).

[1171] *Ditzler v. Loomis Armored Car*, *Inc.*, 16 Cal. Workers' Comp. Rep. (MB) 165 (1988).

[1172] *Judson Steel Corp. v. Workers' Comp. Appeals Bd*., 22 Cal. 3d 658 (1978).

[1173] *Superior Care Facilities v. Workers' Comp. Appeals Bd*., 27 Cal. App. 4th 1015 (1994).

[1174] *Department of Rehab. v. Workers' Comp. Appeals Bd*. (*Lauher*), 30 Cal. 4th 1281, 1300 (2003).

[1175] *Gelson's Mkts., Inc. v. Workers' Comp. Appeals Bd.,* 179 Cal. App. 4th 201 (2009).

[1176] 179 Cal. App. 4th 201.

A California Supreme Court decision has concluded that an injured worker may also file a state disability discrimination claim concurrently with a California Labor Code section 132a claim.[1177] This decision significantly alters the state of the law on that issue. In *City of Moorpark v. Superior Court*, the plaintiff was injured on the job. Once she recovered from her injury she requested to be returned to her position. However, her superior advised her that she was being terminated due to her inability to perform the essential functions of her job. The plaintiff filed a claim of disability discrimination under the Fair Employment and Housing provisions that prohibit such discrimination. The defendant employer argued that such a claim was barred by the exclusive remedy of Labor Code section 132a. The matter proceeded through the court system. Ultimately, the California Supreme Court concluded that Labor Code section 132a was not the exclusive remedy for an employee injured on the job who claims discrimination as a result of a disability, and that an employee may pursue claims under both state laws. The court noted, however, that the employee would not be entitled to double recovery. An employee is also allowed to pursue both workers' compensation claims and claims under the Americans with Disabilities Act.[1178]

Plaintiffs had also previously used *City of Moorpark* to argue that California Labor Code section 132a supported a tort claim for wrongful termination in violation of public policy. However, *City of Moorpark* never actually addressed this issue. In *Dutra v. Mercy Medical Center Mt. Shasta*,[1179] the court of appeals held that a plaintiff cannot use section 132a as a basis for a tort action for wrongful termination, declining to expand the *City of Moorpark* ruling. The court stated that "[a]llowing plaintiff to pursue a tort cause of action based on a violation of section 132a would impermissibly give her broader remedies and procedures than those provided by the statute."[1180]

Based on the above, any action taken with regard to an industrially injured employee should be carefully considered and founded on verifiable reasons that truly reflect the appropriateness and fairness of the action as compelled by the realities of doing business, not just business expediency, and consistency with existing employer leave of absence policies and past practices. Even the seemingly most well-grounded action may spur a penalty petition and, ultimately, liability for unlawful discrimination. Factors to consider may also include: whether the injured worker has reached permanent and stationary status; whether the injured worker has been declared unable to return to his or her usual and customary job; and whether it has been determined that the employer cannot offer modified or alternative work without undue hardship.

§ 3.5.5(e)

Termination of Health & Welfare Benefits During Workers' Compensation Leave

There are several WCAB cases that find that the termination of health benefits while an employer is temporarily disabled violates California Labor Code section 132a. In these cases,

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[1177] *City of Moorpark v. Superior Court*, 18 Cal. 4th 1143 (1998).

[1178] *Wood v. County of Alameda*, 875 F. Supp. 659 (N.D. Cal. 1995).

[1179] 209 Cal. App. 4th 750 (2012).

[1180] 209 Cal. App. 4th at 756. The plaintiff in *Dutra* also attempted to argue she was not subject to the workers' compensation exclusivity rule because her wrongful termination fell outside the compensation bargain of a typical employment relationship. The appellate court dismissed this point as irrelevant because the plaintiff had the opportunity to amend her complaint to seek alternative remedies, but her choice not to amend her complaint "foreclosed all possible remedies except the WCAB." 209 Cal. App. 4th at 756.

the WCAB found that although the employer was following the terms of their employee benefit plan, their action still constituted a detriment to the employee that was not compelled by business necessity.[1181] These cases ran contrary to federal law on this same subject.[1182]

However the WCAB's *en banc* decision in *Navarro v. A&A Farming* held that the WCAB has no jurisdiction over such an action, in that it would be preempted by federal ERISA laws.[1183] However, an employer should be careful not to assume that health benefits can be summarily terminated in every case where an employee is off work due to an industrial injury. The ERISA preemption defense contemplated by *Navarro* applies only to the termination of benefits provided pursuant to an ERISA plan. Not all health plans are ERISA plans. Employers are cautioned to always seek appropriate expert advice on whether their plan is indeed an ERISA plan, and further whether the termination of an employee's health and welfare benefits is legally appropriate under other related laws. Employers should also take note that termination of health and welfare benefits is not synonymous with a termination of employment. While termination of health benefits may be justified, a termination of employment generally may still be a violation of Labor Code section 132a, as well as other state and federal laws. An employer should also seek appropriate legal advice before deciding to terminate the employment of an employee who is off work due to an industrial injury.

§ 3.5.6

F. EMPLOYERS' RIGHTS

Employers have some input into the workers' compensation process. For example, employers may be able to obtain a hearing on the approval of a settlement if they believe that the case is not compensable, providing certain notices have been given and procedures have been followed.[1184] An insurer generally may not insure an employer or seek reimbursement from an employer for automatic late payment penalties.[1185]

As of 2000, however, an employer's right to information relating to pending workers' compensation claims was significantly limited. Employers had been entitled to all information that might affect their workers' compensation insurance premiums, with the exception of any document that the insurer was prohibited from disclosing due to the attorney-client privilege.[1186] However, in 2000, California Labor Code section 3762 was amended to provide that insurers, as well as third-party administrators, administering workers' compensation claims for self-insureds, are prohibited from "disclosing or causing to

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[1181] *Maraviov v. Tenet Health Sys.* (Case No. RDG 7544, Nov. 6, 1997, 25 CWCR 341); *Schick Moving Sys. v. Workers' Comp. Appeals Bd.*, 63 Cal. Comp. Cas. 1307 (1998); *Braden v. Workers' Comp. Appeals Bd.*, 64 Cal. Comp. Cas. 1069 (1999); *Beverly Hosp. v. Workers' Comp. Appeals Bd.*, 61 Cal. Comp. Cas. 491 (1996).

[1182] The Supreme Court of the United States addressed nearly this precise issue in *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125 (1992), in a case involving a statute similar to Labor Code Section 132a. In that case, the Supreme Court held that a District of Columbia requirement that employers that provide health insurance for employees must provide equivalent health insurance coverage for industrially injured employees was preempted by ERISA.

[1183] 67 Cal. Comp. Cas. 296 (2002).

[1184] CAL. LAB. CODE § 3761; CAL. CODE REGS. tit. 8, § 10875.

[1185] CAL. INS. CODE § 11661.6; CAL. LAB. CODE § 4650(e).

[1186] CAL. LAB. CODE § 3762.

be disclosed to an employer, any medical information, as defined in subdivision (b) of section 56.05 of the Civil Code, about an employee who has filed a workers' compensation claim."[1187]

The amended version of Labor Code section 3762 does provide two exceptions to the disclosure prohibition. First, an insurer or third-party administrator can reveal information concerning a "diagnosis" of the injury for which workers' compensation is claimed that would affect the employer's premium.[1188] Second, an insurer or third party administrator can reveal medical information regarding a work related injury that is necessary for the employer to have for the employer to "modify the employee's job duties."[1189]

California Labor Code section 3762 prohibits disclosure to the employer of any "medical information" obtained during the administration of a workers' compensation claim. *Medical information*, as defined in Civil Code section 56.05(f), means "any individually identifiable information . . . in possession of or derived from a provider of health care . . . regarding a patient's medical history, mental or physical condition, or treatment." This would clearly include any previous medical history given by the employee to his doctor as well as the reports and records of the current treating physician. It would also preclude the employer from obtaining subpoenaed records from other health care providers and medical legal reports. It would probably also prohibit the release of medical information by any kind of abstract prepared by a physician or claims person.

Notwithstanding the explicit inclusion of third-party administrators in the amended version of Labor Code section 3762, there is a real question as to whether this exception applies to self-insured employers that do not technically pay premiums. Still, records are kept of loss results for self-insured employers that result in the calculation of experience modification for premium purposes. Additionally, many self-insured employers have excess insurance and therefore might be said to pay workers' compensation premiums within the meaning of Labor Code section 3762(c).

The second exception allows disclosure of medical information necessary for the employer to evaluate whether modified work is available for the employee. It can be argued that any and all medical reports should be made available to the employer once the treating physician indicates that the applicant may return to work with some restrictions. Arguably, employers must be able to review the entire medical report in order to determine whether, given the employee's condition at the time, temporary or permanent modified work can be provided. This would include all information necessary to return an injured worker to full duty—*i.e.*, to determine if modification is necessary and what the modification should be if full duty is not possible, or to provide alternative work.

Labor Code section 3762(c)(1) and (2) was amended to provide that employers are entitled to "medical information limited to the diagnosis of the mental or physical condition for which the workers' compensation is claimed and the treatment provided for this condition." This permits employers further access to treatment records and records relating to a medical diagnosis without having to determine if such information would "effect the employer's" premium. The second exception set forth in Labor Code section 3762(c)(2) regarding information necessary to modify an employee's work duties was not changed.

[1187] CAL. LAB. CODE § 3762(c).

[1188] CAL. LAB. CODE § 3762(c)(1).

[1189] CAL. LAB. CODE § 3762(c)(2).

§ 3.5.7

G. PROCEDURE

§ 3.5.7(a)

Filing a Claim

An employer is required to give an employee an Employee Claim Form within one working day of an industrial injury, excluding injuries that require only first aid.[1190] Filing the claim form with the employer starts the 90-day period to deny the claim or have it presumed compensable.[1191] Filing the form is a prerequisite to a medical evaluation.[1192]

As soon as the claim form is filed, the employer must advise its insurer or claims administrator, since an investigation must be promptly commenced, evidence promptly collected, and a decision made to accept or deny the claim. Failure to promptly report and investigate the claim may prevent the acquisition of evidence that could have been obtained within the first 90 days. If evidence could have been obtained within that 90-day period with the exercise of due diligence, but was acquired later, the evidence may not be admissible at a hearing.[1193] The consequences of the exclusion of evidence may be extremely adverse.

To the extent possible, the investigation should include a statement or deposition from the injured worker, interviews with any witnesses, a site visit with photographs if appropriate, acquisition of all medical records, and a medical-legal report if allowed. Sometimes, a cost-benefit analysis limits the extent of the investigation.

Although the WCAB in *McGoldrick v. Workers' Compensation Appeals Board* held that a denial notice need not be in writing, WCAB rule 10121 requires the denial notice to be in writing, at least for purposes of restarting the statute of limitations.[1194] The better practice is to issue the denial notice in the form required by the rules.

If the claim of injury is accepted, benefits are provided without WCAB involvement. The primary treating doctor is obligated to report regularly and to report the level of permanent disability when permanent and stationary or maximum medical improvement status is reached.[1195] If the parties accept the treating doctor's opinion, the case may be resolved on that basis.

§ 3.5.7(b)

Medical-Legal Evaluations

The WCAB generally relies upon the opinions of Qualified Medical Evaluators (QMEs) when reaching decisions on disputed issues such as periods of temporary disability, the nature and extent of permanent disability, and need for future medical treatment. The procedures for obtaining medical-legal evaluations are set forth in Labor Code sections 4060 through 4062.2.

[1190] CAL. LAB. CODE § 5401(a).

[1191] CAL. LAB. CODE § 5402.

[1192] CAL. LAB. CODE § 5401(c).

[1193] CAL. LAB. CODE § 5402; *Napier v. Royal Ins. Co.*, 20 Cal. Workers' Comp. Rep. (MB) 124 (1992); *Fitness v. American Motorists*, 20 Cal. Workers' Comp. Rep. (MB) 303 (1992).

[1194] 22 Cal. Workers' Comp. Rep. (MB) 119 (1994).

[1195] CAL. LAB. CODE § 4061.5.

The procedures vary depending on whether the employee is represented by an attorney or not. When an employee is represented by an attorney, the parties may agree to use a particular QME (an Agreed Medical Evaluator or AME) to address disputed issues. When an employee is not represented by counsel, or when represented parties cannot agree on an evaluator, Labor Code provisions set forth the procedures for obtaining and selected a physician from a three-member Panel of Qualified Medical Evaluators (a PQME).

§ 3.5.7(c)

Initiating WCAB Proceedings

The jurisdiction of the WCAB is invoked by the filing of an application for adjudication of claim.[1196] The jurisdiction of the WCAB is necessary to schedule depositions and subpoena records.

A hearing is obtained by filing a Declaration of Readiness to Proceed or a request for an Expedited Hearing. The WCAB is required to promptly set cases for hearing. Hearings may be conferences, for the purpose of settlement discussion and the identification of issues, witnesses, and evidence, or trials, for the actual presentation of testimony and receipt of evidence. Conferences are almost always set before trials.

A hearing should not be requested by a party until its case is complete. At a Mandatory Settlement Conference, acquisition and admission of any further evidence not already obtained may be prohibited. Conferences may be adjourned or continued to a later date only if specific good cause exists for the delay.

§ 3.5.7(d)

Statutes of Limitation

Time limits exist on the filing of workers' compensation claims, but claims are rarely precluded by these limits due to a variety of factors, such as the employee's lack of knowledge of his or her rights. No statute of limitations runs against a minor or an incompetent.[1197]

Ordinary cases must be filed within one year from the date of injury, or from the last provision of benefits, whichever is later.[1198]

A claim for death benefits may be filed within one year of the date of death or within one year of the last furnishing of benefits if death occurs more than one year from the date of injury, but in no event may the claim be filed more than 240 weeks from the date of injury.[1199]

Discrimination claims are to be filed within one year of the discriminatory act,[1200] and claims of serious and willful misconduct must be filed within one year of the misconduct.[1201]

[1196] Between January 1, 1990 and January 1, 1994, jurisdiction was invoked by the filing of the claim form with the employer. This process had significant legal and practical problems and was repealed.

[1197] CAL. LAB. CODE § 5408.

[1198] CAL. LAB. CODE § 5405.

[1199] CAL. LAB. CODE § 5406.

[1200] CAL. LAB. CODE § 132a.

[1201] CAL. LAB. CODE § 5407.

§ 3.5.7(e)

Litigation & Hearing

A workers' compensation trial is an informal proceeding. The case is tried before a judge only, and formal rules of evidence do not apply. Unlike at civil trials, at the WCAB hearsay evidence is specifically admissible, though it is sometimes excluded as unreliable. Medical evidence is taken in the form of written reports and records. Testimony is given under oath and the witnesses are examined orally by the attorneys or representatives, or even by the judge.

§ 3.5.7(f)

Arbitration

An alternative to litigation at the WCAB is arbitration. Retired judges or attorneys act as arbitrators. The process is voluntary in most cases, but is required for matters involving insurance coverage disputes, low permanent disability cases, and some rehabilitation appeals. The process is seen as more expedient and less formal than WCAB proceedings. Arbitrators' awards are subject to appeal in the same manner as the awards of WCAB judges.[1202]

§ 3.5.7(g)

Resolution

The WCAB strongly encourages informal resolution of disputes, rather than litigation and a decision by a judge.

A workers' compensation case may be a *medical only* case, involving no lost time or permanent disability. Such cases are usually closed without any further action.

Cases involving indemnity or need for further benefits may be resolved by an agreement to the facts, known as Stipulations with Request for Award. If approved by the WCAB, an award will issue from a judge granting to the injured employee the benefits to which the parties agreed. A stipulated award is subject to reopening for further benefits for up to five years after the date of injury.

All cases may be fully resolved, closed, and not subject to reopening by a Compromise and Release (C&R). A C&R usually deals with all issues including future medical care. Usually, the amount of a compromise and release is greater than the value of the indemnity, since the injured employee is giving up future rights and the employer is being released from any further liability.

All C&R agreements must be approved by the WCAB, which is charged with ensuring the adequacy of the agreement for the injured employee.

There has been a renewed concern about restrictions placed upon workers' compensation C&R agreements by Medicare. The Health Care Financing Administration (HCFA), the agency that administers Medicare, has the right to reimbursement for any monies paid by Medicare for a work-related injury settled by way of compromise and release, when such settlement includes compensation for future medical care. Moreover, reimbursement can come from the worker, his or her lawyer or even the defendant/insurance company paying the settlement.

[1202] CAL. LAB. CODE §§ 5270-5278.

The law governing right of such reimbursement is set forth at U.S. Code title 42, section 1395y(b) and the Code of Federal Regulations title 42, sections 411.40 through 411.47 (also called the "Medicare Second Payer" rules). These laws provide that if an injured worker has received funds from a settlement of a workers' compensation claim for the payment of future medical expenses, which would normally be covered by Medicare, then Medicare is not required to pay such expenses. The regulations also expressly prohibit any attempts to improperly characterize settlement proceeds so as to avoid Medicare's right of reimbursement.

If the case is not settled, but rather tried, a written decision by the judge is required within 30 days of submission of the case. Any party or lien claimant may appeal the trial judge's decision to a panel of WCAB commissioners, which may or may not grant reconsideration. Appeals to the state appellate courts and the California Supreme Court also are discretionary on the part of the court. Compared to the number of requests that are made, review of workers' compensation cases are rare, and the number of reviews that are granted at the injured worker's request far outnumber the reviews requested by the employer.

§ 3.5.7(h)

Continuing Jurisdiction & Reopening a Case

The WCAB has continuing jurisdiction over all its orders, decisions, and awards, but a petition to reopen for good cause, filed within five years of the date of injury, is required to augment, rescind, alter, or amend an award.[1203] Thus, the WCAB can enforce an award of lifetime medical care even ten years after a date of injury, but it cannot award additional temporary disability that long after an injury unless a petition to reopen has been timely filed.

§ 3.5.8

H. CONCLUSION

Workers' compensation reform continues to claim a position atop employers' agendas and reform proponents continue to contend that a great deal more needs to be done to further bring workers' compensation costs under control.

§ 3.6

VI. ADDITIONAL RIGHTS UNDER THE CALIFORNIA LABOR CODE

§ 3.6.1

A. INTRODUCTION

The California Labor Code embodies the state legislature's efforts to protect, develop and improve the welfare and working conditions of workers in California. California employers are presumed to be knowledgeable about literally thousands of sections of the Labor Code. Although most employers are familiar with the basic provisions of the Labor Code, such as

[1203] CAL. LAB. CODE §§ 5804, 5410.

workers' compensation and general wage and hour laws, there are a significant number of unusual and frequently overlooked provisions that, if violated, may lead to significant civil and criminal penalties. Much of THE CALIFORNIA EMPLOYER addresses recent developments in California employment law, including new or amended sections of the Labor Code. The purpose of this section is to provide a thumbnail summary of a number of the many Labor Code provisions that may not be common knowledge.

§ 3.6.2

B. GENERAL PROVISIONS

§ 3.6.2(a)

State Authorities Have Broad Investigative & Enforcement Powers

Labor Code Sections 74, 92 and 93: Provide that to enforce IWC orders and provisions of the Labor Code, DLSE representatives may issue subpoenas to compel the attendance of witnesses and the production of records. DLSE subpoenas are enforceable in the state courts. It is a misdemeanor to willfully ignore such a subpoena if the subpoena requires an appearance ten miles or less from the place of service. DLSE representatives may also administer oaths, examine witnesses under oath, take depositions and prepare affidavits.

Labor Code Section 90: Gives free access to all places of labor to the Labor Commissioner, his or her deputies and agents. Refusing admission to such individuals or not furnishing them with any information regarding their lawful duties that is in the employer's possession or under the employer's control is a misdemeanor.

Labor Code Section 95: Allows designated employees of the DLSE to arrest offending persons without a warrant for certain violations of the Labor Code and other labor laws of the State of California.

Labor Code Section 226(a)(7): Employers must furnish employees with "an accurate itemized statement in writing" showing among other things "the name of the employee and the last four digits of the employee's Social Security number or an employee identification number other than a Social Security number."

Labor Code Section 1171.5: The DLSE may enforce the protections, rights and remedies encompassed in the Labor Code to all individuals who have applied for employment, are currently employed or have been employed in the State of California, regardless of immigration status. In proceedings or discovery undertaken to enforce state laws no inquiry is permitted into a person's immigration status unless the person seeking the information demonstrates by clear and convincing evidence that the inquiry is necessary to comply with federal immigration law.

Labor Code Section 1195.5: Allows the DLSE to examine employer records and determine whether employee wages have been properly paid.

§ 3.6.2(b)

Penalties & Misdemeanor Charges for Violation of the Labor Code

Labor Code Section 23: Unless a different punishment is specifically designated, every offense declared by the Labor Code to be a misdemeanor is punishable by imprisonment in a county jail not exceeding six months or by a fine not exceeding $1,000, or both.

Labor Code Section 91: Makes it a misdemeanor to willfully impede or prevent the Labor Commissioner or his or her deputies or agents in the performance of their duties.

Labor Code Sections 98.1 and 281.6: In an action for unpaid wages brought before the Labor Commissioner or filed in court, for which an award is made, interest may also be awarded at the legal rate set forth in Civil Code section 3289 (10%).

Labor Code Section 203: Failure to pay on time the wages of a departing employee as required can result in a "waiting time" penalty in an amount equal to a day of pay for every day the payment is late, up to a maximum of 30 days. In 2006, the California Supreme Court handed down a significant waiting-time penalty decision in *Smith v. Superior Court* (*L'Oreal USA*).[1204] Looking at the issue of whether section 203 must be enforced to require the immediate payment of final wages to employment relationships ending at the completion of specific periods of time, the California Supreme Court unanimously answered in the affirmative, deciding that section 203 must be interpreted literally.

Labor Code Section 203.1: Provides that payment of wages or fringe benefits to employees by an employer with a check that "bounces" can result, in certain circumstances, in a "waiting time" penalty in an amount equal to the wages or fringe benefits for a period up to 30 days.

Labor Code Section 210: Increases penalties (pursuant to Assembly Bill 276) for more than 100 different Labor Code violations to a maximum amount of $500 with the penalty for the first violation going from $50 to $100 and with penalties for subsequent, willful, or intentional violations going from $100 to $200.

Labor Code Section 213: Assembly Bill 1093 amended Labor Code section 213 to permit employers to pay final wages through direct deposit if the employee already is receiving his or her paycheck in that manner. This amendment did not alter the time by which final pay must be provided pursuant to Labor Code section 202.

Labor Code Section 226.3: Sets forth civil penalties of $250 per employee for the first violation and $1,000 per employee for subsequent violations if an employer fails to furnish employees with itemized wage statements as required by section 226.

Labor Code Section 226.7: An employee cannot be required to work during any meal or rest period, absent a written waiver. An employer that fails to provide a meal or rest period in accordance with the wage orders shall pay one hour of pay at the employee's regular rate of pay for each day that a meal or rest period was not provided. Meal and rest period violations constitute wages, not penalties.[1205]

Labor Code Section 227: Provides that whenever an employer has agreed to make payments to a health or welfare fund, pension fund or vacation plan for the benefit of employees, it shall be

[1204] 39 Cal. 4th 77 (2006).

[1205] *Murphy v. Kenneth Cole Productions,* 40 Cal. 4th 1094 (2007).

unlawful to fail to make such payments either willfully or with the intent to defraud. Violations of this section are a misdemeanor or, if the employer has failed to pay over $500, a felony punishable by imprisonment up to five years and/or a fine up to $1,000. (NOTE: A California Court of Appeal has held that section 227 is preempted by the federal Employee Retirement Income Security Act (ERISA)).[1206]

Labor Code Section 512: Assembly Bill 1734 amended section 512 to exempt from the meal period requirements employees in the motion picture and broadcasting industries if they are covered by a valid collective bargaining agreement.

Labor Code Section 512(c): Employees covered by a collective bargaining agreement are exempt from meal and rest period requirements when employed in the wholesale baking industry.

Labor Code Section 512.5: Exempts employees covered by a collective bargaining agreement from meal and rest period requirements when they operate commercial motor vehicles.

Labor Code Section 515.5(a)(4): The strict-duties test must be met to meet the computer professional exemption. Section 515.5 also creates an alternative salary basis test that creates an exemption for overtime if the computer professional satisfies the duties test and earns a salary of not less than $75,000 for full-time employment and be paid not less than $6,250 per month.

Labor Code Section 558: Provides that any employer or other person acting on the employer's behalf is subject to a civil penalty for violating any IWC order or any provision of the code regulating hours and days of work. The penalty for any initial violation is $50 per underpaid employee for each pay period and for each subsequent violation the penalty is $100 per underpaid employee for each pay period.

Labor Code Sections 2698 *et seq.*: In 2004, the Labor Code Private Attorneys General Act (PAGA) was enacted. This statute, which came colloquially to be known as the "Sue Your Boss" law and the "Bounty Hunter" law, created a private right of action to enforce any labor code provision and to seek penalties of $100 for an initial violation and $200 for each subsequent violation. This law was almost immediately subject to abuses by overzealous plaintiff's attorneys who sued employers over such things as the size of the font on certain mandated posters. Responding to this abuse, the law was amended later in 2004 by Senate Bill (S.B.) 1809. Using the state budget as a vehicle for compromise, Governor Schwarzenegger brokered the drafting and passage of S.B. 1809, which took effect immediately when signed by the Governor on August 11, 2004, with its key provisions expressly retroactive to January 1, 2004. In essence, the amendments whittled back the scope of the PAGA and provided a procedural hurdle of prior notice and exhaustion of administrative remedies on the part of the employee and an opportunity for the employer to cure the alleged violations prior to the filing of an action.

§ 3.6.2(c)

Appeals & Attorneys' Fees

Labor Code Section 98.2: An employer that appeals an adverse decision of the Labor Commissioner must post a bond with the court in the amount awarded by the Labor Commissioner and give written notice of the bond to the parties and the Labor Commissioner. This obligation is not imposed on an employee who appeals.

[1206] *See Cairy v. Superior Ct.*, 192 Cal. App. 3d 840 (1987).

Labor Code Sections 218.5 and 1194: Effective January 1, 2014, courts may award reasonable attorneys' fees and costs to the prevailing party in any action brought for the nonpayment of wages, fringe benefits, or health and welfare pension fund contributions. However, if the prevailing party is not the employee—*i.e.*, the employer—attorneys' fees and costs are only awarded if the court finds that the employee brought the court action in bad faith. As of January 2012, section 1194.3 provides that an employee may recover attorneys' fees and costs that are incurred in enforcing a court judgment for unpaid wages under the Labor Code. However, if the action is for minimum wage or for overtime compensation, only the employee is entitled to recover attorneys' fees if the employee prevails.

§ 3.6.3

C. EMPLOYMENT REGULATIONS

§ 3.6.3(a)

Prohibition Against Discharge or Discrimination

Labor Code Section 98.2(c): Requires courts to award costs and reasonable attorneys' fees to the employee on *de novo* appeals from the Labor Commissioner if the employee is awarded any "amount greater than zero." The court is required to do so even if the employee recovers less in court than was recovered from the Labor Commissioner. This is a statutory reversal of the California Supreme Court's decision in *Smith v. Rae-Venter Law Group.*[1207]

Labor Code Section 98.6: Prohibits discharge or any discrimination against an employee or applicant for instituting or participating in proceedings before the Labor Commissioner.

Labor Code Section 132a: Prohibits discrimination in employment against workers who are injured in the course and scope of their employment or who file a workers' compensation claim.

Labor Code Sections 230 and 230.1: Prohibits discharge of or discrimination against an employee on jury duty so long as the employee gives reasonable notice to the employer that he or she is required to serve. It also prohibits discrimination in employment against a person who is a victim of a crime for appearing in court as a witness as required by law so long as reasonable notice is given to the employer. This section also prohibits an employer from discharging, discriminating against, or retaliating against a person who is a victim of domestic violence for taking time off from work to obtain a temporary restraining order or other injunctive relief to protect the employee or the employee's children. In addition, an employee who is a victim of sexual assault may use paid or unpaid leave, and may not be discharged or discriminated against, for attending court or seeking assistance in connection with the sexual assault.

An employee must give advance notice when feasible and may be required to provide written certification of the need to take the time off.

Willful failure to rehire or to restore the individual to his position can be a misdemeanor. Employers with 25 or more employees cannot discharge or discriminate against an employee who takes time off from work to obtain counseling or to seek medical attention for injuries caused by domestic violence.

[1207] 29 Cal. 4th 345 (2002).

Labor Code Section 230.2: Prohibits an employer from discharging, discriminating against or retaliating against an employee for engaging in protected activity as a victim of domestic violence or sexual assault.

Labor Code Section 230.3: Prohibits discharge or discrimination against an employee for taking time off to perform emergency duty as a reserve peace officer or emergency rescue work, including fire protection organizations or law enforcement agencies.

Labor Code Section 230.4: Prohibits discharge or discrimination by employers with 50 or more employees against volunteer firefighters, reserve peace officers or emergency rescue personnel for taking time off for fire, law enforcement or emergency rescue training.

Labor Code Section 230.5: Prohibits an employer from discharging, discriminating against or retaliating against an employee who is the victim of certain serious offenses (including felony domestic abuse, hit-and-run causing death or injury and sexual assault) or for taking time off from work, at the victim's request, to appear in any proceeding in which a right of the victim is at issue.

Labor Code Section 230.7: Prohibits discharge of or discrimination against an employee who is a parent or guardian who has been requested to attend a meeting at a suspended child's school as long as reasonable notice is given to the employer.

Labor Code Section 230.8: Prohibits employers of 25 or more employees at one location from discharging or discriminating against an employee who is a parent, guardian or grandparent with custody of any child in kindergarten through grade 12 or attending a licensed childcare facility, for taking off up to 40 hours each year to visit the school or daycare facility of the child, as long as the employee gives reasonable advance notice to the employer. Such employees may not take off more than eight hours per calendar month during the year. Such employees shall utilize existing vacation, personal leave, or compensatory time off for purposes of such planned absences unless otherwise provided in a collective bargaining agreement.

The employer may ask the employee to verify the school or daycare facility visit through written verification from the school. In addition to being responsible for reinstatement and back pay, violators are subject to a civil penalty in an amount equal to triple the employee's lost wages and work benefits.

Labor Code Section 232: Prohibits employers from requiring an employee not to disclose the amount of his or her wages, requiring an employee to sign such an agreement, and/or discharging or otherwise disciplining any employee who discloses the amount of his or her wages.

Labor Code Section 232.5: Prohibits an employer from requiring that an employee refrain from disclosing working conditions, or requiring an employee to sign a document restricting the right to disclose working conditions, or disciplining, discharging or discriminating against an employee who makes a disclosure about his or her working conditions.

Labor Code Section 432.2: Prohibits discharge of or retaliation against an employee in private employment for refusing to submit to a polygraph, lie-detector or similar test.

Labor Code Section 1044: Prohibits discharge because of the disclosure of illiteracy of any employee who reveals a problem of illiteracy and who satisfactorily performs his or her work.

Labor Code Sections 1101–1102: Prohibit an employer from threatening to discharge or discharging an employee for participating in politics, holding public office, or otherwise adopting or following any particular course or line of political action or political activity.

Labor Code Section 1102.5: Provides additional protection for employee whistleblowers and provides posting requirements for employers. Protects employees with reasonable, but mistaken, belief that requested a work activity violates the law.

Labor Code Section 1102.6: Creates a clear and convincing burden of proof on an employer to establish the adverse employment action would have been taken absent the protected activity.

Labor Code Section 1102.8: An employer is required to display a "list of employee's rights and responsibilities under the whistleblower laws" in size larger than 14-point type. Previously, the display requirement was a size larger.

Labor Code Sections 1400–1408: Requires covered establishments with 75 or more employees to provide at least 60 days' notice to employees and state and local authorities of mass layoffs (50 or more employees), relocations (moving substantially all of a commercial operation more than 100 miles away) and terminations (substantial cessation of commercial operations). Specific projects and seasonal layoffs are exempted. Failure to provide notice may result in an award of back pay and penalties. Payments to an employee under the federal or California WARN Act are not to be construed as compensation for purposes of determining eligibility to and amount of benefits under the Employment Insurance Code.

Labor Code Section 2929: Provides that employers may not discharge employees because the garnishment of their wages has been threatened or because their wages have been subject to one garnishment for the payment of a judgment. By implication, employers may discharge employees by reason of multiple garnishments.

Labor Code Sections 6399.7 and 6310: Provide that no person shall discharge or in any other way discriminate against an employee because that employee has made an oral or written complaint to the Division of Occupational Safety and Health (DOSH), other governmental agencies having responsibility for assisting DOSH, or the employee's employer or other representative regarding employee safety or health, unsafe working conditions or work practices, or because that employee has participated in an employer-employee occupational health and safety committee, or because that employee has exercised rights including the filing of a complaint and/or testifying in any proceeding related to these provisions of the Labor Code.

If there has been discrimination, the employee will be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer. An employer that willfully refuses to rehire, promote or otherwise restore an employee who has been determined by a grievance procedure, arbitration or legally authorized hearing by law to be eligible for rehiring or promotion is guilty of a misdemeanor.

Labor Code Section 6311: Provides that no employee shall be laid-off or discharged for refusing to perform work whereby any occupational safety or health standards or any safety order of DOSH would be violated, where the violation would create a real and apparent hazard to the employee or his or her fellow employees.

§ 3.6.3(b)

Payment of Wages

Labor Code Section 201: Provides that if an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately. In the case of a layoff of a group of employees at the end of seasonal employment in certain industries, payment is timely if made within 72 hours. The application of this section to temporary service employees is now governed by Labor Code section 201.3.

Labor Code Section 201.3: Allows employers of temporary service employees working on a weekly basis to be paid on a weekly basis even if the assignment ends before the normal payday. Temporary service employees working on a day-to-day basis must be paid on a daily basis. The same payment requirements apply to both with respect to when final pay is due under Labor Code section 201. A *temporary services employer* is defined as an employing unit that contracts to supply workers to perform services for customers, that negotiates with clients about the time and place where the services will be provided, the type of work, the working conditions and the quality and price of services, that is responsible for the assignment and reassignment of employees to clients, that sets rates of pay, that pays workers from its own accounts, and that has the authority to hire and terminate employees.[1208]

Labor Code Section 202: Provides generally that employees who quit their employment must be paid within 72 hours, unless the employees gave 72 hours' notice of their intention to quit, in which case the wages must be paid at the time of quitting. Employees who have not given such notice may elect to receive their final check by mail. If final payment is made late, the employee may be able recover a waiting time penalty of one day's pay for each day the final pay is late up to a maximum of 30 days.

Labor Code Section 204.3: Allows an employer to provide employee time off from work in lieu of paying overtime compensation if specific steps are followed. See § 3.1 of this Chapter for an explanation of compensatory time off requirements and a caution about how federal law affects this statute.

Labor Code Section 206: Requires the employer, in the event of a dispute over wages, to pay without condition and in a timely manner all wages the employer concedes are due. This section also requires the employer to pay within ten days any other amounts of wages that the Labor Commissioner determines should be paid, or the employer may be liable for triple the amount of any damages accruing to the employee as a direct and foreseeable consequence of such failure to pay.

Labor Code Section 206.5: Prohibits an employer from requiring the execution of any release from any claim for wages unless payment of such wages has been made, and further provides that any such release required or signed in violation of the Labor Code is null and void. Violation of this section is also a misdemeanor. It is a violation for an employer to knowingly require an employee to execute false statements in order to be paid. Employers should, as a result, provide employees an opportunity to correct any record of hours of work before requiring that they be signed.

[1208] For employers outside of this definition, some relief may be found in a district court decision concluding that employees who have a recurring—as opposed to a one-time—temporary employment relationship are not considered to be terminated each time an assignment ends. *Elliot v. Spherion Pacific Work, L.L.C.,* 572 F. Supp. 2d 1169 (C.D. Cal. 2008).

Labor Code Section 207: Requires every employer to conspicuously post a notice specifying the regular paydays and the time and place of payment as required by the Labor Code. Violation of this section constitutes a misdemeanor, pursuant to section 215.

Labor Code Section 216: Provides that it is a misdemeanor for any agent, manager, superintendent, etc., who has the ability to pay to willfully refuse to pay wages due after a demand has been made.

Labor Code Section 221: Prohibits an employer from collecting or receiving from an employee any part of the wages paid to the employee.

Labor Code Section 226: Employers must include on a detachable paycheck stub or other contemporaneous record of wage payment showing the gross and net wages earned, total hours worked (nonexempt employees), the applicable hourly rates and the total hours worked at each rate (nonexempt employees), all authorized deductions, and the inclusive dates of the period for which the employee is being paid. If an employee is paid a piece rate, the stub or record must also show the number of piece-rate units and any applicable piece rates. Employers must comply with an oral or written request of a current or former employee to inspect or copy his or her own payroll records within 21 days of receiving the request. The employee may be charged for the actual cost of reproducing the payroll records. The employer is subject to a $750 fine for failing to permit a current or former employee to inspect or copy records within the 21-day period.

Labor Code Section 351: All gratuities belong to the employee, and the employer may not share in or otherwise receive any part thereof. Section 351 provides that "[n]o employer or agent shall collect, take, or receive any gratuity or a part thereof that is paid, given to, or left for an employee by a patron, or deduct any amount from wages due an employee on account of a gratuity . . . ."

This Labor Code provision has become scrutinized in tip-pooling (tip-sharing) cases. Mandatory tip pooling is allowed under certain circumstances. For example, in the restaurant setting, it is acceptable where: (1) employees who share in the tips provide direct table service; (2) the policy does not compensate the employer; and (3) the policy is fair and reasonable.[1209] Tip pooling[1210] should be distinguished from *tip-allocation* policies, in which an employer may permissibly allocate to servers *and* supervisors the tips placed in a collective tip box.[1211]

Labor Code Section 1182.12: Effective July 1, 2014, the minimum wage rate in California is $9 per hour. Because an exempt executive, administrative or professional employee must be paid a salary of at least two times the state's minimum wage for 40 hours of work per week, based on the increase in the state minimum wage, an employee must now be paid at least $720 per week ($37,440 per year) to qualify for a white-collar exemption.

[1209] *Leighton v. Old Heidelberg, Ltd.*, 219 Cal. App. 3d 1062 (1990).

[1210] The employer may not permit managers to share in tips given to an employee directly. *Jameson v. Five Feet Rest., Inc.*, 107 Cal. App. 4th 138 (2003).

[1211] Where customers place gratuities in a collective tip box, rather than to an employee personally, the employer may enforce a tip allocation policy that permits all service employees to share in the gratuity (including, for instance, baristas and shift supervisors). *Chau v. Starbucks Corp.*, 174 Cal. App. 4th 688 (2009).

Labor Code Section 1183: Requires employers to post wage orders for their occupation or industry in the building in which employees affected by the order are employed.

Labor Code Section 1193.6: Allows the Department of Industrial Relations or the DLSE to bring an action for unpaid minimum wages or overtime compensation plus interest and reasonable attorneys' fees with or without the consent of the employees affected.

Labor Code Sections 2751–2752: Provide that employers that have no fixed place of business in California and whose payments to employees involve commissions must have a written employment contract setting forth the method of computation and payment. Employers that do not comply with this written contract requirement will be liable to the employee in a civil action for triple damages.

Labor Code Section 2802: Generally requires employers to reimburse their employees for all that the employees expend or lose in direct consequence of performing their duties for the employer.

An employer may reimburse automobile-related expenses with enhanced compensation for those employees who use automobiles over those who do not.[1212] Care must be taken with respect to itemized wage statements.

§ 3.6.3(c)

Employees' Working Conditions—Rights & Restrictions

Labor Code Section 26: Provides that ex-convicts who have obtained a certificate of rehabilitation and who have obtained a termination of their probation and a dismissal of the information or accusation against them may not be denied a license regulated by the Labor Code.

Labor Code Section 29.5: Provides that the governor shall annually issue a proclamation declaring April 28 as Workers' Memorial Day in remembrance of the courage and integrity of American workers.

Labor Code Section 231: Provides that an employer that requires that an employee have a driver's license shall pay the cost of any physical examination required for the license unless the examination was taken before the employee applied for such employment with the employer.

Labor Code Section 232.5: Prohibits an employer from requiring that an employee refrain from disclosing working conditions, or requiring an employee to sign a document restricting the right to disclose working conditions, or disciplining, discharging or discriminating against an employee who makes a disclosure about his or her working conditions.

Labor Code Sections 233 and 234: Requires that employers that provide paid sick leave to employees must allow employees to use up to one-half of their yearly accrual for the illness of a child, parent, spouse or domestic partner of the employee. Sick leave includes time off, personal days, vacation, etc., if such time off could be used by an employee for his or her own personal illness. Employers may not have an absence control policy that counts sick leave authorized under Labor Code section 233 as time off under the policy.

Please note that San Francisco has adopted its own sick leave policy. Among other things, it provides that employees earn one hour of paid sick leave for every 30 hours worked. Employees

[1212] *Gattuso v. Harte-Hanks Shoppers, Inc*. 42 Cal. 4th 554 (2007).

of small employers with ten or less employees may accrue up to 40 hours of paid sick leave. Other employees accrue up to 72 hours. Accrued paid sick leave carries over from year to year.

Labor Code Section 432: Requires that upon request employers must give to an employee a copy of any document the employee has signed relating to his or her obtaining employment.

Labor Code Section 435: Prohibits employers from making audio or video recordings of an employee in a restroom, locker room or room designated by an employer for changing clothes. An employer may seek a court order to create such recordings. This section does not apply to the federal government and its employees.

Labor Code Sections 450–451: Prohibit employers from compelling or coercing employees to patronize the employer or anyone else in the purchase of anything of value. Violation of this section is a misdemeanor.

Labor Code Section 1175: Provides that failure to keep required records or refusing access to a place of business to any member of the IWC or employee of the DLSE engaged in administering or enforcing applicable provisions of the Labor Code is a misdemeanor.

Labor Code Section 1194.2: Allows liquidated damages in an amount equal to unpaid wages and interest to be awarded in an action to recover wages paid at less than the minimum wage, but does not allow liquidated damages for failure to pay overtime compensation.

Labor Code Section 1198.5: Requires an employer, upon request, to allow an employee to inspect all personnel records related to the employee's performance or to any grievance concerning the employee. Such examinations are to be conducted at reasonable times and at reasonable intervals. Unless the personnel records are kept at a location that is different from the place the employee reports to work, the employee is not entitled to be compensated for the time to review the personnel record. Employees do not have a right to review records relating to the investigation of a possible criminal offense, or letters of reference.

Labor Code Section 1199: Makes it a misdemeanor to require employees to work under conditions prohibited by an order of the IWC or to pay employees a wage less than the minimum fixed by the Commission or to fail to otherwise comply with an order or ruling of the Commission.

Labor Code Section 1701–1701.20: Sets forth detailed requirements for how artists, including actors and actresses, are to be paid fees. Requires written contracts for advance-fee talent services. Specific contractual requirements are outlined and recordkeeping obligations are detailed.

Labor Code Section 2750.5: Sets forth the criteria to satisfactorily prove independent contractor status. This section also provides that there is a rebuttable presumption regarding the burden of proof that a worker who performs services for which a license is required, generally as a contractor or builder, is presumed to be an employee if that person has not obtained a license. Refer to THE NATIONAL EMPLOYER® for an in-depth discussion of independent contractor status.

Labor Code Section 2855: Requires that contracts to provide personal services of a unique, unusual, extraordinary or intellectual character having a peculiar value generally may not be enforced against the employee beyond seven years from the commencement of services under that contract.

Labor Code Section 2856: Provides that employees are required to substantially comply with all directions of their employer concerning the service in which they are engaged unless to do so would be impossible, unlawful or would impose new and unreasonable burdens upon the employees.

Labor Code Section 2860: Provides that everything that employees acquire by virtue of their employment belongs to the employer except the compensation to which the employee is entitled.

Labor Code Section 2863: Provides that employees who have their own business to transact that is similar to that performed for the employer must give preference to the business of the employer.

§ 3.6.3(d)

Inventions Made by an Employee

Labor Code Section 2870: Provides that employees may be required by contract to assign, or offer to assign, to their employer their rights to an invention unless those inventions were developed by the employees entirely on their own time without using the employer's equipment, supplies, facilities or trade-secret information, and otherwise do not result from or relate to any work performed by the employees for the employer.

§ 3.6.3(e)

Bonds from Employees

Labor Code Section 402: Prohibits the demand of cash bonds from employees unless the employee is entrusted with property of an equivalent value or the bond is in an amount equivalent to the value of goods, wares, or merchandise periodically advanced to the employee.

Labor Code Section 404: Provides that any money put up as a bond (or deposit) by an employee shall be returned to the employee with accrued interest immediately upon return of the property entrusted to the employee.

Labor Code Section 405: Prohibits commingling of property put up as a bond by an employee with the employer's property, and provides that any such commingling or misappropriation is theft under the Penal Code. Violation of this section is also a misdemeanor under section 408.

§ 3.6.3(f)

Collective Bargaining Agreements

Labor Code Section 514: Section 514 has been amended to require "not less than 30% more than the state minimum wage for employees deemed overtime exempt under a collective bargaining agreement."

§ 3.6.3(g)

Restrictions on Persuading Employees to Relocate in Order to Obtain Jobs

Labor Code Sections 970–972: Prohibit persuading a person to relocate for a job by making knowingly false representations about the kind, character or existence of such work, the length of time the work will last, the compensation for the work, the sanitary or housing conditions regarding the work and/or the existence or nonexistence of any labor dispute at the

job. Violation of section 970 is a misdemeanor,[1213] and also will make the employer liable in a civil action for double damages resulting from the misrepresentations.[1214]

§ 3.6.3(h)

Restrictions on Advertising for Employees During a Strike

Labor Code Sections 973–974: Prohibit soliciting or advertising for employees during a strike or labor dispute without clearly identifying in the advertisement the existence of the strike or labor dispute, the name of the person placing the advertisement, and the company he or she represents that authorized the advertisement or solicitation. Violation of this section is a misdemeanor.

§ 3.6.3(i)

Payment of Wages to Striking Employees & Use of Labor Union Insignia

Labor Code Section 209: Requires that, in the event of a strike, all unpaid wages earned by striking employees be paid on the next regular payday without reduction and that any deposit, money, or other guarantee previously required by the employer from the employee be returned to each striking employee. Violation of this section is a misdemeanor pursuant to section 215.

Labor Code Section 1011: Prohibits the sale of any article with a label that misrepresents the labor used to produce the article. Violation of this provision is a misdemeanor.

Labor Code Section 1012: Prohibits the willful misrepresentation or false statement that union labor was employed in the production or sale of an article or the performance of a service. Violation of this section is a misdemeanor.

Labor Code Sections 1015–1018: Prohibit the willful forgery of a union label for use on articles, the willful use or display of the genuine union label or trademark in a manner not authorized by the labor organization, the willful unauthorized use of a labor union card, and the willful unauthorized wearing of a union button. Violation of any of these sections is a misdemeanor.

Labor Code Sections 1133–1134: Prohibit the use of professional strikebreakers, as defined in these sections, to replace any employees during a strike or lockout. Section 1136 makes such a violation a misdemeanor.

Several courts around the country have determined that similar strikebreaker legislation is preempted by the National Labor Relations Act.[1215] While those decisions cast doubt on the validity of the California statute, there are no California court decisions specifically addressing whether the statute is preempted.

[1213] CAL. LAB. CODE § 971.

[1214] CAL. LAB. CODE § 972.

[1215] *Michigan State Chamber of Commerce v. Michigan*, 1984 WL 61212 (Mich. Cir. Ct. 1984); *Illinois ex rel. Barra v. Archer Daniels Midland Co.*, 1982 U.S. Dist. LEXIS 14643 (C.D. Ill. 1982), *vacated on procedural grounds*, 704 F.2d 935 (7th Cir. 1983); *Chamber of Commerce v. State*, 445 A.2d 353 (N.J. 1982).

§ 3.6.3(j)

Alcohol & Drug Rehabilitation

Labor Code Section 1025: Requires private employers that regularly employ 25 or more employees to reasonably accommodate an employee who wishes to participate in an alcohol or drug rehabilitation program.

Labor Code Section 1026: Requires an employer to make reasonable efforts to safeguard the privacy of an employee as to the fact that he or she has enrolled in an alcohol or drug rehabilitation program.

Labor Code Section 1028: Allows employees to file a complaint with the Labor Commissioner if they believe they have been denied reasonable accommodation regarding a requested alcohol or drug rehabilitation program.

§ 3.6.3(k)

Lactation Break Privilege

Labor Code Sections 1030–1033: Require private and public employers to provide a reasonable amount of break time to accommodate an employee desiring to express milk for the employee's infant child. The break time shall, if possible, run concurrently with any break time already provided to the employee, but additional time may be requested. Break time that does not run concurrently with already provided breaks is unpaid. The employer must also make reasonable efforts to provide the employee with a place, other than a toilet stall, for the employee to express milk. The lactation break time is not required if doing so would seriously disrupt the operations of the employer. A $100 civil penalty may be awarded for each violation. Employers should also be aware of the breastfeeding requirements set forth in the federal Patient Protection and Affordable Care Act.

§ 3.6.3(l)

Employee Literacy Assistance

Labor Code Section 1041: Requires private employers that regularly employ 25 or more employees to reasonably accommodate and assist any employee who reveals a problem of illiteracy and requests employer assistance in enrolling in an adult literacy education program, provided that the reasonable accommodation does not impose an undue hardship on the employer. Employer assistance includes, but is not limited to, providing the employee with the locations of local literacy education programs or arranging for a literacy education provider to visit the job site.

Labor Code Section 1042: Requires employers to make reasonable efforts to safeguard the privacy of the employee as to the fact that he or she has an illiteracy problem.

Labor Code Section 1044: Prohibits discharge because of the disclosure of illiteracy of any employee who reveals a problem of illiteracy and who satisfactorily performs his or her work.

§ 3.6.3(m)

Reemployment Privileges

Labor Code Section 1050: Provides that it is a misdemeanor for an employer to make a misrepresentation that prevents or attempts to prevent a former employee from obtaining employment.

Labor Code Section 1053: Allows, upon special request, the furnishing of a truthful statement concerning the reason for the discharge of an employee or why an employee voluntarily left the service of the employer.

Labor Code Section 1054: Provides that a civil action for triple damages may be brought for a violation of section 1050.

§ 3.6.4

D. EMPLOYMENT OF MINORS

Labor Code Sections 1290–1294, 1297: Severely limit the type of work that may be performed by minors under the age of 16 years.

Labor Code Section 1296: Allows the DLSE to determine whether any particular trade, process of manufacturing or occupation is sufficiently dangerous to the lives or limbs or injurious to the health or morals of minors under 18 years of age to justify the prohibition of minors under 16 years of age from employment in those occupations.

Labor Code Section 1303: Provides that it is a misdemeanor for any person, including a parent or guardian of a minor, to employ or permit any minor to be employed in violation of the above Labor Code sections. Violating this provision could lead to fines of $1,000 to $10,000, and imprisonment.

§ 3.6.5

E. FARM LABOR CONTRACTORS

Labor Code Section 226(a): Requires farm labor contractors to provide each employee with the name and address of the legal entity that secured the services of the farm labor contractor.[1216] This disclosure must appear on the itemized statement that must accompany each payment of wages. A knowing and intentional failure to comply with this provision will result in monetary penalties and may be the subject of a civil action under the California Labor Code Private Attorneys General Act of 2004.

Labor Code Section 1683: Requires farm labor contractors to obtain a license for that activity from the Labor Commissioner. Special license application procedures are set forth in Labor Code section 1684.

Labor Code Section 1695.6: Prohibits a grower from knowingly employing the services of a farm labor contractor who is not licensed.

Labor Code Section 1695.7: Requires a farm labor contractor to provide a copy of his or her currently valid state license to an agricultural grower before entering into any agreement to supply agricultural labor or services to that grower. The grower has an affirmative obligation to inspect and verify the contractor's license. The grower must also keep a copy of the license for a period of three years after the termination of the agreement. This section further provides that any grower entering into an agreement in violation of this section will be subject to a civil action by "aggrieved workers for any claims against the unlicensed contractor arising from employment

[1216] CAL. LAB. CODE § 226(a).

under the labor contract if the claims are the direct result of violations of state laws regulating the following: wages, housing, pesticides, or transportation. Prevailing workers are entitled to recover applicable damages as well as reasonable attorney's fees and costs."

Labor Code Section 1697.1: Prohibits any person from making any false or misleading statements that agricultural employment or employee benefits related to agricultural employment will be jeopardized unless an individual or his family members pay a fee or some other thing of value for transportation to or from the worksite. Violation of this provision is a misdemeanor and is subject to a civil action for injunctive relief, triple actual damages, reasonable attorney's fees, and costs. Any other party may also bring an action for injunctive relief on behalf of the general public and upon prevailing will recover reasonable attorney's fees and costs.

For discussion of other statutes affecting farm labor contractors, see Chapter 10, "Agricultural Employment & Labor Relations in California."

§ 3.6.6

F. PUBLIC WORKS

Labor Code Section 1773.1(d): Permits an employer to take credit for pension and other contributions toward prevailing wage obligations if paid on a quarterly basis.

Labor Code Section 1774: Requires contractors and their subcontractors to whom public works contracts of over $1,000 are awarded to pay not less than the specified prevailing rates of wages to all workers employed in the execution of the contract.

Labor Code Section 1776: Requires contractors and their subcontractors to maintain certified payrolls for public work performed and to provide copies of the certified payrolls within ten days after receipt of a written request from the awarding body, the DLSE, or the DAS. Any member of the public may request review of the certified payrolls by making a request through the awarding body, the DAS, or the DLSE.

Labor Code Section 1777.1: Provides that any contractor or subcontractor performing public work who is found by the Labor Commissioner to be in violation of the public works portion of the Labor Code with intent to defraud shall be ineligible to bid on or receive any public works contract for a period of not less than one year or more than three years. Subsequent violations may also lead to additional debarment.

Labor Code Section 1778: Provides that any person who receives or conspires with another to take or receive for his or her own use or the use of any other person any portion of the wages of a worker or working subcontractor in connection with services rendered on any public work is guilty of a felony.

Labor Code Section 1812: Provides that contractors and subcontractors must keep accurate records showing the name of each worker as well as the actual hours worked each calendar day and each calendar week by each worker employed in connection with the public work. This section also requires that records be kept open at all reasonable hours for inspection by the awarding body and/or by the DLSE.

§ 3.6.7

G. INDUSTRIAL HOMEWORK

Labor Code Section 2651: Prohibits industrial homework in the manufacture of the following materials or articles: articles of food or drink; articles for use in connection with the serving of food or drink; articles of wearing apparel; toys and dolls; tobacco; drugs and poisons; bandages and other sanitary goods; explosives, fireworks, and articles of like character; and other articles the manufacture of which by industrial homework is determined by the DLSE to be injurious to the health and welfare of the industrial homeworkers or to render unduly difficult the maintenance of existing labor standards established by law or regulation for factory workers in a similar industry.

Labor Code Section 2658: Requires anyone employing industrial homeworkers in industries not prohibited by section 2651 to acquire a license for that activity from the DLSE.

Labor Code Section 2658.5: Provides that the employment of industrial homeworkers in permitted industries without a valid industrial homeworker license is a misdemeanor. Upon a third conviction for violation of this section, the employer of the industrial homeworker will have its license suspended for not more than three years and is subject to a fine of $30,000 and/or imprisonment of up to one year.

Labor Code Section 2659: Requires employers to ensure that industrial homeworkers possess a valid employer's license or a homeworker's permit issued by the DLSE.

Labor Code Section 6409.1: Eliminates the requirement that employers file a report of every work-related injury or illness with the Division of Labor Statistics and Research. The rule, which will not become effective until regulations are promulgated and adopted, requires that insured employers only file an electronic report with the insurer and that self-insured employers file a report with the Workers' Compensation Systems.

§ 3.6.8

H. GARMENT MANUFACTURING

Labor Code Section 2676: Provides that it is a misdemeanor for any person to engage in the garment manufacturing business without first registering with the Labor Commissioner.

§ 3.6.9

I. WORKERS' COMPENSATION & INSURANCE

§ 3.6.9(a)

General Provisions

Labor Code Section 3357: Provides that any person rendering services for another, other than as an independent contractor or unless expressly excluded in the Labor Code, is presumed to be an employee.

§ 3.6.9(b)

Conditions of Compensation Liability

Labor Code Section 3600(a)(9): Provides that injuries that arise out of an employee's voluntary participation in off-duty recreational, social, or athletic activity generally are not compensable under the workers' compensation scheme unless these activities are reasonably expected, or expressly or impliedly required by the employment.

Labor Code Section 4656: The limitations period for receiving aggregate disability benefits is five years from the date of the injury for injuries occurring on or after January 1, 2008.

§ 3.6.9(c)

Insurance & Security

Labor Code Section 3700.5: Provides that it is a misdemeanor to fail to secure the payment of workers' compensation by one who knew or reasonably should have known of the obligation to secure the payment of workers' compensation. Penalties include imprisonment for up to one year, a fine of $10,000, or both.

Labor Code Section 3702.9: Provides that self-insured employers may be required to pay restitution for any losses and a civil penalty in addition to remedies and penalties provided by statute for failure to secure payment of workers' compensation.

Labor Code Section 3707: Provides that injured employees may attach the property of their employers to secure the payment of any workers' compensation judgment that is ultimately obtained.

Labor Code Section 3751: Makes it a misdemeanor for employers to receive direct or indirect contributions from their employees to cover all or any part of the cost of workers' compensation insurance.

§ 3.6.9(d)

Uninsured Employers Fund

Labor Code Section 3710.1: States that when employers fail to secure the payment of workers' compensation, a stop order prohibiting the use of employee labor shall be issued to the employer until the employer has complied with the payment requirements under the workers' compensation scheme.

Labor Code Section 3710.2: States that failure of employers to observe a stop order issued pursuant to section 3710.1 is a misdemeanor punishable by imprisonment in the county jail or a fine not exceeding $10,000, or both.

Labor Code Section 3722: States that at the time a stop order is issued pursuant to section 3710.1 (where an employer has failed to secure the payment of workers' compensation as required), a penalty assessment of $1,000 per employee up to a maximum of $100,000 shall be issued against the employer.

§ 3.6.9(e)

Jurisdiction in Compensation Proceedings

Labor Code Section 5305: States that the Division of Industrial Accidents has jurisdiction over all controversies arising out of injuries suffered outside of California in those cases where the injured employee is a resident of California at the time of the injury and the contract of hire was created in California.

Labor Code Section 5306: Allows an employee injured on the job the right to proceed against the estate of an employer, if the death of the employer was subsequent to the employee's injury.

Labor Code Section 5308: Grants the Division of Industrial Accidents jurisdiction over controversies arising out of insurance policies issued to self-employed persons when those policies confer benefits identical to those provided under state law.

§ 3.6.9(f)

Limitations of Proceedings

Labor Code Section 5400: Requires the employee to serve the employer with notice of a claim within 30 days after the occurrence of an injury.

Labor Code Section 5402: States that an employer's knowledge of an injury that affords the employer an opportunity to investigate the facts surrounding the injury is equivalent to service of notice to the employer under state law.

Labor Code Section 5407: Requires that serious-misconduct and willful-misconduct proceedings against an employer must be commenced within 12 months from the date of the employee's injury.

§ 3.6.9(g)

Truth in Advertising

Labor Code Sections 5430–5434: Require truthful and adequate disclosure of all material and relevant information in advertising that solicits persons to file workers' compensation claims. Violations of these sections constitute a misdemeanor.

§ 3.6.9(h)

Attachments

Labor Code Section 5600: Allows writs of attachment authorizing the sheriff to attach the property of the defendant/employer as security for payment of a compensation award under specific circumstances.

Labor Code Section 5603: Preference is given to an employer's real property in levying attachments.

§ 3.6.9(i)

Findings & Awards

Labor Code Section 5814: Allows for a 10% increase of a compensation award when payment of workers' compensation has been unreasonably delayed or refused.

Labor Code Section 5814.5: Allows for the award of reasonable attorneys' fees incurred in enforcing a compensation award when the payment of compensation has been unreasonably delayed or refused subsequent to the issuance of an award.

§ 3.6.10

J. OCCUPATIONAL SAFETY & HEALTH

Labor Code Section 6300: Enacts the California Occupational Safety and Health Act of 1973 for the purpose of assuring safe and healthful working conditions.

Labor Code Section 6321: Prohibits any person from giving advance warning of an inspection or investigation to be conducted. A violation is a misdemeanor punishable by a fine of not more than $1,000 or by imprisonment for not more than six months, or both.

Labor Code Section 6401.7: Requires that every employer shall implement and maintain an effective injury prevention program, which must be clarified in writing. See THE NATIONAL EMPLOYER® and Chapter 8 of THE CALIFORNIA EMPLOYER for a comprehensive review of safety and health issues, including requirements for an injury prevention program.

