

Survival Guide for Texas Employers with California Employees

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Why Do Business in California?

- Employer-friendly laws
- Non-litigious employees
- Tax benefits for out-of-state companies



CALIFORNIA REPUBLIC

Why Do Business in California?



Overview

- New legislation
- Recent case law developments
- Key pitfalls for out-of-state employers

CALIFORNIA RECENT LEGISLATION

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Paid Sick Leave: A Year Later. . .

- Rate of pay
- Requiring documentation of need for leave
- Integration with local ordinances (San Francisco, Los Angeles, San Diego, Santa Monica, Berkeley and more)
- Integration with worker's compensation, FMLA, CFRA, PDL, etc.
- Front load v. accrual method, using existing PTO/vacation policies



Paid Sick Leave: Scope

- May be used to care for oneself and certain family members (children, grandchildren, spouses, domestic partners, parents, grandparents, and siblings)
- No exceptions for small employers or nonprofits
- Almost all employees eligible, including part-time, exempt or non-exempt, employed privately or by the government, or seasonal workers
- Few excepted employees, such as employees subject to certain CBAs, certain in-home support service providers, and certain airline employees
- **Out-of-state residents eligible if they work 30 or more days per year in California**

Paid Sick Leave: Accrual

- Accrual starts either on July 1, 2015 or the date of hire, whichever is later
- No probationary periods, but ok to prevent use during first 90 days of employment
- Employees must accrue paid sick leave at a rate of at least 1 hour for every 30 hours worked
- Ok to set accrual cap at 48 hours (6 days) per year
- Any accrued paid sick leave must carry over from year to year

Paid Sick Leave: Pay

- Calculate paid sick leave based upon:
 - an employee's regular rate of pay
 - total wages divided by total hours worked in a 90-day period
 - the wages for other forms of paid leave, as specified

Paid Sick Leave: “Up Front Method”

- Provide 3 days or 24 hours at beginning of designated 12 month period (applies to part time employees too)
- Unlike accrual method, no carry over from year to year



Paid Sick Leave: Limits

- May cap the use of paid sick leave to 24 hours (3 days) per year
- Ok to establish minimum usage blocks of up to 2 hours

Paid Sick Leave: Termination

- Not required to pay out at termination (unless under PTO or vacation)
- If an employee is rehired within one year of his termination, previously accrued paid sick leave must be reinstated

Paid Sick Leave: Other

- Requires notice, posting, and record keeping
[https://www.dir.ca.gov/DLSE/Publications/Paid_Sick_Days_Poster_Template_\(11_2014\).pdf](https://www.dir.ca.gov/DLSE/Publications/Paid_Sick_Days_Poster_Template_(11_2014).pdf)
- Must keep records documenting the hours worked and paid sick days accrued and used by each employee for at least three years
- Amends the requirements for Wage Theft Prevention Act notice provided to employees at the time of hiring:
http://www.dir.ca.gov/dlse/LC_2810.5_Notice.pdf
- Payday notice – wage statement or other doc with same information
- Discrimination and retaliation prohibited; Creates a rebuttable presumption of retaliation if the employee is subjected to an adverse employment action within 30 days of certain protected activities

Paid Sick Leave: Other

- PSL obligation met if make available an amount of leave applicable to employees for specified uses, and the policy satisfies specified accrual, carry over, and use requirements, or that provided paid sick leave or paid time off to employees before January 1, 2015
- No obligation to inquire into or record the purposes for which an employee uses sick leave or paid time off

Paid Sick Leave: Liability

- Labor Commissioner to enforce
- No express private cause of action for employees, but violations may support a claim for wrongful termination or retaliation
- Relief available under PAGA
- Relief available for violations includes reinstatement, back pay, payment of withheld sick time, and penalties of up to \$4,000

Paid Sick Leave: Local Ordinances

- Berkeley
- Emeryville
- Los Angeles
- Oakland
- San Diego
- San Francisco
- Santa Monica



Paid Sick Leave: To Do

- Amend or create policies, Wage Theft Prevention Act Notice, wage statements
- Integrate with city mandates
- Ensure record keeping practices in place



San Francisco Paid Parental Leave

- Effective January 1, 2017 for employers with 50 or more employees anywhere
- Provides for paid parental leave for employees within the City and County boundaries of San Francisco
- Supplement income from PFL benefit for six weeks so employee receives 100% of earnings, subject to ceiling of \$106,740/maximum weekly amount \$924
- Can require employee to use two weeks of accrued vacation



Other San Francisco Ordinances

- Family Friendly Workplace Ordinance (20 or more employees, in any location) allows eligible employees to request a flexible or predictable working arrangement to assist with caregiving responsibilities
- Fair Chance Ordinance (20 or more employees, in any location) requires employers taking adverse action based on a conviction history or unresolved arrest, give the individual an opportunity to present evidence that the information is inaccurate, the individual has been rehabilitated, or other mitigating factors.
- Formula Retail Employee Rights Ordinances (40 or more retail establishments and 20 or more employees) regulates hours, retention, scheduling and treatment of part time employees

SB 3 Minimum Wage Increase: Overview

- From \$10 (current) to \$15 per hour over next 6 years
- No bar to municipalities passing ordinances with higher wage
- Governor may pause scheduled increases due to budget/economics
- After 2022/2023 (for small employers) increase either 3.5% or rate of change in consumer price index
- Impacts salary basis test for white collar exemptions



SB 3 Minimum Wage Increase: CA v. FLSA

- California's salary basis test for white collar exemptions is tied to minimum wage – must earn 2x minimum wage to be exempt
- FLSA increasing to \$913 per week/\$47,476 per year
- California test won't meet federal test until 2019
- Options if employees meet CA test but not federal test?

SB 3 Minimum Wage Increase: Other Implications

- Calculation for inside sales commissioned employee: increases earnings amount to meet exemption
 - 1.5 times minimum wage
 - More than one half commissions
- CBA exemption
- Increases required earnings for piece-rate employees' non-productive time
- Meal and lodging credits

SB 836 PAGA revised to include more LWDA involvement

- Signed into law as part of state budget package
- Extends time for LWDA to review notice and consider investigating from 30 to 60 days
- LWDA has 65 days to notify parties it intends to investigate, so plaintiffs cannot sue until 65 days have passed (increase from 33)
- LWDA has 180 days to issue citations against employer
- PAGA plaintiffs must serve lawsuit on LWDA as well as notice of settlement or judgment
- All documentation must be submitted to LWDA online
- Impact?

AB 2337 notice of domestic leave rights to employees

- If employer has more than 25 employees, existing law provides for domestic violence leave rights
- Employer must provide notice of leave rights at time of hire and any other time requested
- Labor Commissioner to prepare template notice by July 1, 2017 – effective date of employer’s notice obligations

AB 908 expands paid family leave and disability insurance

- Existing law provides for partial wage replacement benefits for employees for own disability as well as to care for family members
- Increases benefits paid out to employees by January 1, 2018
- Increase from 55% to 60% or 70% depending on applicant's income
- Employers will need to increase applicable pay deductions

AB 2535 clarifies information needed on pay statements

- Existing law (Labor Code section 226) requires that several items of information be included on paystubs
- Previous ambiguity regarding including hours worked for employees not paid solely by salary (commissions or stock options)
- Clarifies employers need not include hours worked information for exempt employees paid by salary plus other compensation

SB 269 expands protection for small businesses against disability access lawsuits

- Creates rebuttable presumption that certain “technical violations” do not give rise to damages if the violations are corrected within 15 days of receiving written notice
- Exempts a defendant from liability for statutory damages if it has corrected any violations within 120 days of an inspection by a certified access specialist

AB 2883 amends who is covered under workers' compensation

- The definition of “employee” now includes:
 - Officers and board members of private corporations rendering services for pay
 - Working members of a partnership or LLC who receive wages irrespective of profits
- Specifies how such individuals may declare that they are not employees

AB 2899 requires employers challenging a labor commissioner decision to post a bond

- Employers seeking a writ of mandate contesting the Labor Commissioner's ruling must post a bond in an amount equal to the unpaid wages assessed under the citation excluding penalties
- Proceeds would be forfeited to employee if employer fails to pay within 10 days of conclusion of proceedings

SB 1241 allows employees to void choice of law provisions in employment contracts

- Applies to employees primarily residing and working in California
- Employee may void contract term that requires adjudication outside of California or deprives employee of substantive protection of California law
- Dispute over voided provision must be adjudicated in California under California law
- Employees enforcing right to void contract term would be entitled to injunctive relief and attorney's fees
- Not applicable if employee represented by counsel
- Not applicable to existing agreements

AB 1843 bars employers from asking about juvenile crimes during application process

- Employer cannot ask applicant to disclose or use as factor in making hiring decision any information regarding an arrest, detention, processing, diversion, supervision, adjudication, or court disposition that occurred while applicant involved in juvenile justice system
- Exception for health care employees

SB 1001 broadens protections from “unfair immigration-related practices”

- Makes it unlawful for employers to:
 - Request more or different documents than required under federal law to verify that an employee or applicant is not an unauthorized immigrant
 - Refuse to honor documents that reasonably appear to be genuine
 - Refuse to honor documents based on specific status or term that accompanies the authorization to work
 - Attempt to reinvestigate or re-verify an incumbent employees’ authorization to work using an “unfair immigration-related practice”



AB 1732 requires single-occupancy restrooms to be labeled “all-gender”

- Applies to any business, place of public accommodation, or government agency
- Effective March 1, 2017

AB 1676 and SB 1063 Target Wage Discrimination

- Prohibits employers from considering prior salary alone to justify any disparity in compensation between male and female employees
- Expands existing gender-based equal pay laws to race and ethnicity
 - Employer has burden to demonstrate pay disparity based on
 - Seniority
 - Merit system
 - Production system
 - Bona fide factor that is job related and consistent with a business necessity other than race or ethnicity

2016 Amendments to FEHA Regulations

- New written policy requirements
- Expanded definition of sex discrimination
- Clarified religious accommodation obligations
- Prohibits discrimination against a non-citizen holding a drivers' license
- Reasonable accommodation obligations include allowing support animal

Proposed FEHA Regulations

- Prohibit bright line policy disqualifying job applicants for certain convictions is presumptively not consistent with business necessity
- Increase protections for transgender workers

CALIFORNIA CASE LAW UPDATE

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Flores v. City of San Gabriel (9th Cir. 2016)

Under the FLSA, cash in lieu of benefits must be included in regular rate of pay

Bermudez Vaquero v. Ashley Furniture (9th Cir. 2016)

Individualized damages in wage and hour class action do not defeat class certification

Martin v. Yasuda (9th Cir. 2016)

Defendants waived right to arbitration by litigating the case in District Court for 17 months without advising the Court of intent to arbitrate with plaintiffs

Mendoza v. Roman Catholic Archbishop (9th Cir. 2016)

ADA claim improper where no full time position existed following plaintiff's leave of absence

Corbin v. Time Warner (9th Cir. 2016)

Rounding hours found permissible and
de minimus doctrine recognized

Morris v. Ernst & Young, LLP (9th Cir. 2016)

Ninth Circuit adopted NLRB argument that requiring employees to sign class waiver in arbitration agreement as condition of employment violates NLRA

Burnell v. Swift Transportation (CD Cal May 4, 2016)

Motion for class certification on meal and rest periods denied because plaintiffs failed to show defendant had unlawful policy

Ryther et al v. BJ's Restaurants (CD Cal Sept. 15, 2016)

Arbitration agreement with class action waiver found enforceable because employees were allowed 30 days to opt out of the waiver

Kilby v. CVS Pharmacy, Inc. (Cal Supreme Court 2016)

Employers are required to provide “suitable seating”
and it is the employer’s burden to demonstrate
compliance is infeasible because
no suitable seating exists



Harris v. Tap Worldwide LLC (Ca. Ct. Appeal 2016)

Arbitration agreement appended to employee handbook enforceable

Rodriguez v. E.M.E., Inc. (Ca. Ct. Appeal 2016)

Reversed summary judgment for employer on rest break claim, holding that combined rest breaks may be unlawful under certain circumstances

Castro-Ramirez v. Dependable Highway-Express (Ca. Ct. Appeal 2016)

Extended state law prohibiting disability discrimination to include
“associational disability discrimination”

Kim v. Reins International California Inc. (2016)

Trial court dismissed PAGA claims against restaurant operator where there was a settlement of named plaintiff's wage and hour claims

Noe v. Superior Court (Ca. Ct. Appeal June 1, 2015)

- AEG contracted with Levy to manage food and beverage services at various facilities
- Levy contracts with Canvas to provide laborers
- Plaintiffs alleged various wage claims and wrongful and willful misclassification as independent contractors under Labor Code section 226.8
- Defendants AEG and Levy filed a motion for summary judgment that they could not be liable because they did not make classification decision
- Trial court granted MSA as to the 226.8 claim

Noe v. Superior Court (Ca. Ct. Appeal June 1, 2015)

- Plaintiffs filed a writ to reverse trial court's decision on 226.8 claim
- Held: LC 226.8 is ***not limited*** to employers who make the misclassification decision, but also extends to any employer who is aware that a co-employer has willfully misclassified joint employees and fails to remedy the issue. But, Plaintiff's petition was denied on grounds that it cannot be enforced through a private action.

Noe v. Superior Court (Ca. Ct. Appeal June 1, 2015)

- Decision refers to LC 2810.3 in support of broad view of liability:
 - “[U]nder section 2810.3, which became effective January 1, 2015, any business entity that obtains workers from a labor contractor ‘shall share with [the] labor contractor all civil legal responsibility and civil liability for’ paying the wages of any workers supplied by the labor contractor. Thus, even if the business entity is not the wage claimant’s employer, and therefore owes no duty to pay wages under section 1194, the entity is nonetheless liable because section 2810.3 imposes joint liability.”

Joint Employer Liability

- New law makes this even more of a “hot button” issue for CA employers
- Various versions of the joint employer test depending on applicable law, but ultimately highly fact specific
- Factors:
 - Who hires
 - Who pays
 - Who controls/directs activities
 - Who sets schedules
 - Who maintains work records
 - Rules on appearance? What to say?

Cochran v. Schwan's Home Services, Inc.

- Labor Code section 2802 requires employers to reimburse employees for a “reasonable percentage” of work-related cell phone bills
- Obligation exists irrespective of (i) whether the employee would have incurred the expense of the cell phone plan anyway, with or without the job, (ii) whether the employee’s cell phone plan has unlimited minutes, (iii) whether the employee (as opposed to a third party, such as a friend or relative) personally pays for the cell phone plan, (iv) whether the cell phone bill is ever actually paid, or (v) whether the employee changed her plan to accommodate her work-related cell phone usage
- “[A]n employee need only show that he or she was required to use a personal cell phone to make work-related calls, and [that] he or she was not reimbursed”

Mendiola v. CPS Security Solutions

On call time includes sleep time



Williams v. Chino Valley Independent Fire District (2015) 61 Cal.4th 97

An unsuccessful FEHA plaintiff should not be ordered to pay the defendant's fees or costs unless the plaintiff brought or continued litigating the action without an objective basis for believing it had potential merit

Golden v. California Emergency Physicians Medical Group

“No re-hire” clauses may run afoul of Cal. Bus. & Prof. Code § 16600, which provides that a contract is void if it restrains anyone from engaging in a lawful profession

Common Pitfalls for the Out-of-State Employer

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Not a Myth: Up to Seven Months of Pregnancy and Baby Bonding Leave



Not a Myth: Up to Seven Months of Pregnancy and Baby Bonding Leave

- PDL applies to employers of 5 or more
- Up to four months disability leave
- Broad definition of pregnancy disability in new regs (including morning sickness, Dr.'s appointments, post-partum)
- Four months = 17 1/3 weeks

Not a Myth: Up to Seven Months of Pregnancy and Baby Bonding Leave

- California Family Rights Act does **not** apply to pregnancy disability time
- **Intermittent** baby bonding time allowed
- Benefits must be maintained during entirety of pregnancy disability leave and CFRA leave (if eligible)
- No diagnosis on CFRA medical certification (can't use FMLA form)
- New forms for California
- Amended CFRA Regulations
- New notices for California for PDL and CFRA

FEHA and Reasonable Accommodations for Pregnant Workers

- No eligibility requirement
- Must give 30 days' advance notice of the need for accommodation, unless it is not practicable to do so. Employer must respond to the employee within 10 calendar days
- Entitled to a transfer to a less strenuous or hazardous position if (1) the employer has a policy of authorizing such transfers for other disabled employees, or (2) her "health care provider" states that the transfer is medically advisable and the transfer can be reasonably accommodated by the employer
- The burden is on the employer to prove by a preponderance of the evidence that it cannot reasonably accommodate the transfer request. § 7291.8(b)

FEHA and Reasonable Accommodations for Pregnant Workers

- The employer need not create a job it would not have otherwise created, discharge another employee, or violate a CBA. § 7291.8(a)(2)(B). However, an employer must create a light duty job for pregnant employees if it does so for occupationally-injured employees.
- Cannot transfer an employee over her objections, unless the employee's health care practitioner states that a reduced schedule or intermittent leave is medically advisable and the employer temporarily transfers the employee to a position that better meets its needs. §§ 7291.6(a)(1)(G), 7291.8(c)
- Other accommodations might include additional rest and restroom breaks, seating, modified equipment or devices, and modified work schedules. § 7291.2(s)
- An employer may not require a pregnant employee to take a leave of absence if she has not requested leave. § 7291.6(a)(1)(H)
- Undue hardship **NOT** a defense.

California's Unique Wage and Hour Laws



California's Unique Wage and Hour Laws

- Wage statement rules (Labor Code 226)
- Wage Theft Prevention Act of 2012
 - Paid sick leave law required an amended notice unless exempt
- Exemption analysis unlike FLSA
 - Quantitative test, salary basis tied to minimum wage
- Written commission agreements required
- Vacation pay as vested wages (can be an asset sale issue)
- Termination pay if involuntary due at time of separation

California's Unique Wage and Hour Laws

- Industry Wage Orders v. Labor Code
 - Conflicting provisions
 - DLSE manual and DLSE opinion letters persuasive
- Personnel and payroll files disclosure rules
- Meal and rest period requirements
- Penalty scheme (i.e. waiting time penalties for willful failure to pay wages)
 - Willful = failure to pay
- Private Attorney's General Act (PAGA)

Social Media: Right to “(Dis)Like”



Social Media: Right to “(Dis)Like”

Labor Code section 980 prohibits requiring employees to:

- Reveal personal e-mail or social media password
- Access social media in employer’s presence
- Divulge any social media content

Labor Code section 980 allows:

- Employer investigations of employee misconduct or legal violation
- Restrictions and access if employer-issued electronic devices

Other Privacy Protections

- Employers cannot prohibit lawful off-duty conduct (Labor Code section 96(k))
- Credit check restrictions – general rule is cannot conduct credit check as part of background check unless exception applies (i.e. financial positions, law enforcement)
- California has own FCRA-like statute requiring consent and disclosure forms to be slightly different

QUESTIONS?

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