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*1 CA Guide to Employee Handbooks About the Author*

**About the Author**

**Morrison & Foerster LLP**

For a number of years, the law firm of Morrison and Foerster LLP has advised clients on the form and content of employee handbooks and personnel policy manuals. In the course of advising its clients, the firm's employment and labor law group has developed a series of model policy guidelines for use in such handbooks and manuals. These guidelines were compiled, annotated, and edited by members of the group for publication in this Guide. James E. Boddy, Jr. served as chief editor for the original project.

Josephine Staton Tucker served as the chief editor for many years, and we thank her for her contribution to the publication.



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*1 CA Guide to Employee Handbooks Abbreviations*

**Abbreviations**

acq. acquiesced

aff'g. affirming

Amend. Amendment

Art. Article

Bus. & Prof. Code Business and Professions Code

C.B. Internal Revenue Service Cumulative Bulletins

C.F.R. Code of Federal Regulations

Cal. California Reports

Cal. 2d California Reports, Second Series

1 CA Guide to Employee Handbooks Abbreviations

Cal. 3d California Reports, Third Series

Cal. 4th California Reports, Fourth Series

Cal. App. California Appellate Reports

Cal. App. 2d California Appellate Reports, Second Series

Cal. App. 3d California Appellate Reports, Third Series

Cal. App. 4th California Appellate Reports, Fourth Series

Cal. Code Reg. California Code of Regulations (formerly California Administrative Code)

Cal. Const. California Constitution

Cal. L. Rev. California Law Review

Cal. Rptr. West's California Reporter

Cal. Rptr. 2d West's California Reporter, Second Series

Cal. Rules of Ct. California Rules of Court

cert. denied certiorari denied

Civ. Code Civil Code

Code Civ. Proc. Code of Civil Procedure

Com. Code Commercial Code

1 CA Guide to Employee Handbooks Abbreviations

Corp. Code Corporations Code

D.L.S.E. California Division of Labor Standards Enforcement

E.E.O.C. United States Equal Opportunity Commission

Educ. Code Education Code

Elec. Code Elections Code

Evid. Code Evidence Code

Exec. Order Executive Order (Federal)

F. Federal Reporter

F. Supp. Federal Supplement

F.2d Federal Reporter, Second Series

F.R.D. Federal Rules Decisions

Fam. Code Family Code

Fed. Reg. Federal Register

Fin. Code Financial Code

Fish & G. Code Fish and Game Code

Food & Agr. Code Food and Agricultural Code

Gov. Code Government Code

1 CA Guide to Employee Handbooks Abbreviations

Harb. & Nav. Code Harbors and Navigation Code

Health & Saf. Code Health and Safety Code

I.R.C. Internal Revenue Code

I.R.S. Internal Revenue Service

Ins. Code Insurance Code

L. Ed. Lawyers' Edition, United States Supreme Court Reports

L. Ed. 2d Lawyers' Edition, United States Supreme Court Reports, Second Series

Lab. Code Labor Code

memo. memorandum

Mil. & Vet. Code Military and Veterans Code

mod. modified

Ops. Cal. Atty. Gen. Opinions of the California Attorney General

P. West's Pacific Reporter

P.2d West's Pacific Reporter, Second Series

Prob. Code Probate Code

Pub. Contract Code Public Contract Code

Pub. L. Public Laws (uncodified federal statutes)

1 CA Guide to Employee Handbooks Abbreviations

Pub. Res. Code    Public Resources Code

Pub. Util. Code    Public Utilities Code

reh. denied    rehearing denied

Rest.    Restatement

Rest. 2d    Second Restatement

Rev. & Tax. Code    Revenue and Taxation Code

Rev. Rul.    Internal Revenue Service Revenue Rulings

rev'd.    reversed

rev'g.    reversing

S. Ct.    West's Supreme Court Reporter

Stats.    Statutes of California (uncodified)

Sts. & Hy. Code    Streets and Highways Code

T.C.    Tax Court Reports

U.S.    United States Supreme Court Reporter (official)

U.S. Const.    United States Constitution

U.S.C.    United States Code

U.S.L.W. United States Law Week

Unemp. Ins. Code Unemployment Insurance Code

Veh. Code Vehicle Code

Wat. Code Water Code

Welf. & Inst. Code Welfare and Institutions Code



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*1 CA Guide to Employee Handbooks*

**Scope**

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What's New

*1 CA Guide to Employee Handbooks Scope*

## Scope

### HIGHLIGHTS

Release 21 December 2009

#### **Employee Handbooks and Personnel Policy Manuals**

This release contains updated model guidelines. For example, see the following:

Leaves of Absence (§ 2.09)

Company Property; Confidential and Personal Information (§ 2.15)

Technology and Security (§ 2.16)

Blogging (§ 2.17)

Mobile Devices (§ 2.18)

Safety Program (§ 2.26)

Employee Benefits (§ 2.27)

Solicitation, Distribution, and Bulletin Boards (§ 2.28)

Proof of Right to Work (§ 2.31)

Unions (§ 2.36)

**More Extensive Blogging Policy.** This release includes a more extensive blogging policy, which addresses concerns such as invasion of privacy, discrimination, harassment, unfair labor practices, libel, and disclosure of trade secrets. See § 2.17.

**More Extensive Policy Regarding Mobile Devices.** This release includes a more extensive mobile devices policy regarding the uses of handheld mobile devices (including a telephone, personal organizer, and other devices) while operating a motor vehicle during work hours or on company business. See § 2.18.

**New Provisions Affecting Leaves of Absence.** The Leaves of Absence Policy has been updated to include the two new types of FMLA leave: military caregiver leave and exigency leave. The policy has also been revised to reflect other revisions to the FMLA regulations that took effect in January of 2009. See § 2.09.

**Special Alert.** At time of press, President Obama had recently signed into law the "National Defense Authorization Act for Fiscal Year 2010," which expands the military leaves available under the FMLA. This development will be covered in the next release.

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- **Wilcox on *California Employment Law***
- ***Bender's California Labor & Employment Bulletin***
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DIVISION 1 INTRODUCTION

*1-1 CA Guide to Employee Handbooks 1.syn*

**§ 1.syn Synopsis to Chapter 1: INTRODUCTION**

§ 1.01 PURPOSE

§ 1.02 WHETHER TO HAVE AN EMPLOYEE HANDBOOK, A PERSONNEL POLICY MANUAL, OR BOTH

§ 1.03 ORGANIZATION OF THE GUIDE

§ 1.04 HOW TO USE THE GUIDE

§ 1.05 CAUTIONS REGARDING HANDBOOKS AND MANUALS



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DIVISION 1 INTRODUCTION

*1-1 CA Guide to Employee Handbooks § 1.01*

**§ 1.01 PURPOSE**

This Guide was developed to assist employers and their attorneys with the preparation of employee handbooks and personnel policy manuals. It may be used for the development of an entire handbook or manual, for the preparation of individual policies, or for reviewing existing policies. However the Guide is employed, the purpose is to assist the user in producing clear policies that comply with legal requirements, and to provide reference to some of the more important legal principles governing such policies. Each model policy is accompanied by notes providing references to Wilcox, California Employment Law (Matthew Bender), for further discussion of the applicable legal principles. Although this Guide may be used by non-attorney human resources professionals, as well as by attorneys practicing in this field, any manual or handbook should be reviewed by experienced legal counsel before the employer finalizes it and distributes it for use.

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Labor & Employment Law Employment Relationships Employment Contracts Interpretation Labor & Employment Law Wrongful Termination Breach of Contract Employer Handbooks



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## DIVISION 1 INTRODUCTION

### *1-1 CA Guide to Employee Handbooks § 1.02*

#### **§ 1.02 WHETHER TO HAVE AN EMPLOYEE HANDBOOK, A PERSONNEL POLICY MANUAL, OR BOTH**

In order to decide whether to have an employee handbook, a personnel policy manual, or both, it is first necessary to distinguish between them. Handbooks and manuals differ in the intended audience, in scope, and in the degree of detail. Employee handbooks are addressed to employees. They generally are shorter and simpler than personnel policy manuals, communicating in clear direct terms only the more important policies that govern employment--equal employment opportunity, vacation, sick leave, holidays, and discipline, for example. Personnel policy manuals, by comparison, are addressed to managers and personnel professionals who must administer the employer's policies. They not only describe the policies, but tell how the policies should be administered. Personnel policy manuals, therefore, are generally more comprehensive in scope, address a greater number of policies, and address each policy in greater detail.

Whether to have one or both depends on the needs of the employer. Many large employers have both employee handbooks and personnel policy manuals; many small employers have neither. An employee handbook is recommended for most employers. It tells employees what they may expect of their employer and what the employer expects of them. In the absence of any written guidelines, an employer is more likely to encounter problems arising from ignorance of its policies, inconsistent application, and confusion as to what is expected. An employee handbook can help avoid many of these problems.

Whether to go beyond this and develop a personnel policy manual is a more difficult question. Large organizations find them necessary to maintain consistency and to ensure compliance with various legal requirements. For all employers, however, personnel policy manuals are a two-edged sword. To the extent they properly spell out steps to be followed for discipline, performance evaluation, and payment of wages, for example, and to the extent they are followed, personnel policy manuals can help avoid legal problems. If the personnel policy manual is complex, however, the chances increase that it will not be followed and that legal problems may result [*see* discussion in § 1.05; *see also* Wilcox, *California Employment Law*, § 62.03 [1] (Matthew Bender) for more detailed discussion]. For every employer, then, a balance must be struck between providing guidance on the one hand and avoiding traps for the unwary on the other. In attempting to strike the proper balance, the employer should consult with legal counsel.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Labor & Employment Law Employment Relationships Employment Contracts General Overview Labor & Employment  
Law Wrongful Termination Breach of Contract Employer Handbooks



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## DIVISION 1 INTRODUCTION

*1-1 CA Guide to Employee Handbooks § 1.03*

### **§ 1.03 ORGANIZATION OF THE GUIDE**

This Guide is organized into three parts. The first (Division 1) consists of this Introduction; the second (Division 2) provides materials for preparation of employee handbooks and personnel policy manuals; and the third (Division 3) contains a guide to posting obligations for California employers.

The employee handbook and personnel policy manual division is organized around the various model policies. Each section begins with the text of the policy itself ("Model Guideline"). These are referred to within the text of the policies as "guidelines," rather than as "policies," to emphasize that the provisions are not intended to be rigidly binding. While this terminology may be useful in litigation, it is not essential, nor will it guarantee a result favorable to the employer. Employers should select the terminology that most comfortably meets their needs. Within each Model Guideline, text appearing in brackets, [such as this], denotes optional provisions, which the authors consider less critical than other language or which may not be appropriate for some employers.

Following each Model Guideline are a "Drafting Checklist" and "Notes." The Drafting Checklist itemizes the issues covered in each guideline, and it may be used either to evaluate existing policies or to develop new ones. The Notes refer to applicable legal principles, case law, statutes, and regulations. They also provide words of caution and explanations where appropriate. The Notes do not attempt to provide a comprehensive discussion of each subject, but rather summarize the most important legal points involved, and refer to appropriate chapters and sections in Wilcox, California Employment Law (Matthew Bender), for further discussion. Both the Model Guidelines and the Drafting Checklists contain references to the appropriate Notes.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Labor & Employment Law  
Employment Relationships  
Employment Contracts  
General Overview  
Labor & Employment Law  
Wrongful Termination  
Breach of Contract  
Employer Handbooks



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## DIVISION 1 INTRODUCTION

### *1-1 CA Guide to Employee Handbooks § 1.04*

#### **§ 1.04 HOW TO USE THE GUIDE**

This Guide can be used in a number of different ways. As stated above, it may serve as the basis for developing new policies, or it may be used to update existing ones. The annotations may also be used as an introduction to the legal principles governing particular policies.

To develop a new handbook or manual, the authors recommend the following steps:

- (1) Determine whether the employer should have only a handbook, only a manual, or both. This will depend on the size of the workforce, the nature and preferences of the employer, and the available budget, among other factors. As noted in § 1.02, if an employer plans to have both, the handbook can be less comprehensive than if the employer plans to have only a handbook. The employer should seek the advice of counsel in making this decision.
- (2) If starting from scratch, review the Model Guidelines and the Drafting Checklists to determine which policies to adopt and what provisions they should include. If starting with an existing handbook or personnel policy manual, compare its policies with the Model Guidelines to determine where additions or modifications may be appropriate. In either case, seek input from employees, supervisors, and managers who will have to live with the final product. More than likely, some modification of the Model Guidelines will be required in order to meet the preferences and needs of each particular workplace. Since few of the Model Guidelines are legally required, employers have broad leeway to pick and choose as they feel appropriate. Furthermore, this Guide divides the Guidelines into those that are recommended and those that are optional. Recommended Guidelines should be given careful consideration, but even these are not absolutely required in most cases. Optional Guidelines tend to be less critical, but may meet the needs of particular employers. Whether to include the Optional Guidelines in a handbook will depend, at least in part, on whether a personnel policy manual will be used as well. If a personnel policy manual will be used, then there is less need to cover each subject in the handbook. It can serve as a short summary of the more important provisions and refer the employee to his or her supervisor or to the human resources department for more details.
- (3) Prepare a draft of the new handbook or manual and have it reviewed first by appropriate managers to determine whether the correct policy choices have been made and whether those choices are clearly and

unambiguously expressed. In drafting particular language, try to avoid mandatory terms like "the Company shall..." using instead phraseology such as "ordinarily the Company will..." or "the Company will attempt to... ." This may help avoid adverse legal consequences if later on there is some technical failure to follow a particular policy. In general, though, if a policy is adopted, the employer must be prepared to follow that policy carefully.

(4) If the draft handbook or manual has not been prepared by an experienced labor attorney, it should be reviewed by one to assure compliance with applicable legal requirements and to avoid ambiguities and unintended commitments.

(5) Finally, the employer should conduct training sessions for its managers and supervisors to make sure that they understand the new policies (and the old ones still in use) and know how to administer them. This should be followed by orientation sessions for employees for both practical and legal reasons. Employees need to know what they may expect of their employer and what will be expected of them. Furthermore, where old policies have been changed (such as lesser benefits or increased responsibilities for employees), these changes may not be legally effective until employees have been given notice.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Labor & Employment Law Employment Relationships Employment Contracts General Overview Labor & Employment Law Wrongful Termination Breach of Contract Employer Handbooks



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## DIVISION 1 INTRODUCTION

*1-1 CA Guide to Employee Handbooks § 1.05*

### **§ 1.05 CAUTIONS REGARDING HANDBOOKS AND MANUALS**

Under current law, a judge or jury may arguably have the discretion to find an employer's handbook or personnel manual to be a binding contract, notwithstanding full written disclaimers that a contract was never intended [*see* discussion in § 2.01[3]; *see also* Wilcox, *California Employment Law*, §§ 60.05[2], 60.06, 62.03[1][a], [b] (Matthew Bender)]. Moreover, the adoption of certain policies, such as a progressive discipline policy, may by itself impair employment at will and result instead in an implied contract that employees may be terminated only for good cause [*see* § 2.12; *see also* Wilcox, *California Employment Law*, §§ 60.05[2], 62.05[4][a] (Matthew Bender)]. Thus, before adopting any of the provisions contained in this Guide or elsewhere, the employer should be aware of the legal consequences and must be willing to follow the terms of the policies involved. Employee handbooks and personnel policy manuals make very costly window dressing, if that is all that is intended.

Finally, even if the provisions of this Guide are adopted verbatim, they should be reviewed by legal counsel to determine whether changes in the applicable law have occurred since the last update to the Guide; whether local ordinances apply; whether the employer's business is subject to other, special legal requirements; and any other legal issues involved.

While the preparation of handbooks and manuals involves many potential pitfalls, the end result can be highly beneficial to employers and employees alike. The authors hope this Guide will assist those who use it in working their way toward that goal.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Labor & Employment Law  
 Employment Relationships  
 At-Will Employment  
 General Overview  
 Labor & Employment Law  
 Employment Relationships  
 At-Will Employment  
 Duration of Employment  
 Labor & Employment Law  
 Employment Relationships  
 At-Will Employment  
 Exceptions  
 Implied Contracts  
 Labor & Employment Law  
 Wrongful Termination  
 Breach of Contract  
 Employer Handbooks  
 Labor & Employment Law  
 Wrongful Termination  
 Breach of Contract  
 Implied Contracts  
 For Cause Standard  
 Labor & Employment Law  
 Wrongful Termination  
 Breach of Contract  
 Implied Contracts



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DIVISION 2 EMPLOYEE HANDBOOKS AND PERSONNEL POLICY MANUALS

*1-2 CA Guide to Employee Handbooks 2.syn*

**§ 2.syn Synopsis to Chapter 2: EMPLOYEE HANDBOOKS AND PERSONNEL POLICY MANUALS**

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[2] Drafting Checklist

[3] Notes

§ 2.02 EQUAL EMPLOYMENT OPPORTUNITY POLICY

[1] Model Guideline

[2] Drafting Checklist

[3] Notes

§ 2.03 EMPLOYMENT AT WILL

[1] Model Guideline

[2] Drafting Checklist

[3] Notes

§ 2.04 INTRODUCTORY PERIOD

[1] Model Guideline

[2] Drafting Checklist

[3] Notes

§ 2.05 HOURS OF WORK, OVERTIME, AND PAY DAY

[1] Model Guideline

[2] Drafting Checklist

[3] Notes

§ 2.06 VACATION

[1] Model Guideline

[2] Drafting Checklist

[3] Notes

§ 2.07 HOLIDAYS

[1] Model Guideline

[2] Drafting Checklist

[3] Notes

§ 2.08 SICK LEAVE

[1] Model Guideline

[2] Drafting Checklist

[3] Notes

§ 2.08A PAID TIME OFF

[1] Model Guideline

[2] Drafting Checklist

[3] Notes

§ 2.09 LEAVES OF ABSENCE

[1] Model Guideline

[2] Drafting Checklist

[3] Notes

§ 2.09A LEAVES OF ABSENCE [EMPLOYERS WITH FEWER THAN FIFTY EMPLOYEES]

[1] Model Guideline

[2] Drafting Checklist

[3] Notes

§ 2.10 OPEN DOOR

[1] Model Guideline

[2] Drafting Checklist

[3] Notes

§ 2.11 INTERNAL COMPLAINT REVIEW PROCEDURE

[1] Model Guideline

[2] Drafting Checklist

[3] Notes

§ 2.12 TERMINATION, DISCIPLINE, AND RULES OF CONDUCT

[1] Model Guideline

[2] Drafting Checklist

[3] Notes

§ 2.13 POLICY AGAINST HARASSMENT

[1] Model Guideline

[2] Drafting Checklist

[3] Notes

§ 2.14 WORKPLACE VIOLENCE

[1] Model Guideline

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[3] Notes

§ 2.15 COMPANY PROPERTY; CONFIDENTIAL AND PERSONAL INFORMATION

[1] Model Guideline

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§ 2.16 TECHNOLOGY USE AND SECURITY

[1] Model Guideline

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[3] Notes

§ 2.17 BLOGGING POLICY

[1] Model Guideline

[2] Drafting Checklist

[3] Notes

§ 2.18 MOBILE DEVICE POLICY

[1] Model Guideline

[2] Drafting Checklist

[3] Notes

§ 2.19 ACKNOWLEDGMENT OF RECEIPT OF HANDBOOK

[1] Model Guideline

[2] Drafting Checklist

[3] Notes

§ 2.20 EMPLOYEE CLASSIFICATIONS

[1] Model Guideline

[2] Drafting Checklist

[3] Notes

§ 2.21 PERFORMANCE AND PAY REVIEW

[1] Model Guideline

[2] Drafting Checklist

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§ 2.22 PERSONNEL RECORDS

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§ 2.23 DRESS AND GROOMING STANDARDS

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[2] Drafting Checklist

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§ 2.25 EMPLOYMENT OF RELATIVES

[1] Model Guideline

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§ 2.27 EMPLOYEE BENEFITS

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§ 2.28 SOLICITATION, DISTRIBUTION, AND BULLETIN BOARDS

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[3] Notes

§ 2.29 NON-FRATERNIZATION

[1] Model Guideline

[2] Drafting Checklist

[3] Notes

§ 2.30 CONFLICTS OF INTEREST

[1] Model Guideline

[2] Drafting Checklist

[3] Notes

§ 2.31 PROOF OF RIGHT TO WORK

[1] Model Guideline

[2] Drafting Checklist

[3] Notes

§ 2.32 INSPECTIONS ON COMPANY PREMISES

[1] Model Guideline

[2] Drafting Checklist

[3] Notes

§ 2.33 DRUG-FREE WORKPLACE

[1] Model Guideline

[2] Drafting Checklist

[3] Notes

§ 2.34 EMPLOYEE ASSISTANCE PROGRAM

[1] Model Guideline

[2] Drafting Checklist

[3] Notes

§ 2.35 EXTERNAL COMMUNICATIONS

[1] Model Guideline

[2] Drafting Checklist

[3] Notes

§ 2.36 UNIONS

[1] Model Guideline

[2] Drafting Checklist

[3] Notes



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California Employer's Guide to Employee Handbooks and Personnel Policy Manuals

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DIVISION 2 EMPLOYEE HANDBOOKS AND PERSONNEL POLICY MANUALS

*1-2 CA Guide to Employee Handbooks*

**CHECKLIST OF EMPLOYEE HANDBOOK AND PERSONNEL POLICY MANUAL PROVISIONS**

- Introduction to Handbook (see § 2.01)
- Equal Employment Opportunity Policy (see § 2.02)
- Employment at Will (see § 2.03)
- Introductory Period (see § 2.04)
- Hours of Work, Overtime, and Pay Day (see § 2.05)
- Vacation (see § 2.06)
- Holidays (see § 2.07)
- Sick Leave (see § 2.08)
- Paid Time Off (see § 2.08A)
- Leaves of Absence (see § 2.09)
- Leaves of Absence [Employers With Fewer Than Fifty Employees] (see § 2.09A)
- Open Door (see § 2.10)

## 1-2 CA Guide to Employee Handbooks

- Internal Complaint Review Procedure (see § 2.11)
- Termination, Discipline, and Rules of Conduct (see § 2.12)
- Policy Against Harassment (see § 2.13)
- Workplace Violence (see § 2.14)
- Company Property; Confidential and Personal Information (see § 2.15)
- Technology Use and Security (see § 2.16)
- Blogging Policy (see § 2.17)
- Mobile Device Policy (see § 2.18)
- Acknowledgment of Receipt of Handbook (see § 2.19)
- Employee Classifications (see § 2.20)
- Performance and Pay Review (see § 2.21)
- Personnel Records (see § 2.22)
- Dress and Grooming Standards (see § 2.23)
- Smoking (see § 2.24)
- Employment of Relatives (see § 2.25)
- Safety Program (see § 2.26)
- Employee Benefits (see § 2.27)
- Solicitation, Distribution, and Bulletin Boards (see § 2.28)
- Non-Fraternization (see § 2.29)

1-2 CA Guide to Employee Handbooks

- Conflicts of Interest (see § 2.30)
- Proof of Right to Work (see § 2.31)
- Inspections on Company Premises (see § 2.32)
- Drug-Free Workplace (see § 2.33)
- Employee Assistance Program (see § 2.34)
- External Communications (see § 2.35)
- Unions (see § 2.36)



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DIVISION 2 EMPLOYEE HANDBOOKS AND PERSONNEL POLICY MANUALS

Part A. RECOMMENDED GUIDELINES

*1-2 CA Guide to Employee Handbooks § 2.01*

## § 2.01 INTRODUCTION TO HANDBOOK

### [1] Model Guideline

---

#### INTRODUCTION [See Note n1]

This handbook is designed to help employees get acquainted with the Company. It describes some of [our philosophies and beliefs, and] the basic terms and conditions of employment with the Company. Employees are expected to read this handbook carefully, and to know and understand its contents.

The Company reserves the right to make changes to this handbook (see Handbook Revisions, below). Employees are responsible for knowing about and understanding those changes once they have been disseminated. The Company also reserves the right to interpret the provisions of this handbook. For this reason, employees should check with the Personnel Manager to obtain information regarding specific employment guidelines, practices, policies, or procedures.

Because employment at the Company is "at will" (see Guideline 2.03), employees should not interpret anything in this handbook as creating a contract or guarantee of continued employment. [See Note n2]

This handbook is the property of the Company, and it is intended for the personal use and reference by employees of the Company. Circulation of this handbook outside of the Company requires the prior written approval of the Personnel Manager.

#### Handbook Revisions

The Company reserves the right to make changes to this handbook and to any employment policy, practice, work rule, or benefit, at any time without prior notice. [See Note n3] However, any such change is effective only if it is in writing [or on the intranet], and is signed or authorized by the Human Resource Director. Except as otherwise provided in this

handbook, no one has the authority to make any promise or commitment contrary to what is in this handbook.

This handbook replaces all earlier handbooks and supersedes all prior [inconsistent] policies, practices, and procedures. **[See Note n4]**

#### Handbook Acknowledgement

Employees should sign the acknowledgement form at the back of this handbook, tear it out, and return it to the Personnel Department. This will provide the Company with a record that each employee has received this handbook.

### **[2] Drafting Checklist**

#### RECOMMENDED PROVISIONS

1. A disclaimer that the Employee Handbook does not create any legally enforceable right to continued employment **[See Note n2]**;
2. A statement that the Employee Handbook supersedes previous personnel handbooks **[See Note n4]**;
3. A reservation of the right to modify the Employee Handbook **[See Note n3]**;
4. A statement that the Employee Handbook is the employer's property; and
5. An instruction to sign the acknowledgement form at the end of the Employee Handbook [see § 2.19].

#### OPTIONAL PROVISIONS

1. An at-will employment statement [see § 2.03/1] for a sample at-will policy];
2. References to other benefits or policy documents; and
3. A description of the history, philosophy, or values of the employer (but be careful not to create implied promises).

### **[3] Notes**

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Labor & Employment LawAffirmative ActionGeneral OverviewLabor & Employment LawAffirmative ActionComplianceLabor & Employment LawDiscriminationGeneral OverviewLabor & Employment LawDiscriminationTitle VII of the Civil Rights Act of 1964Coverage & DefinitionsGeneral OverviewLabor & Employment LawLeaves of AbsenceFamily & Medical Leave ActCoverage & DefinitionsRestoration of Job & BenefitsLabor & Employment LawLeaves of AbsenceMilitary LeavePublic Health & Welfare LawSocial SecurityDisability Insurance & SSI BenefitsGeneral Overview

#### **FOOTNOTES:**

(n1)Note 1. An introduction is an important component of an employee handbook, but may be less necessary to a personnel policy manual. This model guideline, therefore, is geared towards use in an employee handbook rather than

use in a personnel policy manual.

(n2)Note 2. Statements in employee handbooks can create legally enforceable obligations. See *Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal. 4th 317, 344, 100 Cal. Rptr. 2d 352, 8 P.3d 1089 ("We have made clear that the trier of fact can infer an agreement to limit the grounds for termination based on the employee's reasonable reliance on the company's personnel manual or policies.") (citation and internal quotation marks omitted); *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 680-82, 254 Cal. Rptr. 211, 765 P.2d 373 (termination guidelines contained in an employer's personnel manual may alone be sufficient to create an implied contract that the employee may be terminated only for cause); *Hepp v. Lockheed-California Co.* (1978) 86 Cal. App. 3d 714, 718-19, 150 Cal. Rptr. 408 (jury could find that provisions of written personnel policies regarding recall from layoff were inducements to employees to take and continue employment and thus legally enforceable); *Chapin v. Fairchild Camera And Instrument Corp.* (1973) 31 Cal. App. 3d 192, 197, 107 Cal. Rptr. 111 (corporate personnel policy on severance pay became part of the "understood employment agreement"). A disclaimer that the handbook is not intended to create legally enforceable obligations will not necessarily avoid such liability, but at a minimum it provides the employer with arguments that may be used in court if an employee sues for alleged violation of the handbook. See, e.g., *Hawkins v. Home Depot USA, Inc.* (2003) 294 F. Supp. 2d 1119, 1124 (enforcing at-will presumption where employee had signed an employment acknowledgment that any handbook received "will not constitute an employment contract, but will be a statement of the Company's current policies"), *aff'd* (9th Cir. 2005) 127 Fed. Appx. 305; *Wagner v. Glendale Adventist Medical Center* (1989) 216 Cal. App. 3d 1379, 265 Cal. Rptr. 412 (at-will provision in handbook and on application enforced); but see *Kelecheva v. Multivision Cable T.V. Corp.* (1993) 18 Cal. App. 4th 521, 532-33, 22 Cal. Rptr. 2d 453 (at-will handbook provisions not dispositive when probationary period and progressive discipline policies made employment status ambiguous); *McLain v. Great American Ins. Cos.* (1989) 208 Cal. App. 3d 1476, 256 Cal. Rptr. 863 (at-will provision on application not enforced because progressive discipline language in personnel manual deemed in conflict). For further discussion of the potential legally binding effect of handbook provisions, see *Wilcox, California Employment Law*, §§ 60.05[2], 60.06, 62.03[1][a] -[c] (Matthew Bender).

(n3)Note 3. Despite this provision, notice to employees may nonetheless be required for new or changed policies to become effective. See Note 4 below.

(n4)Note 4. This provision is intended to protect against claims that the employer should have followed prior policies that the employer contends are no longer in effect. To ensure that this provision is effective, however, the employer should provide reasonable notice to employees that the old policies have been superseded. See *Asmus v. Pacific Bell* (2000) 23 Cal. 4th 1, 18, 96 Cal. Rptr. 2d 179, 999 P.2d 71 (requiring employer to provide reasonable notice to employees that it was eliminating employment security policy); *Chapin v. Fairchild Camera and Instrument Corp.* (1973) 31 Cal. App. 3d 192, 194 n.2, 196-97, 107 Cal. Rptr. 111 (employer not permitted to argue that policy on which employees brought suit had been modified since modification had never been communicated to employees); see generally *Wilcox, California Employment Law*, § 62.03[1][a]-[c] (Matthew Bender). Generally, such notice may be accomplished by providing employees with a copy of the handbook with the policy change. If the employer has a prior personnel policy manual that the employer intends to continue to use, the text of this guideline should be modified accordingly.



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DIVISION 2 EMPLOYEE HANDBOOKS AND PERSONNEL POLICY MANUALS

Part A. RECOMMENDED GUIDELINES

*1-2 CA Guide to Employee Handbooks § 2.02*

## § 2.02 EQUAL EMPLOYMENT OPPORTUNITY POLICY

### [1] Model Guideline

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#### EQUAL EMPLOYMENT OPPORTUNITY

It is the Company's policy to provide equal employment opportunity for all applicants and employees. The Company does not unlawfully discriminate [See Note n1] on the basis of race, color, religion, sex (including pregnancy, childbirth, or related medical conditions), gender identity, national origin, ancestry, citizenship, age, physical or mental disability [See Note n2], legally protected medical condition [See Note n3], family care status, veteran status, marital status, domestic partner status, sexual orientation [See Note n4], or any other basis protected by local, state, or federal laws [See Notes n5,n6]. When necessary, the Company also makes reasonable accommodations for disabled employees and for pregnant employees who request an accommodation, [with the advice of their health care providers], for pregnancy, childbirth, or related medical conditions. [See Note n7]

The Company prohibits sexual harassment and the harassment of any individual on any of the other bases listed above. For information about the types of conduct that constitute impermissible harassment [and], the Company's internal procedures for addressing complaints of harassment, [the legal remedies available through and complaint procedures of the appropriate state and federal agencies and directions on how to contact these agencies], please refer to the Company's Policy Against Harassment located at page \_\_\_\_\_ of this Handbook.

[As a government contractor, the Company has adopted an Affirmative Action Plan and is committed to making a good faith effort towards achieving the objectives of the Plan.] [See Note n8] [The Company has appointed \_\_\_\_\_ (name or title) to serve as the Company's Equal Employment Opportunity Officer.] [See Note n9]

This policy applies to all areas of employment including recruitment, hiring, training, promotion, compensation, benefits, transfer, disciplinary action, and social and recreational programs. It is the responsibility of every manager and

employee to conscientiously follow this policy. Any employee having any questions regarding this policy should discuss them with \_\_\_\_\_ [specify individual, e.g., the Personnel Manager].

## [2] Drafting Checklist

### RECOMMENDED PROVISIONS

1. A statement that the employer does not "unlawfully" discriminate [See Notes n1,n2,n3,n4,n5,n6];
2. A statement that the employer will provide reasonable accommodation for disabled employees [See Note n7];
3. A statement that the employer will not condone harassment, including sexual harassment; and
4. A statement referring employees to the employer's Policy Against Harassment.

### OPTIONAL PROVISIONS

1. A statement regarding the employer's affirmative action plan, if the employer has one [See Notes n8,n9].

## [3] Notes

### Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment LawAffirmative ActionGeneral OverviewLabor & Employment LawAffirmative ActionComplianceLabor & Employment LawDiscriminationGeneral OverviewLabor & Employment LawDiscriminationTitle VII of the Civil Rights Act of 1964Coverage & DefinitionsGeneral OverviewLabor & Employment LawLeaves of AbsenceFamily & Medical Leave ActCoverage & DefinitionsRestoration of Job & BenefitsLabor & Employment LawLeaves of AbsenceMilitary LeavePublic Health & Welfare LawSocial SecurityDisability Insurance & SSI BenefitsGeneral Overview

### FOOTNOTES:

(n1)Note 1. The California Fair Employment and Housing Act, *Gov. Code § 12900 et seq.* (FEHA), generally prohibits employers from discriminating against employees and applicants for employment because of their "race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation." *Gov. Code § 12940(a)*. "Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation" are defined to include a perception that the person has any of these characteristics or that the person is associated with a person who has, or is perceived to have, any of these characteristics. *Gov. Code § 12926(m)*.

In addition to California's prohibitions against discrimination, federal law also prohibits discrimination on the basis of certain characteristics. Title VII of the Civil Rights Act of 1964 ( *42 U.S.C. § 2000e et seq.* ) prohibits discrimination on the basis of race, color, religion, sex, or national origin. The Age Discrimination in Employment Act of 1967 (ADEA) ( *29 U.S.C. § 621 et seq.* ) prohibits discrimination on the basis of age against persons who are 40 years of age or older. The Americans With Disabilities Act of 1990 (ADA) ( *42 U.S.C. § 12101 et seq.* ) prohibits employment discrimination on the basis of a disability. The Vietnam Era Veterans' Readjustment Assistance Act of 1974 ( *38 U.S.C. § 4211 et seq.* ) and Uniformed Services Employment and Reemployment Rights Act of 1994 ( *38 U.S.C. § 4301* ) prohibit employment discrimination on the basis of veteran status. The federal Family and Medical Leave Act (FMLA) prohibits

employment discrimination against employees who take family care leave or who participate in any inquiry or proceeding related to family care leave rights. See 29 U.S.C. § 2615. Although these statutes do not expressly require covered employers to adopt general EEO Policy Statements, employers should do so and should inform employees of their policy. Employers who are covered by Executive Order 11246 and who are subject to the implementing affirmative action program regulations at 41 C.F.R. Parts 60-2 and 60-4 are required to develop and publish EEO Policy statements.

The limitation to "unlawful" discrimination is intended to avoid contractual obligations broader than those required by law. See generally *Wilcox, California Employment Law*, § 62.03[1][a] (Matthew Bender); for discussion of the coverage of the various equal employment laws, see *Wilcox, California Employment Law*, Ch. 40 (Matthew Bender).

(n2)Note 2. The definitions of "mental disability" and "physical disability" under California law only require a limitation on a major life activity, not a substantial limitation like the ADA. Also unlike the ADA, under California law, a limitation on a "major life activity" is determined without respect to any mitigating measures, and "working" is considered a "major life activity" regardless of whether the working limitation implicates a single job or a broad class of jobs. See generally *Gov. Code* §§ 12926(i), (k), 12926.1. The definitions of "mental disability" and "physical disability" include a record or history of a mental or physical disability that is known to the employer. See *Gov. Code* §§ 12926(i)(3), (k)(3).

(n3)Note 3. *Gov. Code* § 12940 prohibits discrimination on the basis of a "medical condition." However the term "medical condition" is narrowly defined by statute either as (1) a "genetic characteristic," which is any scientifically or medically identifiable gene or chromosome, or combination or alteration thereof, that is known to be a cause of a disease or disorder in a person or his or her offspring, or that is determined to be associated with a statistically increased risk of development of a disease or disorder, or inherited characteristics that may derive from the individual or family member, that are presently not associated with any symptoms of any disease or disorder; or (2) any health impairment related to or associated with a diagnosis of cancer or a record or history of cancer. See *Gov. Code* § 12926(h). In order to avoid providing more protection than required by law, the guideline refers to a "legally-protected medical condition."

(n4)Note 4. Discrimination on the basis of sexual orientation is prohibited by the FEHA, and is subject to the same procedural requirements as other FEHA-based discrimination claims. See *Gov. Code* § 12940. For discussion of the extent to which discrimination based on sexual orientation is prohibited by state and federal equal employment laws, see *Wilcox, California Employment Law*, § 41.36[2][d] (Matthew Bender).

(n9)Note 5. Under the California Domestic Partner Rights and Responsibilities Act, an employer offering a benefit to employees with spouses must offer the same benefit to employees with registered domestic partners. For example, employer-provided health care coverage for spouses must be available to an employee's registered domestic partner. Note, however, that the scope of the new state law does not extend to federally-conferred rights and benefits, e.g., social security, family leave under the FMLA, etc. California employers should review their policies and practices to ensure compliance with this anti-discrimination provision. In addition, many localities have enacted ordinances prohibiting discrimination on the basis of sexual orientation, and requiring that employee benefits be made available to domestic partners of employees. See, e.g., San Francisco Admin. Code §§ 12B.1(b), 12B.2(b), which is available at [www.sfgov.org/site/sfhumanrights\\_index.asp?id=4584](http://www.sfgov.org/site/sfhumanrights_index.asp?id=4584) (barring the City of San Francisco from contracting with companies that discriminate in the provision of employee benefits on the basis of sexual orientation), discussed in *Air Transport Ass'n of Am. v. City & County of San Francisco*, 992 F. Supp. 1149, 158 L.R.R.M. (BNA) 2138 (N.D. Cal. 1998) 992 F. Supp. 1149. Other localities have enacted policies prohibiting discrimination on the basis of an individual's physical appearance. See, e.g., San Francisco Admin. Code §§ 12B.1(a), 12B.2(a) (prohibiting City of San Francisco from contracting with companies that discriminate on the basis of, among other things, weight or height); Santa Cruz City Council Statement of Equal Employment Opportunity and Non-Discrimination Policy (available at <http://www.ci.santa-cruz.ca.us/hr/eeopol.html>) (prohibiting discrimination on the basis of height, weight, or physical characteristics unless a bona fide occupational qualification).

(n10)Note 6. California's prohibition against discrimination on the basis of "sex" includes discrimination based on gender identity. The definition of "sex" under FEHA includes "gender," defined to include "a person's gender identity and gender related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth." See *Gov. Code § 12926(p)* and *Cal. Penal Code § 422.56(c)*. California law also addresses permissible dress and grooming standards in the transgender context. Under *Gov. Code § 12949*, employers may "require an employee to adhere to reasonable workplace appearance, grooming, and dress standards not precluded by other provisions of state or federal law, provided that an employer shall allow an employee to appear or dress consistently with the employee's gender identity." Employers may therefore continue to enforce bona fide dress and grooming standards, but they must permit their employees to dress based on their gender identification. Employers may want to place employees on notice that "gender identity" is a protected characteristic by including this language in their EEO Policy Statements; however, they are not required to do so by law.

(n11)Note 7. The ADA, the Rehabilitation Act, and the FEHA each require covered employers to make reasonable accommodation for disabled individuals. See *42 U.S.C. §§ 12111(9), 12112(b)* (ADA); *41 C.F.R. § 60-741.2(v)* (Office of Federal Contract Compliance Program's implementing regulation under Rehabilitation Act § 503); *28 C.F.R. § 41.53* (U.S. Department of Justice's coordinating regulations for Rehabilitation Act § 504); *Gov. Code §§ 12926(n), 12940(m)* (FEHA). In addition, the FEHA imposes a duty on employers to reasonably accommodate pregnant employees. An employer must reasonably accommodate "an employee for conditions related to pregnancy, childbirth, or related medical conditions," if the employee requests an accommodation with the advice of her health care provider. *Gov. Code § 12945(b)(1)*. Additionally, an employee who is temporarily disabled as a result of pregnancy is entitled to the same right to transfer to less strenuous or hazardous duty as any other temporarily disabled employee. Moreover, at the request of a pregnant employee's doctor, the employer must grant a transfer to the extent it can be reasonably accommodated. See *Gov. Code § 12945(b)(2)-(3)*. For discussion of state and federal equal employment law requirements regarding accommodation of disabled employees, see *Wilcox, California Employment Law, § 41.51* (Matthew Bender).

(n12)Note 8. Not all employers are required to have an affirmative action policy or written affirmative action plan. Certain state and federal contractors and subcontractors are required to develop written affirmative action plans and to publish their EEO policy to their employees. See *Gov. Code § 12990*; *2 Cal. Code Reg. §§ 8101-8504*; Exec. Order No. 11246; *41 C.F.R. § 60-1.40(a)*; see also *41 C.F.R. Parts 60-2, 60-4*. For discussion of affirmative action requirements generally, see *Wilcox, California Employment Law, Ch. 44* (Matthew Bender).

(n13)Note 9. The implementing regulations of Executive Order 11246 require each covered government contractor to appoint an executive as director or manager of equal employment opportunity programs. See *41 C.F.R. § 60-2.17(a)*; see also *Wilcox, California Employment Law, § 44.42[1]* (Matthew Bender). All employers should designate an EEO officer and vest this person with clear authority to develop EEO policy; identify problem areas; and receive, investigate, and respond to internal complaints of employment discrimination.



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DIVISION 2 EMPLOYEE HANDBOOKS AND PERSONNEL POLICY MANUALS

Part A. RECOMMENDED GUIDELINES

*1-2 CA Guide to Employee Handbooks § 2.03*

## § 2.03 EMPLOYMENT AT WILL

### [1] Model Guideline

---

#### EMPLOYMENT AT WILL

All employment at the Company is "at-will." This means that both employees and the Company have the right to terminate employment at any time, with or without advance notice, and with or without cause. [Employees also may be demoted or disciplined and the terms of their employment may be altered at any time, with or without cause, at the discretion of the Company.] No one other than an officer of the Company has the authority to alter this arrangement, to enter into an agreement for employment for a specified period of time, or to make any agreement contrary to this at-will status. Any such agreement must be in writing, must be signed by an officer of the Company and by the affected employee, and must express a clear and unambiguous intent to alter the at-will nature of the employment relationship. [See Note n1]

### [2] Drafting Checklist

#### RECOMMENDED PROVISIONS

1. A statement that employees may be discharged at any time without notice and without cause [See Note n1]; and
2. A statement that any agreement to the contrary of this policy must be made by an officer of the Company, and must be documented in writing [See Note n1].

#### OPTIONAL PROVISIONS

1. A statement that the employee may terminate his or her employment at any time; and

2. A statement that employees may be demoted or disciplined and the terms of their employment may be altered at any time, with or without cause, at the discretion of the Company [See Note n1].

**[3] Notes**

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Labor & Employment Law  
Collective Bargaining & Labor Relations  
Discipline, Layoff & Termination  
Labor & Employment Law  
Employment Relationships  
At-Will Employment  
General Overview  
Labor & Employment Law  
Employment Relationships  
At-Will Employment  
Duration of Employment  
Labor & Employment Law  
Employment Relationships  
At-Will Employment  
Exceptions  
General Overview  
Labor & Employment Law  
Wrongful Termination  
Breach of Contract  
Employer Handbooks



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DIVISION 2 EMPLOYEE HANDBOOKS AND PERSONNEL POLICY MANUALS

Part A. RECOMMENDED GUIDELINES

*1-2 CA Guide to Employee Handbooks § 2.04*

## § 2.04 INTRODUCTORY PERIOD

### [1] Model Guideline

---

#### INTRODUCTORY PERIOD

The Company attempts to hire the most-qualified employees for each position. To ensure this, the Company provides for an introductory period of employment for the employee to assess the Company and the job content, and for the Company to evaluate the new employee and his or her job performance. All new employees must complete to the Company's satisfaction a \_\_\_\_\_ [*specify period, e.g., 90-day*] introductory period beginning with the date of initial employment. During the introductory period, an employee may be discharged by the Company for any reason and without advance notice. Similarly, the employee may resign employment for any reason without advance notice during this period. **[See Note n1]** [A performance review will be conducted by the employee's supervisor before the introductory period is completed].

At the Company's discretion, an employee's introductory period may be extended one or more times. [Employees earn vacation from the first day of employment *or* Employees are not eligible for and do not earn benefits during the introductory period, except for holiday pay.] **[See Note n2]** On successful completion of the introductory period, an employee will become a regular employee. Successful completion of the introductory period does not, however, guarantee employment for any specific duration [or change the at-will status of regular employment].

### [2] Drafting Checklist

#### RECOMMENDED PROVISIONS

1. A description of when the introductory period commences and when it is completed;
2. A statement concerning whether the employee is eligible for benefits during the introductory period

[See Note n2];

3. A reservation of the right to extend the introductory period;
4. A statement of the right of either the employer or the employee to terminate the employment relationship during this period; and
5. A statement that completion of the introductory period does not entitle the employee to continued employment for any particular length of time [See Note n1].

#### OPTIONAL PROVISIONS

1. A statement that completion of the introductory period does not alter the at-will nature of the employment [See Note n1]; and
2. A statement that employees will be evaluated at the end of their introductory periods.

#### [3] Notes

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law Employment Relationships General Overview Labor & Employment Law Employment Relationships At-Will Employment General Overview Labor & Employment Law Employment Relationships At-Will Employment Duration of Employment Labor & Employment Law Employment Relationships At-Will Employment Exceptions Implied Contracts Labor & Employment Law Wrongful Termination Breach of Contract Employer Handbooks Labor & Employment Law Wrongful Termination Breach of Contract Implied Contracts

#### FOOTNOTES:

(n1)Note 1. Employers who wish to ensure that their employees are employed on an at-will basis should consider whether they wish to implement an introductory period, sometimes called a "probationary" period. A "probationary" period of at-will employment often precedes "regular employment" status, in which the employee has greater job security. Therefore, the existence of a "probationary" period may imply that an increased level of job security attaches at the conclusion of the period, unless regular employment is associated with a higher level of benefits. In any case, if the employer wishes to maintain an at-will employment relationship even after conclusion of the introductory period, this should be clearly specified in the introductory period provision of the handbook. Otherwise, the employer may create an implied-in-fact contract requiring "cause" for discharge after the employee has completed the probationary period. See *Walker v. Northern San Diego County Hosp. Dist.* (1982) 135 Cal. App. 3d 896, 902-05, 185 Cal. Rptr. 617 (holding that a triable issue of fact existed as to whether employer's "Probationary Period" policy in its employee handbook created a contract requiring cause to terminate employees who completed the probationary period). For further discussion of introductory or "probationary" periods, and their possible effect in subsequent wrongful termination litigation, see *Wilcox, California Employment Law*, § 62.03[1][d], [e] (Matthew Bender).

(n2)Note 2. Under California law, the right to vacation ordinarily vests as services are rendered. See *Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal. 3d 774, 780-784, 183 Cal. Rptr. 846, 647 P.2d 122 ; see also Notes in § 2.06 [3] (vacation guideline). Thus, an employee whose employment terminates during the year is entitled to a pro rata share of that year's vacation entitlement. It is permissible for a vacation policy to provide that employees do not accrue vacation during an introductory or "probationary" period. See D.L.S.E. Interpretive Bulletin No. 86-3, P 7(a) (Sept. 30, 1986); but see *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal. 4th 557, 59 Cal. Rptr. 2d 186, 927 P.2d 296 (voiding all "written interpretive policies" of the D.L.S.E. for failure to adopt such policies in compliance with the

Administrative Procedure Act; such written interpretive policies include, for example, portions of the D.L.S.E. Operations & Procedures Manual and portions of the D.L.S.E. Interpretive Bulletins), *cert. denied* (1997) 520 U.S. 1248, 117 S. Ct. 1862, 137 L. Ed. 2d 1062 . For discussion of the weight to be accorded D.L.S.E. interpretations of statutory law, see *Wilcox, California Employment Law, § 1.05[3][c]* (Matthew Bender). However, if the policy gives retroactive vacation credit to employees who have passed their introductory period, then it must similarly grant to employees who are terminated during that period their pro rata share of vacation pay, the accrual of which begins on the date of hire. See D.L.S.E. Interpretive Bulletin No. 86-3, P 7(a) & fn. 2 (Sept. 30, 1986); but see *Tidewater*, above. For full discussion of rules regarding vesting of vacation benefits, see *Wilcox, California Employment Law, § 4.01[2][d]* (Matthew Bender).



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California Employer's Guide to Employee Handbooks and Personnel Policy Manuals

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DIVISION 2 EMPLOYEE HANDBOOKS AND PERSONNEL POLICY MANUALS

Part A. RECOMMENDED GUIDELINES

*1-2 CA Guide to Employee Handbooks § 2.05*

## § 2.05 HOURS OF WORK, OVERTIME, AND PAY DAY

### [1] Model Guideline

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HOURS OF WORK, OVERTIME, AND PAY DAY

#### I. Hours of Work

Company work hours are from \_\_\_\_\_ [*specify, e.g., 8 a.m. to 5 p.m.*], Monday through Friday [The Company reserves the right to modify employees' starting and quitting times and the number of hours worked].

#### II. Meal and Rest Periods

##### A. Rest Periods

Nonexempt employees working at least three and one-half hours in a day are authorized and permitted to take a ten-minute paid rest period for each four hours worked or a major fraction thereof. For example, if a nonexempt employee works six and one-half hours, the employee is authorized and permitted to take two separate ten-minute paid rest periods. [See Note n1]

##### B. Meal Periods

Nonexempt employees working in excess of five hours are authorized and permitted to take a 30 [60] minute unpaid meal period; however, employees working a shift of less than six hours can elect to waive their meal period. Nonexempt

employees working in excess of six hours must take a 30 [60] minute unpaid meal period. Nonexempt employees working in excess of 10 hours in a day will be required to take a second thirty-minute unpaid meal period, unless waived by mutual agreement. Nonexempt employees working in excess of 12 hours are not permitted to waive the second meal period. **[See Note n1]**

#### C. All Meal Periods Are Unpaid

Employees will be relieved of all duties and free to leave the worksite during their meal periods. **[See Note n2]**

### III. Overtime Pay

#### A. Overtime Definition and Rates of Pay

All nonexempt employees who work more than eight (8) hours in one workday **[See Note n2]** or more than forty (40) hours in one workweek will receive overtime pay computed as follows: **[See Note n4]**

(1) Overtime at the rate of 1 1/2 times the employee's regular rate of pay for all hours worked in excess of forty (40) in any one workweek.

(2) Overtime at the rate of 1 1/2 times the employee's regular rate of pay for the first four (4) hours worked in excess of eight (8) hours in any one workday, and for the first eight (8) hours on the seventh day of work in any one workweek. **[See Note n3]**

(3) Overtime at the rate of double the employee's regular rate of pay for all hours worked in excess of twelve (12) in one workday, and for all hours worked in excess of eight (8) on the seventh day of work in one workweek. **[See Note n4]**

[Overtime will be computed on actual minutes worked, adjusted to the nearest 15-minute increment]. **[See Note n5]**

Only those hours that are actually worked are counted to determine an employee's overtime pay. Compensated holidays, for example, are not hours worked and are therefore not counted in making overtime calculations. **[See Note n6]**

[There may be exceptions to the above overtime computations for nonexempt employees who are subject to an Alternative Workweek Schedule.] **[See Note n7]**

#### B. Workweek and Workday

Unless otherwise provided, for purposes of calculating overtime, each workweek begins on Sunday and each workday begins at midnight. **[See Notes n3,n8]**

#### [C. Pre-Authorization

No nonexempt employee may work overtime without the express prior approval of his or her supervisor.] **[See Note n9]**

#### [D. Makeup Time

Nonexempt employees may make up work time that is or would be lost as a result of personal obligations if the time is made up during the same workweek in which the work time is lost. A nonexempt employee will only be permitted to make up work time if the employee submits a signed written request to make up the lost time and the employee's direct supervisor approves the request in advance. A nonexempt employee will not be paid overtime for performing makeup work unless the employee works more than 11 hours in the workday or more than 40 hours in the workweek.] [See **Noten10**]

#### **IV. Other Types of Pay**

##### **A. Reporting Pay**

A nonexempt, full-time employee who reports to work at the Company's request, whether for a regularly scheduled shift or otherwise, will be paid a minimum of four hours' pay at the employee's regular rate, without regard to the number of hours actually worked, unless the reasons for lack of work are beyond the Company's control. [See **Note n11**] Reporting time pay will not be paid to an employee on paid standby status who is called to perform assigned work at a time other than the employee's scheduled reporting time. Reporting time hours are not counted as "hours worked" for overtime purposes unless work is actually performed. [See **Note n12**]

##### **B. Callback Pay**

A nonexempt employee who is called back for a second work period in a workday and is given less than two hours' work will be paid a minimum of two hours' pay at the employee's regular rate of pay for the second work period, without regard to the number of hours actually worked, unless the reasons for any failure to furnish two hours of work are beyond the Company's control. [See **Note n13**]

##### **[C. Shift Premium/Nonexempt Employees**

The Company reserves the right to establish shifts of work. Employees are assigned to a scheduled workweek and shift when hired by the Company. These assignments may change during the course of employment. When there are changes in an employee's workweek or shift assignment, the employee will receive a minimum of five working days' notice.]

[Employees assigned to a shift other than the first shift (day shift) are paid a shift differential in addition to their regular base rate of pay. Employees assigned to work on the second shift (swing shift) are paid at their regular base rate plus a ten-percent (10%) differential. Employees assigned to work on the third shift (night shift) are paid their base rate plus a fifteen-percent (15%) differential. Employees who are called to work prior to the start of their assigned shift, or who work into the shift following their assigned shift, will be paid the shift differential, if any, applicable to their assigned shift for all hours worked that workday. The shift differential is included in an employee's regular rate of pay for the purposes of calculating overtime compensation] . [See **Note n14**]

##### **[D. Split-Shift Premium**

Nonexempt employees who work a Company-established split shift will receive one additional hour's pay at the minimum wage for that workday. The additional hour of compensation for the split shift is not counted as "hours

worked" for purposes of calculating overtime compensation]. **[See Note n15]**

#### [E. Holiday Pay

Employees are paid their regular straight-time wages for Company-paid holidays as set forth under the guideline entitled "Holidays." To receive holiday pay, the employee generally must work the regularly scheduled workdays preceding and following the Company holiday, or receive prior approval from his or her supervisor to take the time off. Nonexempt employees who work during a Company-paid holiday are paid at 1 1/2 times their regular base rate.] **[See Note n16]**

#### [F. Pay Advances

If an employee wishes to be paid in advance for vacation or because of emergency circumstances, a Pay Advance Request form must be completed and submitted to \_\_\_\_\_ (*specify, e.g., the Personnel Department*). A vacation pay advance will be made only if the employee will be on vacation on the regularly scheduled payday(s) and only if the employee submits a request at least ten (10) working days prior to the beginning of the vacation.]

### **V. Place and Time for Payment of Wages**

#### A. Regular Pay Days

Employees are paid biweekly, every other \_\_\_\_ [*specify payday, e.g., Friday*]. [Employees must complete their time cards in a timely manner in order to ensure that they are paid for all hours worked.] **[See Note n17]** If a pay day falls on a holiday, paychecks will be distributed on the preceding workday. Checks are distributed \_\_\_\_\_ [*specify manner of distribution, e.g., by the employee's immediate supervisor at the employee's work station*] on the date assigned for payment. If the employee is absent [from his or her work station] when the paycheck is distributed, the employee may claim the paycheck from \_\_\_\_\_ [*specify, e.g., his or her immediate supervisor*] when the employee returns. **[See Note n18]**

#### B. Payment on Resignation, Termination, or Completion of Assignment or Term

If an employee resigns, his or her paycheck will be available on the final day of work provided the employee has given at least 72 hours' prior notice. If an employee resigns without giving 72 hours' notice or fails to return to work, his or her paycheck will be made available [at the office at which the employee was performing services] within 72 hours after the date when the employee is considered to have terminated, unless the employee requests in writing that his or her final paycheck be mailed. If an employee is terminated involuntarily, his or her paycheck will be available at the time of discharge. If an employee is hired for a specific assignment or otherwise has a defined term of employment, his or her paycheck will be available upon the completion of the assignment or employment term. The employee's final paycheck will include payment for all wages owed and for any accrued but unused vacation time. **[See Note n19]**

#### **[2] Drafting Checklist**

### **RECOMMENDED PROVISIONS**

#### A. Hours of Work

1. A statement of the work hours that the employer expects employees to observe; and
2. A description of meal and rest periods [See Note n1].

**B. Overtime [See Notes n3,n4,n5,n6,n7,n8,n9]**

1. A definition of overtime;
2. A statement of eligibility for overtime;
3. A description of the rates of overtime pay; and
4. A definition of the workweek and, when applicable, workday on which overtime is calculated.

**C. Other Types of Pay**

1. A description of reporting time pay [See Note n11]; and
2. A description of callback pay [See Note n13].

**D. Pay Day**

1. A statement of the day employees are paid and the manner of distributing paychecks [See Note n18];
2. An explanation of when paychecks are distributed if the payday falls on a holiday; and
3. An explanation of the payment of final wages upon resignation, termination, or completion of specific assignment or employment term. [See Note n19].

**OPTIONAL PROVISIONS**

**A. Hours of Work**

1. A statement of work hours for different shifts;
2. Reservation of right to modify employees' starting and quitting times and number of hours worked; and
3. A description of any alternative work schedule adopted pursuant to an agreement with employees [See Note n7].

**B. Overtime**

1. A statement prohibiting unauthorized overtime [See Note n8];
2. A statement of the employer's policy regarding makeup time;
3. Instructions regarding the manner in which employees are to record overtime;
4. A statement concerning weekend work (i.e., whether or not such work automatically entitles an

employee to overtime compensation);

5. A statement that notice may or may not be given to employees who are asked to work overtime;

6. A statement regarding compensatory time off [See Note n20]; and

7. A statement that working assigned overtime is a condition of employment.

#### C. Other Types of Pay

1. If the employer's operation involves multiple shifts, a provision for shift premium pay, including a statement of how employees are to be paid who work outside of their regularly assigned shift, and a statement that shift differential is included in the employee's regular rate of pay for purposes of computing overtime [See Note n14];

2. A statement that holiday pay will not be paid if the employee is absent without advance approval the day before or after the holiday;

3. A statement concerning whether work on a company-observed holiday entitles employees to premium pay and, if so, the applicable premium rate [See Notes n5,n16]; and

4. A statement regarding pay advances.

#### D. Pay Day

1. A statement that employees' time cards must be completed in a timely manner in order to ensure that employees are paid for all hours worked [See Note n17].

#### [3] Notes

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law  
 Collective Bargaining & Labor Relations  
 Discipline, Layoff & Termination  
 Labor & Employment Law  
 Wage & Hour Laws  
 Assignments, Deductions & Garnishments  
 Labor & Employment Law  
 Wage & Hour Laws  
 Coverage & Definitions  
 Overtime & Work Period  
 Labor & Employment Law  
 Wage & Hour Laws  
 Coverage & Definitions  
 Regular Rate  
 Labor & Employment Law  
 Wage & Hour Laws  
 Wage Payments

#### FOOTNOTES:

(n1)Note 1. Under the "Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999," employers are required to provide nonexempt employees with a meal period of at least 30 minutes if the employee works more than five hours per day, unless the work period is no more than six hours and the employee waives the meal period. See *Lab. Code § 512* ; Industrial Welfare Commission ("IWC") Wage Orders 1-2001 through 17-2001. Employers generally must provide an additional 30-minute meal period if the employee works more than 10 hours per day, unless: (1) the work period is no more than 12 hours; (2) the employee did not waive the first meal period; and (3) the employee consents to waive the second meal period. See *Lab. Code § 512* ; Wage Orders 1-2001 through 3-2001, 6-2001 through 11-2001, 13-2001, and 15-2001 through 17-2001. If the employer fails to provide an employee with a required meal period, the employer must pay the employee one hour of pay at the regular rate for each work day that the meal period is not provided. See *Lab. Code § 226.7(b)* ; Wage Orders 1-2001 through 13-2001 and 15-2001 through 17-2001. The Wage Orders also require employers to provide nonexempt employees with one paid ten-minute break for each four hours worked, to be

taken as far as practicable in the middle of each four-hour period. The rules on meal and rest periods vary somewhat for different industries, particularly the motion picture industry (Wage Order 12-2001) and the construction, drilling, logging and mining industries (Wage Order 16-2001). Therefore, employers should review the Wage Order applicable to their industry. The Wage Orders can be found at [www.dir.ca.gov/IWC](http://www.dir.ca.gov/IWC). Employers should be aware of recent changes in the law regarding meal and rest periods. On April 16, 2007, the California Supreme Court held in a unanimous decision that an employee has up to three years to bring a claim for an employer's failure to provide a meal or rest period. See *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal. 4th 1094. *California Labor Code § 226.7(b)* generally provides that if an employer fails to provide an employee a meal or rest period, the employer must pay the employee one additional hour of pay for each day that employee was not provided a meal or rest period. At issue in *Murphy v. Kenneth Cole* was whether the one hour of additional pay amounted to a "wage," governed by a three-year statute of limitations, or a "penalty," subject to a one-year statute of limitations. The *Murphy* Court held that the additional hour of pay is a "wage" and not a "penalty." The practical consequences of this decision to employers include the following: (1) nonexempt employees may now seek recovery for unpaid meal and rest periods for each workday in which an alleged violation occurred during the three years, as opposed to one year, preceding the employee's claim; (2) employers may be subject to unfair competition claims, governed by a four-year statute of limitations, for failure to pay "wages" for missed meal and rest breaks; (3) employers will likely be exposed to waiting time penalties under *Labor Code § 226.7* for failure to pay all wages due and owed upon the termination of employment; and (4) employees may seek an award of civil penalties under the Private Attorneys General Act, *Labor Code § 2698, et seq.* based on an employer's failure to remit the additional hour of pay due to employees who missed their meal or rest periods. For a full discussion of required meal and rest periods under California law, see *Wilcox, California Employment Law, §§ 3.23-3.24* (Matthew Bender).

(n2)Note 2. As described in Note 1, the Wage Orders generally require employers to "provide" employees with duty-free lunch periods. The affirmative steps an employer must take to "provide" this meal period is yet unsettled under California law. See *Brown v. Fed. Express Corp.* (C.D. Cal. Feb. 26, 2008) 2008 U.S. Dist. LEXIS 17125 (employer need only provide a meal break, not force the employee to take one); *White v. Starbucks Corp.* (N.D. Cal. 2007) 497 F. Supp. 2d 1080 (accord); but see *Perez v. Safety-Kleen Sys.* (N.D. Cal. June 27, 2007) 2007 U.S. Dist. LEXIS 48308 (employer may not assume that employees take their meal period, but must take affirmative steps to provide a meal break). Until this issue is resolved by the California Supreme Court, employers are advised, at the very least, to provide all employees with a duty-free meal period and to advise employees they are free to take that meal period. See *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal. App. 4th 949, 962-963, 35 Cal. Rptr. 3d 243 (employers have an affirmative duty to ensure that workers are relieved of all duty during meal periods). Additionally, employers should be aware that employees must, except in very limited circumstances, be permitted to leave the Company's premises during their meal period.

(n3)Note 3. With limited exceptions, California employers must pay daily overtime to nonexempt employees who work more than eight hours in a workday and for the first eight hours worked on the seventh day of work in any workweek. See *Lab. Code § 510(a)*. The IWC has published Wage Orders reflecting the daily overtime and seventh-day overtime requirements.

The IWC is authorized to review and establish the duties required for executive, administrative, and professional employees to qualify for an exemption from the overtime requirements. See *Lab. Code § 515(a)*. These exemptions generally apply only to employees who earn a monthly salary of at least two times the state minimum wage for full-time employment and are "primarily engaged" in exempt duties. See § 1 of applicable Wage Order. Exempt administrative duties are generally defined to include performance of office or non-manual work directly related to management policies or general business operations of the employer. See § (1)(A)(2) of the applicable Wage Order. Exempt executive duties are generally defined to include management of the enterprise or of a customarily recognized department or subdivision thereof, direction of two or more employees' work, and the ability to hire and fire. See § (A)(1) of the applicable Wage Order. To qualify for the professional exemption, an employee must be either: (1) licensed or certified by the State of California and primarily engaged in the practice of law, medicine, dentistry,

optometry, architecture, engineering, teaching, or accounting; or (2) primarily engaged in an occupation commonly recognized as a learned or artistic profession, as defined by the federal regulations as of the date of the Wage Order. See Wage Orders 1-2001 through 13-2001 and 15-2001 at § 1(A)(3)(b),(e); Wage Order 17-2001 at § 3. Certain employees working in the computer software field, licensed physicians, and licensed surgeons meeting specified hourly rate of pay requirements (or, for computer workers, a salary at or above a specified amount) may also qualify for an exemption from overtime requirements. See *Lab. Code* §§ 515.5, 515.6; see also Wage Orders at § 1(A)(3)(h)-(i). For a complete discussion of State and Federal overtime compensation requirements, as well as exceptions to and exemptions from those requirements, see *Wilcox, California Employment Law, Ch. 3* (Matthew Bender).

(n4)Note 4. The federal Fair Labor Standards Act (FLSA) requires the payment of overtime to nonexempt employees at the rate of 1 1/2 times the regular rate of pay for all hours worked in excess of 40 hours per workweek. See 29 U.S.C. § 207(a)(1). Similarly, California law requires the payment of overtime to nonexempt employees at the rate of 1 1/2 times the regular rate of pay for all hours worked in excess of 40 hours per workweek. California law also generally requires the payment of overtime to nonexempt employees at the rate of 1 1/2 times the regular rate of pay for all hours worked in excess of eight hours in a workday and for the first eight hours worked on the seventh day of work in any workweek. In addition, California law requires the payment of overtime at two times the regular rate of pay for hours worked beyond 12 in a workday and for hours worked beyond eight on the seventh day of work in any workweek. See *Lab. Code* § 510(a); see also § 3 of applicable Wage Order. For a complete discussion of state and federal overtime compensation requirements, as well as exceptions to and exemptions from those requirements, see *Wilcox, California Employment Law, Ch. 3* (Matthew Bender).

(n9)Note 5. This is not a legal requirement, but rather a matter of convenience at the option of the employer. See generally DLSE, Enforcement Policies and Interpretations Manual §§ 47.1-47.2 (June 2002); 29 C.F.R. § 785.48(b) (FLSA regulations permitting employer to "round off" employees' work time).

(n10)Note 6. Under the FLSA and California law, employers need not include paid-time-off hours (e.g., holiday, sick leave) as "hours worked" for overtime purposes, nor are they required to include paid-time-off pay in the regular rate of pay. 29 U.S.C. § 207(e)(2) (pay for vacation, holiday, illness, and similar periods when no work is performed need not be included in employee's "regular rate of pay"). For a full discussion of what time must be included in "hours worked" for purposes of computing overtime compensation under state and federal law, see *Wilcox, California Employment Law* §§ 3.07, 3.08 (Matthew Bender).

(n11)Note 7. Upon approval by two-thirds of affected employees in a readily identifiable work unit in a secret ballot election, an employer may adopt an alternative workweek schedule that authorizes payment of straight time for no more than 10 hours per workday in a 40-hour workweek. See *Lab. Code* § 511(a). An employer cannot reduce an employee's regular rate of pay because an alternative workweek schedule has been adopted, repealed, or nullified. See *Lab. Code* § 511(c). If an alternative workweek schedule is adopted, employers must make a reasonable effort to accommodate those employees who were eligible to vote in an election, but who cannot work the alternative schedule adopted in the election, by providing a work schedule not to exceed eight hours in a workday. See *Lab. Code* § 511(d). Similarly, employers may accommodate employees hired after an election who cannot work the alternative workweek schedule by providing a work schedule not to exceed eight hours in a workday. See *Lab. Code* § 511(d). Employers must also explore reasonable alternatives for employees who cannot work the alternative work schedules because of religious belief or observance. See *Lab. Code* § 511(d). Employees who work more than eight but fewer than 12 hours in a workday pursuant to an alternative workweek schedule are entitled to overtime pay at 1 1/2 times the regular rate for all hours worked in excess of the regularly-scheduled work hours or for more than 40 hours in a workweek. See *Lab. Code* § 511(b). Employees on an alternative workweek schedule who work more than 12 hours on a regularly-scheduled workday or more than eight hours on an unscheduled work day are entitled to overtime pay at two times the regular rate for those hours. See *Lab. Code* § 511(b). These rules and additional rules on alternative workweek election procedures can be found in the IWC Wage Orders.

(n12)Note 8. The wage and hour laws do not specify a particular day or time that workweeks and workdays must

begin for overtime calculation purposes. Thus, an employer is free to select the day of the week and time of day that best fits its operations or that minimizes overtime obligations. However, the employer cannot manipulate the designated beginning time for workweeks or workdays solely to avoid overtime, *e.g.*, by frequently changing the designated starting times of workweeks or workdays. See 29 C.F.R. § 778.105 (FLSA regulations).

(n13)Note 9. The inclusion of a requirement that employees receive authorization for overtime may be useful but does not, in itself, relieve the employer of liability for overtime compensation if an employee works overtime hours without obtaining the required authorization. Under both federal and state law, any time that an employee is "suffered or permitted" to work counts as "hours worked" for purposes of computing overtime, regardless of whether the employee was required, requested, or authorized to work. See 29 U.S.C. § 203(g); 29 C.F.R. §§ 785.11-785.13; Wage Orders 1-2001 through 17-2001. The employer has the right to control an employee's activities, and therefore an employer who "suffers or permits" an employee to work overtime must pay the required premium, even if the overtime was not authorized. See *Morillion v. Royal Packing Co.* (2000) 22 Cal. 4th 575, 585, citing *Forrester v. Roth's I.G.A. Foodliner, Inc.*, (9th Cir. 1981) 646 F.2d 413, 414 (decided under FLSA). In unusual cases, an employer may be able to successfully argue that an employee performed overtime work without the employer's knowledge and should not be paid for it (for example, if the employee routinely took work home without the supervisor's knowledge or consent). Such situations are considered on a case-by-case basis in light of all the circumstances. For a full discussion of what time must be included in "hours worked" for purposes of computing overtime compensation under state and federal law, see *Wilcox, California Employment Law* §§ 3.07, 3.08 (Matthew Bender).

(n26)Note 10. *Labor Code Section 513* permits an employer to approve written requests from employees to make up work time that is or would be lost as a result of a personal obligation of the employee. See *Lab. Code § 513*. The makeup time will not count toward the number of hours worked on the day that the makeup time is performed for overtime purposes, provided: (1) the makeup time is performed in the same workweek in which the work time was lost; and (2) the employee does not work more than 11 hours in the workday or 40 hours in the workweek when the makeup work is performed. Employers may wish to limit the amount of time an employee can make up to avoid overtime liability. Under *Labor Code section 513*, an employee must submit a signed written request for each occasion that he or she wishes to make up work time, and the employer may not encourage or otherwise solicit employees to request approval to take personal time off and make up the work hours within the same week. Employers should advise supervisors and managers not to solicit or otherwise encourage employees to make up lost work time.

(n27)Note 11. The IWC Wage Orders generally provide that, if an employee is required to report to work but is then provided less than half of the employee's usual or scheduled day's work, the employee must be paid for one-half of the usual or scheduled day's work, but in no event less than two or more than four hours at the regular rate. See Wage Orders 1-2001 through 16-2001, at § 5. Employers are exempt from this requirement under various circumstances, including when the cause of the lack of work is not within the employer's control, such as an act of God. See Wage Orders 1-2001 through 16-2001, § 5(C). This Model Guideline assumes that the employee regularly works an eight-hour day. If the employer does not wish to pay four hours' reporting time pay to an employee who regularly works less than an eight-hour day, the guideline should be modified accordingly. For discussion of reporting time pay requirements, see *Wilcox, California Employment Law*, § 2.06[1][b] (Matthew Bender).

(n28)Note 12. Reporting time pay in excess of hours actually worked may be excluded from the regular rate for overtime compensation purposes. However, if the employee actually worked or waited at the employer's premises after reporting, the employer must pay the applicable regular or overtime rate for that time. See *Wilcox, California Employment Law* §§ 3.07[1][e][i], 3.08[1][c] (Matthew Bender).

(n29)Note 13. The IWC Wage Orders provide that if an employee is required to report to work for a second time in any one workday and is furnished with less than two hours' work on the second reporting, the employee must be paid for at least two hours at the regular rate of pay. See generally Wage Orders 1-2001 through 16-2001, § 5. Employers are exempt from this requirement under various circumstances, including when the cause of the lack of work is not within the employer's control, such as an act of God. See Wage Orders 1-2001 through 16-2001, § 5(C). If the employee works

more than two hours, the employer is required to pay the employee for the time worked at the applicable regular or overtime rate.

Prior to the California Supreme Court's decision in *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal. 4th 557, 59 Cal. Rptr. 2d 186, 927 P.2d 296, cert. denied (1997) 520 U.S. 1248, 117 S. Ct. 1862, 137 L. Ed. 2d 1062, the policy of the Division of Labor Standards Enforcement ("DLSE") was that nonexempt employees called back to work were entitled to count "reasonable time for travel from the point at which the employee is summoned to return to work, to the work site and return" as hours worked. See Division of Labor Standards Enforcement, Operations and Procedures Manual § 10.87 (September 1989). In light of the *Tidewater* decision, it is unclear whether this interpretation carries any weight under California law, and the DLSE's current Enforcement Policies and Interpretations Manual is silent as to the inclusion of travel time in callback pay. However, other commentators hold that payment for travel time is required. See *Wilcox, California Employment Law* § 3.07[1][e][ii] (Matthew Bender). California law differs on this point in many respects from the federal Portal-to-Portal Act. See 29 U.S.C. §§ 251-262; 29 C.F.R. § 785.36; see also *Wilcox, California Employment Law* § 3.07[2][b][i], [c] (Matthew Bender). For further discussion of callback pay requirements, see *Wilcox, California Employment Law* § 3.07[1][e][ii] (Matthew Bender).

(n30)Note 14. An employer is not legally required to pay a shift differential, but if a shift differential is paid, it must be included in the regular rate of pay for overtime calculation purposes. See 29 C.F.R. § 778.207(b) (FLSA guidelines). For a full discussion of the types of pay that must be included in computing an employee's regular rate of pay for overtime purposes, see *Wilcox, California Employment Law* § 3.08 (Matthew Bender).

(n31)Note 15. An employer is not required by law to pay a split-shift premium to employees who reside at their place of employment. See 8 Cal. Code Regs. §§ 11010-11160, § 4(C) (Wage Orders 1-2001 to 16-2001 at § 4(C)). Some commentators also suggest that employers may credit or offset wages in excess of the minimum wage against the split-shift premium, which would obviate the need to pay a split-shift premium to many employees. See *Wilcox, California Employment Law* § 2.06[1][a] (Matthew Bender).

(n32)Note 16. Employers are not required by state or federal law to pay a premium for work on a holiday, unless, of course, the work qualifies for an overtime premium. See *Wilcox, California Employment Law* §§ 3.07[1][k], 3.08[2][g] (Matthew Bender).

(n33)Note 17. California law generally requires employers to pay employees twice each month, "on days designated in advance by the employer as regular paydays." *Lab. Code* § 204. Thus, even if an employee fails to complete a time card, the employer must pay the employee for hours worked. Because the employer may not know the employee's actual "hours worked," the employer should pay the employee for the hours that he or she would typically work during the payroll period (e.g., 40 hours per week for a full-time employee). However, the employer cannot recover overpayments via setoffs or deductions from the employee's wages without proper signed authorizations from the employees, and the employer generally cannot recover such overpayments by making deductions from employees' final paychecks, even with an employee's signed authorization. See *Lab. Code* § 221; *Phillips v. Gemini Moving Specialists* (1998) 63 Cal. App. 4th 563, 74 Cal. Rptr. 2d 29; *California State Employees' Association v. State of California* (1988) 198 Cal. App. 3d 374, 377, 243 Cal. Rptr. 602; *Barnhill v. Robert Saunders & Co.* (1981) 125 Cal. App. 3d 1, 6, 177 Cal. Rptr. 803; *Wilcox, California Employment Law* § 4.10[1][b] and comments (Matthew Bender). With respect to overtime wages, *Labor Code* section 204 permits employers to defer payment of any overtime wages until the "payday for the next regular payroll period." As a practical matter, however, unless the employer knows how many overtime hours the employee worked, the employer cannot pay overtime wages even by the next regular payroll period.

(n34)Note 18. In the absence of a collective bargaining agreement providing for a different arrangement, nonexempt employees must be paid twice each month, while employees exempt under the FLSA may be paid once per month. See *Lab. Code* § 204. The requirements of Section 204 are satisfied by a weekly, biweekly, or semimonthly payroll, provided that payment is made not more than seven calendar days following the close of the payroll period. See

*Lab. Code § 204* . For a full discussion of the rules regarding the time and place for payment of wages and exceptions to those rules, see *Wilcox, California Employment Law § 4.01* (Matthew Bender). Every employer must conspicuously post a notice specifying the regular pay days and the time and place of payment of wages at the place of work, if practicable, or otherwise at some place where it can be seen as employees come or go to their places of work, or at the office or nearest agency for wage payment kept by the employer. See *Lab. Code § 207* .

(n35)Note 19. The provisions of the Model Guideline regarding payment of an employee's final wages follow the requirements of *Labor Code Sections 201* , *202* and *208*. See *Villafuerte v. Inter-Con Security Systems, Inc.* (2002) 96 *Cal. App. 4th Supp. 45, 51, 117 Cal. Rptr. 2d 916, 920* (holding that *Labor Code Sections 202* and *208* require an employer to tender or deliver the final paycheck to an employee who quits at the employer's place of business unless the employee expressly requests that the employer mail the paycheck). This includes the obligation to pay final wages upon the completion of a specific job assignment or defined term of employment. See *Smith v. Superior Court* (2006) 39 *Cal 4th 77* . Accordingly, where employees are retained for particular assignments or terms of employment, employers should tender the final wages at the conclusion of the assignment or term. Note that the requirement differs for discharged motion picture and oil drilling employees. See *Cal. Lab. Code §§ 201.5* , *201.7*. Note also that, as of 2009, employees of temporary services firms generally are not entitled to immediate payment upon the completion of a particular assignment unless the employee's employment relationship with the temporary services employer has been terminated outright at the end of the assignment. *Labor Code § 201.3*. In the absence of a collective bargaining agreement to the contrary, employers must pay all accrued but unused vacation time as wages at the time of termination. See *Lab. Code § 227.3* ; *Suastez v. Plastic Dress-Up Co.* (1982) 31 *Cal. 3d 774, 784, 183 Cal. Rptr. 846, 647 P.2d 122* (holding that vacation is considered a form of wages that vests on a daily basis); see also *Wilcox, California Employment Law § 4.01[2][d]* (Matthew Bender). Paid time off ("PTO") is treated as vacation for this purpose. See, e.g., DLSE Opinion Letter 1986.11.04; *Wilcox, California Employment Law § 4.01[2][d][i]* (Matthew Bender).

An employer may not deduct amounts owed to the employer from an employee's final paycheck, even with the employee's express written authorization, except for the authorized periodic amount that would be deductible if it were one of the employee's regular paychecks. See *Lab. Code §§ 221* , *224, 225.5*; *Barnhill v. Robert Saunders & Co.* (1981) 125 *Cal. App. 3d 1, 6, 177 Cal. Rptr. 803* ; DLSE Opinion Letter 1991.05.16. One California court has held that an employer may be liable for tortious breach of a fundamental public policy by withholding a setoff from an employee's wages. See *Phillips v. Gemini Moving Specialists* (1998) 63 *Cal. App. 4th 563, 74 Cal. Rptr. 2d 29* (discussing setoffs and deductions under *Labor Code sections 221* and *224* ). For a discussion of the weight to be accorded to the DLSE's interpretations of statutory law, see *Wilcox, California Employment Law, § 1.05[3][c]* (Matthew Bender). For full discussion of rules regarding payment of wages to discharged employees and deductions from employees' paychecks, see *Wilcox, California Employment Law, §§ 4.01[2]* , *4.10* (Matthew Bender).

(n36)Note 20. State and federal law both limit the extent to which an employer may give compensatory time off in lieu of paying overtime compensation. *Labor Code section 204.3* permits the substitution of compensatory time off in lieu of overtime, provided all of the following conditions are met: (1) the compensatory time off is provided pursuant to applicable provisions of a collective bargaining agreement or, if not covered by a collective bargaining agreement, pursuant to a written agreement entered into between the employer and the employee before the performance of the work; (2) the employee may only accrue a maximum of 240 hours of compensatory time off; (3) the employee has requested, in writing, compensatory time off in lieu of overtime pay; and (4) the employee is regularly scheduled to work no less than 40 hours in a workweek. However, this statute is of limited value to California employers. First, it does not apply to employees subject to Wage Orders 1, 3, 5, 8, 10, 13, or 14. See *Lab. Code § 204.3(i)* . Second, the FLSA--which applies to all employers who engage in interstate commerce--permits only public employers to provide employees with compensatory time off in lieu of overtime pay. See *29 U.S.C. § 207(o)* . A private employer in California would have to fall below the jurisdictional minimum for FLSA coverage to take advantage of the state exemption. Because all doubts regarding the proper payment of overtime are resolved against the employer, it is advisable for employers who wish to substitute compensatory time off in lieu of overtime pay to consult legal counsel. For additional discussion, see *Wilcox, California Employment Law, § 3.13* and comment (Matthew Bender).



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California Employer's Guide to Employee Handbooks and Personnel Policy Manuals

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DIVISION 2 EMPLOYEE HANDBOOKS AND PERSONNEL POLICY MANUALS

Part A. RECOMMENDED GUIDELINES

*1-2 CA Guide to Employee Handbooks § 2.06*

## § 2.06 VACATION

### [1] Model Guideline

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#### VACATION POLICY [See Note n1]

The Company provides vacation benefits to eligible employees to enable them to take paid time off for rest and recreation. The Company believes that this time is valuable for employees in order to enhance their productivity and make their work experience with the Company personally satisfying. The Company also provides long-service employees with additional vacation benefits as years of service are accumulated.

#### A. Vacation Accrual

All regular full-time employees [who have completed at least \_\_\_\_\_ (*specify, e.g., six (6) months*) of continuous service with the Company] are eligible to \_\_\_\_\_ [take *or* accrue] vacation benefits based on their continuous length of service, measured from [the completion of \_\_\_\_\_ (*specify, e.g., six (6) months'*) continuous service after] the date of hire. [See Note n2] ["Continuous length of service" is defined as service that is uninterrupted by termination of employment and subsequent rehire by the Company or a break in service that has been bridged.] Vacation accrues according to the following schedule:

[Set forth rate of accrual based on length of service, such as the following]

<b>Years of Continuous Service</b>	<b>Vacation Accrual</b>
[Six months after] [D]ate of hire through fifth year	10/12 of one day for each full month worked up to a maximum of 10 days per year. [No vacation (is earned, and none) may be taken during the first six months of employment].

Sixth year through tenth year	15/12 of one day for each full month worked up to a maximum of 15 days per year.
Eleventh year and thereafter	20/12 of one day for each full month worked up to a maximum of 20 days per year.

#### B. Part-Time and Temporary Employees

[Regular part-time employees working a minimum of twenty (20) hours per week accrue vacation benefits on a *pro rata* basis.] Temporary employees and employees who work less than \_\_\_\_\_[*specify, e.g., 20 hours*] per week do not accrue vacation benefits. **[See Note n3]**

#### C. Maximum Accrual

Vacation accruals may not exceed twice an employee's current annual entitlement (*e.g., 40 days for an employee with more than ten years of service*). Once this maximum is reached, all further accruals will cease. Vacation accruals will recommence after the employee has taken vacation and his or her accrued hours have dropped below the two-year maximum. **[See Note n4]**

#### D. Pay in Lieu of Vacation

No employee will receive pay in lieu of vacation except on the termination of his or her employment, as described in Paragraph F, below, unless the employee has deferred his or her vacation at the Company's request.

#### [E. Vacation Accrual During Periods of Leaves of Absence

No vacation accrues during an unpaid leave of absence or while on disability salary continuation. Vacation accruals recommence when the employee returns to work.] **[See Note n9]**

#### F. Vacation Pay on Termination

On termination of employment, the employee is paid all accrued but unused vacation at the employee's base rate of pay at the time of his or her termination. **[See Note n5]**

#### G. Vacation Approval

All vacations must be approved in advance [by the employee's immediate supervisor].

#### H. Vacation Scheduling

Scheduling of vacations is to be done in a manner consistent with the Company's operational requirements. Vacation requests should be submitted by employees to their immediate supervisor for approval at least two weeks prior to the

commencement of a vacation period. [In the event that two or more employees have requested vacations covering the same period and may not be absent simultaneously, preference shall be given to the employee with the greater length of service]. Employees who wish to receive their pay prior to going on vacation must make a pay advance request at least four weeks in advance. Subject to supervisor approval, an employee may otherwise schedule and take vacation at any time once it has accrued.

#### I. Vacation Use

All vacation days should be taken not later than the calendar year immediately following the year in which they accrue, unless prior approval is obtained from the supervisor. **[See Note n6]**

#### J. Vacation Advances

An employee is not permitted to borrow on future accrual of vacation benefits, [except with the approval of the Personnel Manager]. [In no case may vacation time be borrowed or taken before an employee becomes eligible to begin accruing vacation, as described in Paragraph A, above]. **[See Note n2]** If an employee has used any vacation days before they have been accrued and then leaves the employment of the Company, the overdrawn amount must be repaid to the Company. **[See Note n5,n7]**

#### K. Holidays Occurring During Vacation

If an observed Company holiday (*see* guideline entitled "Holidays") occurs during an employee's scheduled vacation, no deduction from accrued vacation will be made for the holiday period. An employee may add to his or her vacation period by adding to or using the holiday period in place of accrued vacation time.

#### [L. Vacation Increments

Accrued vacation must be taken by eligible employees in increments of at least \_\_\_\_\_ (*specify, e.g., four (4) hours*). **[See Note n8]**

#### [M. Vacation for Family Care and Medical Leave Purpose

Employees who request family care or medical leave pursuant to the Company's Family Care and Medical Leave policy generally must apply any accrued vacation pay to their family or medical leave.] **[See Note n9]**

### **[2] Drafting Checklist**

#### RECOMMENDED PROVISIONS

1. A description of employees eligible for vacation benefits **[See Notes n2,n3]**;
2. A description of accrual rates by employee classification and tenure **[See Notes n2,n3]**;
3. A provision for maximum accrual **[See Note n2]**;

4. A statement regarding whether pay in lieu of vacation is permitted;
5. A statement providing for payment of accrued vacation on termination of employment [**See Note n3**];
6. A requirement of advance approval for use of vacation time;
7. A statement concerning when vacation should be used [**See Note n4**];
8. A statement pertaining to vacation advances [**See Note n5**]; and
9. A statement pertaining to treatment of holidays that fall during a vacation period.

#### OPTIONAL PROVISIONS

1. A requirement that employees work a certain period of time before earning or taking vacation time [**See Note n2**];
2. A provision concerning scheduling conflicts;
3. A provision addressing accrual during leaves of absence;
4. A requirement that vacation be taken in specified increments (*e.g.*, four hours or one day at a time) [**See Note n8**]; and
5. A provision informing employees seeking to take family or medical leave that they must apply available vacation to their leave [**See Note n9**].

#### [3] Notes

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law Wage & Hour Laws Coverage & Definitions Holiday, Sick & Vacation Pay Pensions & Benefits Law General Overview

#### FOOTNOTES:

(n1)Note 1. Employers should be aware that various city and county governments impose additional requirements related to sick leaves, vacation time, and paid time off for government contractors, including requirements for compensated sick leave. These policies are typically part of the city or county's living wage ordinance. Employers contracting with city and county governments should review these ordinances to determine whether they apply.

(n2)Note 2. Many employers grant their employees paid time off ("PTO") in lieu of vacation benefits and other paid leave. Employers who grant PTO should not have a separate vacation policy, but should instead refer to the PTO Policy at § 2.08A of this Guide. In either event, in general, California employers are not required by law to provide paid vacation to their employees. See note 1 above. If they do, however, vacation benefits are deemed a form of deferred compensation, which "vests" as an employee works and which cannot be "forfeited." See *Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal. 3d 774, 784, 183 Cal. Rptr. 846, 647 P.2d 122 ; Lab. Code § 227.3 . Nonetheless, employers may exclude a specified initial period of employment, including the introductory or "probationary" period, from eligibility

for vacation accrual. See DLSE, Enforcement Policies and Interpretations Manual § 15.1.3 (June 2002).

The sample policy, as drafted, does not exclude any initial period; it permits employees to accrue and take vacation starting on the date of hire. Optional provisions are given in brackets, which may be used either (1) to permit employees to accrue vacation during an initial period, such as six months, but not to take vacation during that period, or (2) to preclude employees from taking or accruing vacation during the initial period. For a discussion of rules regarding vesting of vacation benefits, see *Wilcox, California Employment Law*, § 4.01[2][d][ii] (Matthew Bender).

(n3)Note 3. Employers may limit paid vacation benefits to specified classifications of employees (e.g., only full-time employees). See, e.g., DLSE Opinion Letter 1990.09.24.

(n4)Note 4. The California Labor Commissioner has interpreted *Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal. 3d 774, 183 Cal. Rptr. 846, 647 P.2d 122, to permit employers to establish maximum amounts of vacation hours that may be accrued. See DLSE, Enforcement Policies and Interpretations Manual § 15.1.4 (June 2002); see also *Kistler v. Redwoods Community College Dist.* (1993) 15 Cal. App. 4th 1326, 1334, 19 Cal. Rptr. 2d 417 (employer may validly bar accrual of further vacation leave until the specified vacation is taken); *Boothby v. Atlas Mechanical, Inc.* (1992) 6 Cal. App. 4th 1595, 1601-02, 8 Cal. Rptr. 2d 600 (upholding Labor Commissioner's interpretation of *Suastez*). The policy as drafted provides that when the maximum accrual is reached, the employee is no longer eligible to accrue vacation until the accrued hours drop below the maximum. Although the cap in this policy is set at twice the employee's annual entitlement, a lower cap than two times the annual accrual rate likely is permissible, as long as it is "reasonable." See, e.g., DLSE Opinion Letter 1988.07.25. For further discussion of the Labor Commissioner's guidelines regarding vacation pay policies, see *Wilcox, California Employment Law*, § 4.01[2][d][iii] (Matthew Bender).

(n9)Note 5. *Labor Code Section 227.3* provides that, unless otherwise provided in a collective bargaining agreement, whenever an employment contract or policy provides for paid vacations, and an employee is terminated without having taken all of his or her vested vacation time, the vested vacation time that has not been used must be paid to the employee as wages at his or her final wage rate. *Labor Code Section 227.3* further provides that an employment contract or policy may not provide for forfeiture of vested vacation time on termination. In *Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal. 3d 774, 784, 183 Cal. Rptr. 846, 647 P.2d 122, the California Supreme Court held that vacation benefits are a form of deferred compensation and that such benefits "vest" as an employee works. Thus, on termination the employee must be paid the amount of pro rata vacation earned on a daily basis. See DLSE, Enforcement Policies and Interpretations Manual § 15.1.1. For a full discussion of rules regarding payment of vacation benefits on termination of employment, see *Wilcox, California Employment Law*, § 4.01[2][d] (Matthew Bender).

(n10)Note 6. This provision is intended to discourage large accruals of unused vacation time by requiring supervisor approval to carry vacation time over beyond the year after the one in which the vacation was earned. However, under *Labor Code Section 227.3* and *Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal. 3d 774, 784, 183 Cal. Rptr. 846, 647 P.2d 122, as interpreted by the Labor Commissioner, this policy cannot be enforced through forfeiture of vacation. See DLSE, Enforcement Policies and Interpretations Manual § 15.1.4; see also *Wilcox, California Employment Law*, § 4.01[2][d][iii] (Matthew Bender).

(n11)Note 7. If an employer permits an employee to take vacation time before it has accrued, and the employee subsequently resigns or is terminated, California law appears to prohibit employers from deducting the overdrawn amount from the employee's final paycheck, even with the employee's written authorization. See *California State Employees' Assn. v. State of California* (1988) 198 Cal. App. 3d 374, 376-78, 243 Cal. Rptr. 602; *Barnhill v. Robert Saunders & Co.* (1981) 125 Cal. App. 3d 1, 6; DLSE Opinion Letter 1991.05.16; see also *Wilcox, California Employment Law*, § 4.10[1][b] (Matthew Bender). Therefore, employers should consider consulting legal counsel before deducting vacation advances from a final paycheck.

(n12)Note 8. The California Court of Appeal has held that employers may make deductions from an exempt employee's vacation leave bank for partial-day absences from work. *Conley v. Pacific Gas and Electric Co.* (2005)

*131 Cal. App. 4th 260*. The *Conley* decision upheld an employer's policy of deducting from vacation leave banks for absences of four hours or longer. The California Labor Commissioner has adopted the enforcement position that employers may make deductions from vacation leave banks for partial-day absences of four hours or longer. See DLSE, Enforcement Policies and Interpretations Manual § 51.6.15. However, employers may not deduct from actual salaries in partial-day increments if the employee's accrued vacation bank is exhausted.

(n13)Note 9. Both the federal and state family care leave laws generally permit employers to require employees to substitute accrued vacation time for family care or medical leave taken for any purpose. See *29 U.S.C. § 2612(d)(2)*; *Gov. Code § 12945.2(e)*. However, the regulations interpreting the California family care leave law (the "California Family Rights Act") restrict the employer's ability to inquire about the use of vacation for a family care leave purpose. Thus, if an employee requests vacation leave, without specifying that it is for a family care leave purpose, the employer may not ask if the employee is taking vacation time for such a purpose. If, however, the employee indicates that he or she is taking leave for a family care leave purpose, the employer may require the employee to apply his or her accrued vacation to the leave. See *2 Cal. Code Reg. § 7297.5(b)(2)*. The substitution of paid leave for family care leave does not extend the total duration of family care leave to which an employee is entitled beyond 12 weeks in a 12-month period.

Under federal law, employees on family care leave may, but are not entitled to, accrue any additional benefits, including vacation, or seniority during the unpaid portion of a family care leave. See *29 C.F.R. § 825.215(d)(2)*. State law expressly addresses this issue only with respect to seniority accrual, and provides that on a return from leave, employees must return with no less seniority or seniority-related benefits (such as vacation) than they had prior to the leave. See *Gov. Code § 12945.2(g)*; see also *2 Cal. Code Reg. § 7297.5(d)(3)*. The guideline's optional provision complies with the FMLA and prohibits the accrual of vacation during the unpaid portion of a family care leave. However, the optional provision permits employees to accrue vacation during the paid portion of family care leave, *e.g.*, during the time for which they have substituted paid leave for unpaid family care leave. If the employer normally permits employees to accrue vacation and sick leave while they are on paid vacation, then the employer should permit employees on family care leave to accrue these same benefits when they substitute paid vacation leave for unpaid family care leave. See *2 Cal. Code Reg. § 7297.5(d)(2)*. For more information on family care and medical leave requirements, see the Leaves of Absence guideline at § 2.09 of this Guide.



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California Employer's Guide to Employee Handbooks and Personnel Policy Manuals

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DIVISION 2 EMPLOYEE HANDBOOKS AND PERSONNEL POLICY MANUALS

Part A. RECOMMENDED GUIDELINES

*1-2 CA Guide to Employee Handbooks § 2.07*

## § 2.07 HOLIDAYS

### [1] Model Guideline

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#### HOLIDAYS

The Company observes the following standard holidays each year:

*[Specify holidays, such as the following]*

New Year's Day	Labor Day
Martin Luther King, Jr., Day	Thanksgiving Day
Presidents' Day	Friday After Thanksgiving
Memorial Day	Christmas Eve
Independence Day	Christmas Day

Eligible employees will receive a day off on each of the holidays listed above. **[See Note n1]**

#### A. Eligibility

Unless otherwise provided in this policy, all full-time employees will receive time off with pay at their normal base rate for each company-observed holiday. **[See Note n2]** Part-time and temporary employees are not eligible for paid holiday benefits. Moreover, all employees are ineligible for holiday benefits that accrue while on leave of absence.

## B. Weekends and Vacations

Holidays falling on Saturdays will normally be observed on the preceding Friday. Holidays falling on Sundays will normally be observed on the following Monday. Holidays that occur during an eligible employee's vacation will not be counted as vacation days taken.

## C. Pay In Lieu of Time Off

The Company may, in its sole discretion, require some or all employees to work on company-observed holidays, in which case the Company will provide pay in lieu of time off. **[See Note n3]**

## [D. Rate of Pay

Nonexempt employees required to work on a company-observed holiday will be paid at 1 1/2 times their normal base rate for all hours worked, plus 8 hours' straight-time pay for the holiday. Double time will be paid for all hours worked in excess of 12 hours on a holiday, in addition to the 8 hours' straight-time pay for the holiday.] **[See Note n4]**

### **[2] Drafting Checklist**

#### RECOMMENDED PROVISIONS

1. A list of each holiday the Company observes **[See Note n1]**;
2. A provision for holidays that fall on weekends or during a vacation;
3. A reservation of the right to schedule work on holidays **[See Note n3]**; and
4. A statement of which employees are eligible for holiday pay **[See Note n2]**.

#### OPTIONAL PROVISIONS

1. A selection of additional days that employees may take off without pay (e.g., the employee's birthday or "floating" holidays) **[See Note n5]**;
2. A requirement that employees must work the regular work days immediately preceding and following the holiday in order to be eligible for a paid holiday; and
3. A statement of any premiums applicable to work performed on holidays **[See Note n4]**.

### **[3] Notes**

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Labor & Employment Law  
 Discrimination  
 Accommodation  
 Labor & Employment Law  
 Wage & Hour Laws  
 Coverage & Definitions  
 Holiday, Sick & Vacation Pay

**FOOTNOTES:**

(n1)Note 1. Neither state nor federal law requires that an employer observe "legal" holidays. The holidays listed are simply the most commonly recognized ones. However, employers must "reasonably accommodate" the religious practices of their employees, which may include allowing employees to take time off work on religious holidays, unless such accommodation would impose an undue hardship on the employer. See *42 U.S.C. § 2000e(j)* (Title VII); *Gov. Code § 12940(m)* (FEHA); *Ansonia Board of Education v. Philbrook* (1986) 479 U.S. 60, 68-69, 107 S. Ct. 367, 372, 93 L. Ed. 2d 305, 315 ; see also *Wilcox, California Employment Law*, §§ 41.52[2][b] and 41.52[3] (Matthew Bender).

(n2)Note 2. Employers are not required to offer employees paid time off for holidays. Nonetheless, employers commonly offer certain employees (e.g., full-time employees) paid time off for company-observed holidays

(n3)Note 3. If the employer requires nonexempt employees to work on a company-paid holiday, the employer must make up the lost benefit to the affected employees. For example, the employer may choose to pay employees at their base rate of pay for the hours worked, in addition to holiday pay. Alternatively, the employer may grant the affected employees another day off with pay.

(n4)Note 4. The law does not require employers to pay premium rates for holiday work, but if the employer elects to pay premium rates for holiday work, it should specify what the premium rates will be.

(n9)Note 5. If the employer allows employees to take one or more floating holidays, which are not contingent upon the happening of a particular event (such as sickness, a holiday, bereavement, etc.), California law requires that floating holidays be treated as vacation days. This means that unused floating holidays must be paid to employees at time of termination. See DLSE Opinion Letter 1992.04.27. For a discussion of California's vacation pay rules, see *Wilcox, California Employment Law*, § 4.01[2][d] (Matthew Bender).



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DIVISION 2 EMPLOYEE HANDBOOKS AND PERSONNEL POLICY MANUALS

Part A. RECOMMENDED GUIDELINES

*1-2 CA Guide to Employee Handbooks § 2.08*

## § 2.08 SICK LEAVE

### [1] Model Guideline

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#### SICK LEAVE [See Note n1]

In order to help prevent loss of earnings that may be caused by accident or illness, [or by other emergencies,] the Company has established paid sick [and emergency] leave. [See Note n2]

#### A. Eligibility [See Note n3]

All regular full-time employees [who have completed their introductory period] [See Note n4] are eligible for sick-leave benefits. Regular part-time employees [who have completed their introductory period] [and are working a minimum of twenty (20) hours per week] are eligible for sick-leave benefits. Temporary employees [and employees working fewer than twenty (20) hours per week] are ineligible to earn or receive sick-leave benefits. [See Note n5]

#### B. Use

Sick leave may be taken for a personal illness, [an emergency], a disability, [or for a family care or medical leave as described in the Company's "Leaves Of Absence" policy]. [See Note n6] Eligible employees may also use sick leave, [in an amount not to exceed one-half of their annual accrual], to attend to an illness of a child, parent, spouse, or domestic partner of the employee. [See Note n7] Additionally, hours absent for medical and dental appointments will be treated as sick leave. [See Note n8]

Sick leave must be taken by eligible employees in increments of at least \_\_\_\_ [specify, e.g., one hour].

The Company retains the right to request verification from a licensed health care provider for all absences due to illness or disability. Sick pay may be withheld if a satisfactory verification is not provided by the employee. **[See Note n9]**

#### C. Compensation For Sick Leave

Eligible employees will receive pay at their normal base rate for any sick leave taken. [However, new employees who are absent during their introductory periods due to illness, disability, or any other reason that would qualify for sick leave under this policy will not be compensated.] **[See Note n10]** [Moreover], no employee will receive pay in lieu of sick leave under any circumstances, and employees will not be paid for any accrued but unused sick leave upon termination of employment. **[See Note n11]**

#### D. Accrual Of Sick Leave

[Following their introductory period], regular full-time employees accrue \_\_\_\_\_[specify amount, e.g., 12] sick leave days per calendar year, and regular part-time employees [working a minimum of twenty (20) hours per week] accrue sick leave on a *pro rata* basis. **[See Note n12]** Eligible employees may carry over accrued but unused sick leave from one calendar year to the next. However, sick leave may only be accumulated up to a total of \_\_\_\_\_[specify, e.g., 50] days. **[See Note n13]**

Employees will not accrue sick leave during any unpaid leave of absence.

#### E. Approval

Whenever possible (e.g., for a scheduled doctor's or dentist's appointment), employees must seek approval from their immediate supervisor prior to taking their sick leave. Otherwise, the employees must notify their immediate supervisor as soon as practicable and, in no event, later than \_\_\_\_\_[specify, e.g., one] hour after their scheduled starting time. **[See Note n14]**

#### F. Coordination of Sick Leave Benefits With Other Benefits

The Company will pay sick-leave benefits to an eligible employee during the normal three-day waiting period before the employee is paid workers' compensation benefits pursuant to the applicable state or federal law governing the industrial injury or illness. **[See Note n15]**

Similarly, the Company will pay sick-leave benefits during the normal seven-day waiting period before the eligible employee is paid benefits from either state unemployment disability or other insured unemployment disability plan. **[See Note n16]**

Following the three-day and seven-day waiting periods specified above, an employee will continue to receive accrued sick pay, less the disability benefits actually received or the disability benefits that would have been received had the employee made timely application to the appropriate agency.

#### **[2] Drafting Checklist**

#### RECOMMENDED PROVISIONS

1. A description of employees eligible for sick leave [See Notes n2,n5];
2. Rules concerning amount and use of sick leave [See Notes n6,n7,n8,n12,n13];
3. A restriction on pay in lieu of sick leave [See Note n11];
4. A provision for maximum accrual, if the Company elects to adopt such [See Note n13];
5. A reservation of right to request a medical verification of illness [See Note n9];
6. A restriction on accrual of sick leave during personal or disability leave; and
7. A provision for coordination of sick pay benefits with state and federal disability benefits [See Notes n15,n16].

#### OPTIONAL PROVISIONS

1. A provision for use of sick leave for personal emergencies;
2. A provision for use of sick leave for purposes enumerated in the employer's family care and medical leave policy [See Notes n6,n9];
3. A provision for use of sick leave for family illness, disability, emergencies, or other purposes not covered by the employer's family care and medical leave policy [See Note n6];
4. A bonus for employees who do not use any sick leave in a one-year period (or who use some specified amount less than their full accrual);
5. A statement concerning the basis for calculating sick-leave benefits (e.g., on the employee's base rate of pay, on the basis of shift differentials, and so forth); and
6. A statement that sick leave benefits will be charged in specified minimum time increments, such as one hour.

#### [3] Notes

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law  
 Discrimination  
 Accommodation  
 Labor & Employment Law  
 Leaves of Absence  
 Family & Medical Leave Act  
 General Overview  
 Labor & Employment Law  
 Leaves of Absence  
 Short-Term Leave  
 Labor & Employment Law  
 Wage & Hour Laws  
 Coverage & Definitions  
 Holiday, Sick & Vacation Pay

#### FOOTNOTES:

(n1)Note 1. Employers should be aware that various city and county governments impose additional requirements related to sick leaves, vacation time, and paid time off for government contractors, including requirements for compensated sick leave. These policies are typically part of the city or county's living wage ordinance. In November 2006, San Francisco became one of the first to adopt a paid sick leave ordinance that applied to all employers with employees working within the geographical boundaries of the City and County of San Francisco. See S. F. Admin. Code, ch. 12W. Information related to this ordinance can be found at <http://www.sfgov.org/site/olse>.

(n2)Note 2. Many employers grant their employees paid time off ("PTO") in lieu of sick-leave benefits and other paid leave. Employers who grant PTO should not have a separate sick-leave policy, but should instead refer to the PTO Policy at Section 2.08A of this Guide. In either event, an employer is not required by law to provide paid sick leave except as described in Notes 1 and 3. An employer is, however, required to provide unpaid leave for pregnancy disability, on-the-job injury, the employee's serious health condition, and family care. See *Gov. Code § 12945(a)* (requiring pregnancy disability leave); *Lab. Code § 132a* (prohibiting discharge of or discrimination against employees who are disabled as a result of injury covered by workers' compensation law); *Gov. Code § 12945.2* (requiring leave for family care and for employee's serious health condition); *29 U.S.C. § 2612* (same); see also Notes in § 2.09[3] of this Guide. An employer also may be required to provide unpaid leave as a form of reasonable accommodation to an employee who is disabled. See *Gov. Code §§ 12926(n)(2), 12940(m)*; *2 Cal. Code Reg. § 7293.9*; *29 C.F.R. § 1630.2(o)*. For a full discussion of equal employment law provisions regarding pregnancy disability leave, see *Wilcox, California Employment Law, §§ 8.10 et seq., 41.51[5]* (Matthew Bender). For a discussion of the scope of workers' compensation law, see *Wilcox, California Employment Law, Ch. 20* (Matthew Bender). For a discussion of the duty to accommodate persons with disabilities, see *Wilcox, California Employment Law, § 41.51* (Matthew Bender).

(n3)Note 3. Under the San Francisco Sick Leave Ordinance, any employees working within the geographical boundaries of the City or County of San Francisco are entitled to paid sick leave regardless of whether they are full-time, part-time or temporary employees, unless the right to sick leave is expressly waived under a collective bargaining agreement. See S.F. Admin. Code, ch. 12W. However, an employer is not required to provide paid sick leave until after an initial 90-day waiting period of employment. See S.F. Admin. Code, ch. 12W, § 12W.3(a). This permits an employer to withhold paid sick leave during the introductory period or from short-term employees, including those retained through temporary personnel agencies. The Sick Leave Ordinance also requires employers to post a notice informing employees of their sick leave rights and to maintain records of hours worked, and paid sick leave taken, by employees for four years. See S.F. Admin. Code, ch. 12W, § 12W.5.

(n4)Note 4. As discussed in connection with Section 2.04 of this Guide, employers should consider whether they wish to implement an introductory period for new employees. For a discussion of factors to be considered in deciding whether to implement an introductory period, see § 2.04 of this Guide, Note 1.

(n9)Note 5. As discussed in Note 1, paid sick leave is not required by state law, but is granted at the discretion of the employer. Employers who have sick-leave policies typically grant paid sick leave to full-time employees and certain part-time employees (e.g., part-time employees who work a minimum of 20 hours per week).

(n10)Note 6. Under the California Family Rights Act (CFRA) and the Family and Medical Leave Act (FMLA), an employer may require that sick leave be substituted for a leave due to the employee's own serious health condition. See *Gov. Code § 12945.2(e)*; *29 U.S.C. § 2612(d)(2)(B)*. An employer also may require an employee disabled by pregnancy to substitute her accrued sick leave for otherwise unpaid pregnancy disability leave. See *2 Cal. Code Reg. § 7291.11(b)*. For model family care, medical, and pregnancy disability leave policies, see § 2.09 of this Guide.

(n11)Note 7. All employers who provide sick leave to employees must "permit an employee to use in any calendar year the employee's accrued and available sick leave entitlement, in an amount not less than the sick leave that would be accrued during six months at the employee's then current rate of entitlement, to attend to an illness of a child, parent, spouse, or domestic partner of the employee." See *Lab. Code § 233*. Any restrictions placed on an employee's ability to take sick leave also apply to sick leave taken to attend to an illness of the employee's child, parent, spouse, or domestic partner. See *Lab. Code § 233*. An absence control policy that counts sick leave taken pursuant to *Labor Code Section 233* as an absence that may lead to or result in discipline, discharge, demotion, or suspension is a per se violation of Section 233, entitling the employee to legal and equitable relief. See *Lab. Code § 234*.

(n12)Note 8. Inclusion of medical and dental appointments in the sick leave program is not mandatory. If the appointment is made at the employer's direction, however, the time must be counted as hours worked for purposes of computing overtime. See *29 C.F.R. § 785.43*. For full discussion of what time must be included in hours worked under

state and federal wage and hour laws, see *Wilcox, California Employment Law*, § 3.07 (Matthew Bender).

(n13)Note 9. The CFRA and the Family Medical Leave Act (FMLA) permit employers to require medical certification for leave taken for the employee's own serious health condition or to care for a child, spouse, or parent with a serious health condition. See 29 U.S.C. § 2613 ; *Gov. Code* § 12945.2(j)(1) , (k)(1). The San Francisco Ordinance allows employers to take "reasonable measures" to verify or document that an employee's use of paid sick leave is proper. See S.F. Admin. Code, ch. 12W, § 12W.4(d). Since sick leave may be substituted for family care leave in some instances, as discussed in Note 6, any employer that intends to request medical certification under a family care leave policy should also reserve the right to request such certification in a sick leave policy provision. For further discussion of medical certification under the CFRA and FMLA, see § 2.09 of this Guide. The California Confidentiality of Medical Information Act imposes restrictions on an employer's ability to obtain medical information about an employee from a health care provider and requires employers to treat such information in a confidential manner. See generally *Civ. Code* § 56 *et seq.* For discussion of the Act, see *Wilcox, California Employment Law*, § 51.13 (Matthew Bender).

(n26)Note 10. Generally, to qualify as exempt from overtime under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.* , and under California law, an employee must be paid on a "salary basis" and, with limited exceptions, may not be subject to deductions in pay for absences of less than one week. See *Stanley v. City of Tracy* (9th Cir. 1997) 120 F.3d 179, 183-84 . However, deductions from paid leave accounts for absences of less than one day do not violate the "salary basis test" when there is no deduction from actual pay. See, e.g., *Barner v. City of Novato* (9th Cir. 1994) 17 F.3d 1256, 1261-62 (employer's policy of deducting from paid leave banks does not "affect the plaintiffs' status as salaried employees" where there is no deduction from actual wages); *Doherty v. Center for Assisted Reproduction* (9th Cir. 2000) 108 F.Supp. 2d 672 , 678 (employer's policy of deducting comp time from a plaintiff who worked fewer than 80 hours per two weeks did not affect the employee's exempt status). In order to preserve an employee's exempt status, time off for sick leave should not result in any reduction of actual salary except for absences of one full day or more, and only in accordance with a bona fide sick leave plan, policy, or practice. See 29 C.F.R. § 541.602 . Exempt employees' sick leave banks may be reduced for absences of less than a full day, provided that the employees' salaries are not actually reduced in the event that the sick leave bank is exhausted.

(n27)Note 11. Unlike vacation benefits, accrued but unused sick leave need not be paid to employees upon termination. Therefore, employers who choose to adopt a sick-leave policy should include a provision advising its employees that they will not be paid for any accrued but unused sick leave upon their termination.

(n28)Note 12. Twelve paid sick days per year is a typical amount, although some employers provide more and some less. Part-time employees generally receive a *pro rata* share, and probationary and temporary employees typically receive no paid sick days. In some companies, salaried, executive, administrative, and professional employees who are exempt from state and federal minimum wage and overtime requirements are not limited to a specific number of sick leave days. The San Francisco Sick Leave Ordinance requires employers to provide one hour of paid sick leave to an employee for every 30 hours worked. The paid sick leave accrues in one-hour increments; there is no fractional accrual for any portion of 30 hours worked. See S.F. Admin. Code, ch. 12W, § 12W.3(b).

(n29)Note 13. Because an employer is not obligated to grant sick-leave benefits to its employees, the employer may limit the amount of sick leave days that employees may accrue. Under the San Francisco Sick Leave Ordinance, employers with 10 or more employees must allow accrual of unused paid sick time up to 72 hours, and employers with fewer than 10 workers (including full-time, part-time and temporary employees) must allow accrual of up to 40 hours of paid sick leave. See S.F. Admin. Code, ch. 12W, § 12W.3(c). Employers wishing to limit the number of sick-leave time that employees may accrue should include this provision in their sick-leave policy.

(n30)Note 14. Employers may require employees to give "reasonable notification" of an absence from work for which paid sick leave will be used under the San Francisco Sick Leave Ordinance. See S.F. Admin. Code, ch. 12W, § 12W.4(c).

(n31)Note 15. See *Lab. Code § 4652* (waiting period for disability benefits under California workers' compensation law).

(n32)Note 16. See *Unemp. Ins. Code § 2627* (waiting period for state disability benefits under California law); see also discussion in *Wilcox, California Employment Law, § 80.63* (Matthew Bender).



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California Employer's Guide to Employee Handbooks and Personnel Policy Manuals

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DIVISION 2 EMPLOYEE HANDBOOKS AND PERSONNEL POLICY MANUALS

Part A. RECOMMENDED GUIDELINES

*1-2 CA Guide to Employee Handbooks § 2.08A*

## § 2.08A PAID TIME OFF

### [1] Model Guideline

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#### PAID TIME OFF [See Note n1]

The Company grants Paid Time Off ("PTO") to eligible employees to provide them with the flexibility to meet both their work and personal needs. The Company believes that this time is valuable for employees not only to make their work experience with the Company personally satisfying, but also to enhance their productivity. PTO can be used by eligible employees for any reason (e.g., vacation, illness, medical appointments, personal business).

#### I. Eligibility

All regular full-time employees [who have completed their introductory period] [See Note n2] are eligible to participate in the Company's PTO program. Regular part-time employees [who have completed their introductory period and are working a minimum of \_\_\_\_ (*specify, e.g., 20*) hours per week] are eligible to participate in the Company's PTO program. Temporary employees [and employees working fewer than \_\_\_\_ (*specify, e.g., 20*) hours per week] are ineligible to participate in the Company's PTO program. [See Note n3]

#### II. Use

Subject to certain limitations discussed below, employees may use PTO as soon as it is accrued. Employees may take PTO for any reason, including the following: vacation, personal illness, medical and dental appointments, emergencies, family care and medical leave, disability leave, and personal commitments. Nonetheless, employees should make every effort to schedule time off for personal appointments (medical appointments, teacher conferences, auto repairs, etc.) before and after working hours. [See Note n4]

Non-exempt employees must record all PTO (whether paid or unpaid) on their weekly time cards. Exempt employees must record all PTO on a PTO Request Form for submission to the Payroll Department. PTO is recorded by the Personnel Department in increments of \_\_\_\_\_ [*specify, e.g., 1/4 hour*] and charged against an employee's accrued PTO. **[See Note n5]**

### III. Accrual

Employees accrue PTO monthly, based on their regularly scheduled workweek and continuous length of service, measured from [the completion of \_\_\_\_\_ (*specify, e.g., six (6) months*) continuous service after] the date of hire. ["Continuous length of service" is defined as service that is uninterrupted by termination of employment and rehire by the Company.]

#### A. Accrual Rate For Full-Time Employees

Following their introductory period, full-time employees accrue PTO based upon the following schedule: **[See Note n6]**

[*Set forth accrual rate based on length of service, such as the following:*]

Total Years of Service	PTO Days Per Year	PTO Accrual Rate (Hours per Month)	PTO Maximum Balance (Total Days)
0-1	18	12.00	36.0
1-5	20	13.33	40.0
5-10	25	16.66	50.0
10+	27	18.00	54.0

Eligible full-time employees may carry over accrued PTO from one calendar year to the next. As indicated in the above table, however, the PTO maximum balance for full-time employees is \_\_\_\_\_ [*specify, e.g., 2 times an employee's annual PTO accrual rate*]. An employee who reaches his or her PTO maximum balance will not accrue additional PTO until the employee's PTO balance drops below the maximum balance. PTO accrual will recommence after the employee has used his or her PTO and the accrued PTO hours have dropped below the maximum balance. **[See Note n7]**

#### B. Accrual Rate For Part-Time Employees

Following their introductory period, eligible part-time employees accrue PTO on a *pro-rata* basis. [For example, part-time employees working 32 hours per week after one year of continuous service will accrue 80% of the 13.33 hours per month shown in the above table, or 10.6 hours per month, for a total of 16 days per year.]

The PTO maximum balance for eligible part-time employees is \_\_\_\_\_ [*specify, e.g., the same as for full-time employees*].

#### [C. PTO Accrual During Leaves of Absence

Employees do not accrue PTO during any unpaid leave of absence or while on disability salary continuation. PTO accruals recommence when the employee returns to work].

#### **IV. Compensation For PTO**

Eligible employees will receive pay at their normal base rate for any PTO taken. [However, employees who are absent during their introductory periods will not be compensated.] No employee will receive pay in lieu of PTO except on the termination of his or her employment, as described in Section IX below, unless the employee has deferred his or her PTO at the Company's request.

#### **[V. Non-Compensated Time Off**

As an alternative to charging time off against accrued PTO for personal appointments, non-exempt employees may take the time off as leave without pay or submit a written request to make up the time off during the same workweek. Non-exempt employees may choose to make up the time on the day the absence occurs, or the time may be made up within the same workweek, as long as the total hours worked in any day (combining regularly-scheduled time and make-up time) do not exceed 11 hours, and the make-up time does not cause the employee's hours to exceed 40 for the week. [See Note n8]

Premium pay will not be paid for make-up time, and all make-up time must be productive and reported on the employee's weekly time card. All make-up time must be arranged in advance through the employee's immediate supervisor.]

#### **VI. Approvals For PTO**

##### **A. Scheduled PTO**

PTO that is requested and approved in advance of the date of absence is considered "Scheduled PTO." Employees are not required to provide a reason for requesting Scheduled PTO. Employees must, however, coordinate their Scheduled PTO with their immediate supervisors in advance.

[Scheduled PTO must be requested on a PTO Request Form and approved by the employee's immediate supervisor in advance of the absence. Typically, requests are approved on the basis of \_\_\_\_\_(specify, e.g., seniority or date of receipt). In addition, consideration of an employee's PTO balance relative to the maximum PTO balance may be a factor in approving a request for PTO. The first choice on the PTO Request Form is approved whenever possible, but the needs of the Company are also considered].

[Scheduled PTO of fewer than \_\_\_\_ (specify, e.g., 5) days may be approved on short notice, based on supervisor discretion and business needs]. Scheduled PTO of greater than \_\_\_\_ (specify, e.g., 5) days requires a minimum of two weeks' notice for approval of the time off. [In the event that two employees have requested PTO covering the same period and may not be absent simultaneously, preference shall be given to the employee with the greater length of service].

##### **B. Unscheduled PTO**

PTO that is taken for an unscheduled absence, such as an unexpected illness or emergency, and is not approved in advance by the employee's immediate supervisor is considered "Unscheduled PTO." Employees taking Unscheduled PTO must notify their immediate supervisor as soon as practicable and, in no event, later than \_\_\_\_\_ [*specify, e.g., 1*] hour after their scheduled starting time. Moreover, employees taking Unscheduled PTO must advise their immediate supervisor of their anticipated return date and the need for work coverage. [The Company may require employees taking Unscheduled PTO for a personal illness or for family care or medical leave purposes to provide certification from a physician. The Company also reserves the right to require a second certification from another physician for any employee illness of any length.]

**[See Note n9]**

[Regular attendance is essential to the Company as absences can cause a disservice to our customers and to other employees. More than \_\_\_\_\_ (*specify, e.g., 7*) unscheduled days off in a 6-month period (including unscheduled leave without pay) is considered excessive. Excessive Unscheduled PTO may result in counseling and, if the problem continues, may be grounds for disciplinary action, up to and including termination of employment].

## **VII. PTO Advances**

An employee is not permitted to borrow on future accrual of PTO, [except with the approval of the Personnel Manager]. [In no case may PTO be borrowed or taken before an employee becomes eligible to begin accruing PTO, as described in Paragraph II, above]. **[See Note n3]** If an employee has used any PTO before it has been accrued and then leaves the employ of the Company, the amount of pay for any PTO taken that has not been accrued at the time of termination must be repaid to the Company. **[See Note n10]**

## **[VIII. Salary Advances and Paychecks in Connection with PTO**

If a pay day falls during an employee's Scheduled PTO of one week or more [and the employee does not have his or her paycheck directly deposited into a checking or savings account], the employee may request a salary advance for a sum approximately equal to \_\_\_\_\_ (*specify, e.g., 70%*) of the employee's semi-monthly paycheck, exclusive of overtime. The salary advance will be deducted from the employee's semi-monthly paycheck against which the advance was drawn.

A request for a salary advance must be made to the Payroll Department at least three weeks prior to the employee's Scheduled PTO. If approved, a salary advance check will be given to the employee by 3:00 p.m. on the day prior to the employee's Scheduled PTO.

If special handling is not requested, the Payroll Department will hold the employee's paycheck for three days from the pay day, after which time the paycheck will be mailed to the employee's home address. If the employee has automatic payroll deposit, the paycheck will be deposited on pay day in the normal fashion.]

## **IX. Payment of Accrued PTO Upon Separation From Company**

Upon separation of employment, whether voluntary or involuntary, the employee will be paid all accrued but unused PTO at the employee's base rate of pay at the time of separation. Although employees ordinarily accrue PTO monthly, separating employees will be deemed to accrue PTO daily through their last day of employment. **[See Note n11]**

## **[X. PTO For Family Care and Medical Leave Purposes**

Employees who request family care or medical leave pursuant to the Company's Family Care and Medical Leave policy must apply any available accrued PTO to their family care or medical leave. [See Note n12] [Furthermore, employees entitled to receive Family Temporary Disability Insurance (FTDI) benefits, as described more fully in the Leaves of Absence Policy, are required to first use two weeks of earned, unused PTO before receiving FTDI benefits.] [See Note n13]

## [2] Drafting Checklist

### RECOMMENDED PROVISIONS

1. A description of eligible employees [See Note n3];
2. A description of accrual rates by employee classification and tenure [See Note n3];
3. A provision for maximum accrual [See Note n7];
4. A statement regarding whether pay in lieu of time off is permitted;
5. A statement providing for payment of accrued PTO on separation of employment [See Note n11];
6. A requirement for advance approval of scheduled PTO;
7. A provision for maximum allowable unscheduled PTO;
8. A statement of the procedure for recording PTO [See Note n5]; and
9. A statement pertaining to PTO advances [See Note n11].

### OPTIONAL PROVISIONS

1. A requirement that an employee work a certain period of time before accruing or taking PTO [See Note n3];
2. A provision addressing accrual of PTO during unpaid leaves of absence;
3. A provision concerning scheduling conflicts;
4. A provision allowing employees to make up time missed for personal appointments as an alternative to taking PTO;
5. A provision concerning salary advances and paychecks during scheduled PTO; and
6. A provision informing employees seeking to take family or medical leave that they must apply available PTO to their leave [See Notes n12,n13].

## [3] Notes

### Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law  
Leaves of Absence  
Short-Term Leave  
Labor & Employment Law  
Wage & Hour Laws  
Coverage & Definitions  
Holiday, Sick & Vacation Pay  
Labor & Employment Law  
Wage & Hour Laws  
Wage Payments

#### FOOTNOTES:

(n1)Note 1. Employers should be aware that various city and county governments impose additional requirements related to sick leaves, vacation time, and paid time off for government contractors, including requirements for compensated sick leave. These policies are typically part of the city or county's living wage ordinance. In November 2006, San Francisco became one of the first to adopt a paid sick leave ordinance that applied to all employers with employees working within the geographical boundaries of the City and County of San Francisco. See S. F. Admin. Code, ch. 12W. Information related to this ordinance can be found at <http://www.sfgov.org/site/olse>.

(n2)Note 2. As discussed in connection with Section 2.04 of this Guide, employers should consider whether they wish to implement an introductory period for new employees. For a discussion of factors to be considered in deciding whether to implement an introductory period, see § 2.04 of this Guide, Note 1.

(n3)Note 3. Many employers grant their employees paid time off ("PTO") in lieu of vacation, sick leave, personal days, floating holidays, and other paid leave. Employers who grant PTO should use this policy instead of the separate vacation and sick-leave policies included in this Guide. As with vacation and sick-leave benefits, in general, California employers are not required by law to provide PTO to their employees. See Note 1. Moreover, employers may limit PTO benefits to specified classifications of employees (e.g., full-time employees). However, if an employer provides PTO and permits employees to use the PTO days for any reason, California law treats the PTO as a form of vacation pay. This means that employers must follow the rules that prohibit "use-it-or-lose-it" vacation policies and must pay employees' accrued but unused vacation at time of termination. See, e.g., DLSE Opinion Letter 1990.09.24

As discussed in *Section 2.08* of this Guide, if an employer chooses to grant its employees PTO in lieu of sick leave and has employees working within the geographic boundaries of the City and County of San Francisco, the employer is required to provide PTO in compliance with San Francisco's Sick Leave Ordinance. See S.F. Admin. Code, ch. 12W. This Ordinance requires that paid sick leave be provided regardless of whether employees are full-time, part-time or temporary employees, unless the right to sick leave is waived under a collective bargaining agreement. However, an employer is not required to provide paid sick leave until after an initial 90-day waiting period of employment. See S.F. Admin. Code, ch. 12W, § 12W.3(a). This permits an employer to withhold paid sick leave during the introductory period or from short-term employees, including those retained through temporary personnel agencies. In addition, the Ordinance requires employers to post a notice informing employees of their sick leave rights and to maintain records of hours worked, and paid sick leave taken, by employees for four years. See S.F. Admin. Code, ch. 12W, § 12W.5.

The sample policy, as drafted, permits eligible employees to accrue and take PTO starting on the date of hire. Optional provisions are given in brackets, which may be used to preclude employees from accruing PTO during an introductory period. For a discussion of vesting of vacation benefits (and, by analogy, PTO benefits), see *Wilcox, California Employment Law, § 4.01[2][d][ii]* (Matthew Bender).

(n4)Note 4. As discussed in Note 3, PTO is not required by state law. Hence, an employer may generally specify the circumstances under which an employee may use PTO. However, employers whose PTO policies permit employees to use PTO leave for a personal illness must also "permit an employee to use in any calendar year the employee's accrued and available sick leave entitlement, in an amount not less than the sick leave that would be accrued during six months at the employee's then current rate of entitlement, to attend to an illness of a child, parent, spouse, or domestic partner of the employee." *Lab. Code § 233*. The enforcement position of the D.L.S.E. is that PTO, when employees can use it for any purpose, constitutes a form of sick leave within the meaning of *Labor Code Section 233*. See DLSE Opinion Letter 2003.05.21. Any restrictions placed on an employee's ability to take PTO would also apply to leave

taken to attend to an illness of the employee's child, parent, spouse, or domestic partner. See *Lab. Code § 233*. As drafted, the model guideline permits an employee to take PTO for any purpose and, therefore, would comply with the requirements of *Labor Code Section 233*.

Furthermore, employees under San Francisco's Sick Leave Ordinance are allowed to use *any or all* of their sick leave to care for, in addition to the above parties, a legal guardian or ward, grandparent, grandchild, or "designated person" of the employee's choice if the employee has no spouse or registered domestic partner. Employees entitled to name a "designated person" must be given an opportunity to do so no later than 30 hours after becoming eligible for sick leave and have a 10-day window to make the designation that they can then amend annually. Moreover, under San Francisco's ordinance, child, parent, sibling and grandchild relationships include those relationships based on biology, adoption and step and foster care relationships. See S.F. Admin. Code, ch. 12W, § 12W.4.

Generally, to qualify as exempt from overtime requirements under federal and state law, an employee must be paid on a "salary basis" and, with limited exceptions, may not be subject to deductions in pay for absences of less than one week. Employers may deduct from salary in full-day increments for absences due to personal reasons or for absences due to sickness or disability under a bona fide sick leave plan or policy. See *29 CFR § 541.602(b)*. Under federal law, any employer deductions from vacation or PTO leave banks for absences of less than one day do not violate the "salary basis test" when there is no deduction from actual pay. See, e.g., *Barner v. City of Novato* (9th Cir. 1994) 17 F.3d 1256, 1261-62 (holding that employer's policy of deducting from paid leave banks does not "affect the plaintiffs' status as salaried employees" where there is no deduction from actual wages). California law, similarly, permits the deduction of accrued vacation or PTO for partial-day absences of four hours or more. *Conley v. Pacific Gas and Electric Co.* (2005) 131 Cal. App. 4th 260; DLSE, Enforcement Policies and Interpretations Manual § 51.6.15 (June 2002). See also, *Section 2.06[3]*, Note 8 of this Guide.

(n9)Note 5. An absence control policy that counts sick leave taken pursuant to *Labor Code Section 233* as an absence that may lead to or result in discipline, discharge, demotion or suspension is a per se violation of Section 233, entitling the employee to legal and equitable relief. See *Lab. Code § 234*.

(n10)Note 6. The San Francisco Sick Leave Ordinance requires employers to provide one hour of paid sick leave to an employee for every 30 hours worked. The paid sick leave accrues in one hour increments; no fractional accrual is required for any portion of 30 hours worked. See S.F. Admin. Code, ch. 12W, § 12W.3(b).

(n11)Note 7. The California Labor Commissioner has interpreted *Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal. 3d 774, 183 Cal. Rptr. 846, 647 P.2d 122, to permit employers to establish maximum amounts of PTO hours that an employee may accrue. See DLSE, Enforcement Policies and Interpretations Manual § 15.1.4 (June 2002); see also *Kistler v. Redwoods Community College District* (1993) 15 Cal. App. 4th 1326, 1334, 19 Cal. Rptr. 2d 417 (employer may validly bar accrual of further vacation leave until the specified vacation is taken); *Boothby v. Atlas Mechanical, Inc.* (1992) 6 Cal. App. 4th 1595, 1601-02, 8 Cal. Rptr. 2d 600 (upholding Labor Commissioner's interpretation of *Suastez*). Under the San Francisco Sick Leave Ordinance, employers with 10 or more employees must allow accrual of unused paid sick time up to 72 hours and employers with fewer than 10 workers (including full-time, part-time and temporary employees), must allow accrual of up to 40 hours of paid sick leave. See S.F. Admin. Code, ch. 12W, § 12W.3(c). The policy, as drafted, provides that when the maximum accrual is reached, the employee is no longer eligible to accrue further PTO until the accrued hours drop below the maximum.

(n12)Note 8. The policy as drafted follows California's rules on make-up time as found in *Labor Code § 513*.

(n13)Note 9. Employers may require employees to give "reasonable notification" of an absence from work for which paid sick leave will be used under the San Francisco Sick Leave Ordinance, and employers may take "reasonable measures" to verify or document that an employee's use of paid sick leave is proper. See S.F. Admin. Code, ch. 12W, § 12W.4(c)-(d).

(n26)Note 10. If an employer permits an employee to take PTO before it has accrued, and the employee subsequently resigns or is terminated, California law appears to prohibit employers from deducting the overdrawn amount from the employee's final paycheck, even with the employee's written authorization. See *California State Employees' Assn. v. State of California* (1988) 198 Cal. App. 3d 374, 376-78, 243 Cal. Rptr. 602 ; *Barnhill v. Robert Saunders & Co.* (1981) 125 Cal. App. 3d 1, 6 ; DLSE Opinion Letter 1991.05.16; see also *Wilcox, California Employment Law*, § 4.10[1][b] (Matthew Bender). Therefore, employers should consult legal counsel before deducting PTO advances from an employee's final paycheck.

(n27)Note 11. *Labor Code Section 227.3* provides that, unless otherwise provided in a collective bargaining agreement, whenever an employment contract or policy provides for paid vacation and an employee is terminated without having taken all of his or her vested vacation time, the vested vacation time that has not been used must be paid to the employee as wages at his or her final wage rate. *Labor Code Section 227.3* also provides that an employment contract or policy may not provide for forfeiture of vested vacation time upon termination. In *Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal. 3d 774, 784, 183 Cal. Rptr. 846, 647 P.2d 122 , the California Supreme Court held that vacation benefits are a form of deferred compensation that "vests" as an employee works. Thus, on termination the employee must be paid the amount of *pro rata* vacation earned on a daily basis. The Labor Commissioner takes the position that, because employees have an absolute right to take PTO (unlike traditional sick leave where using such leave is contingent on sickness), PTO is, in effect, the same as vacation and is also subject to the provisions of *California Labor Code Section 227.3* as interpreted in *Suastez*. See, e.g., DLSE Opinion Letter 1990.09.24.

(n28)Note 12. Both the federal and state family care leave laws generally permit employers to require employees to substitute accrued vacation time or other accrued time off for family care or medical leave taken for any purpose. See 29 U.S.C. § 2612(d)(2) ; *Gov. Code § 12945.2(e)* . However, the regulations interpreting the California family care leave law (the "California Family Rights Act") restrict an employer's ability to inquire about the use of vacation for a family care leave purpose. See 2 Cal. Code Reg. § 7297.5(b)(2)(A) . Thus, if an employee requests PTO without specifying that it is for a family care leave purpose, the employer may not ask if the employee is taking PTO for such a purpose. If, however, the employee indicates that he or she is taking leave for a family care leave purpose, the employer may require the employee to apply his or her accrued PTO to the leave. See 2 Cal. Code Reg. § 7297.5(b)(2) . The substitution of paid leave for family care leave does not extend the total duration of family care leave to which an employee is entitled beyond 12 weeks in a 12-month period.

Under federal law, employees on family care leave may, but are not entitled to, accrue any additional benefits, including PTO, or seniority during the unpaid portion of a family care leave. See 29 C.F.R. § 825.215(d)(2) . State law expressly addresses this issue only with respect to seniority accrual, and provides that on a return from leave, employees must return with no less seniority or seniority-related benefits (such as PTO) than they had prior to the leave. See *Gov. Code § 12945.2(g)* ; see also 2 Cal. Code Reg. § 7297.5(d)(3) . The guideline's optional provision complies with the FMLA and prohibits the accrual of PTO during the unpaid portion of a family care leave. However, the optional provision permits employees to accrue PTO during the paid portion of family care leave, e.g., during the time for which they have substituted PTO for unpaid family care leave. If the employer normally permits employees to accrue PTO while they are on PTO, then the employer should permit employees on family care leave to accrue these same benefits when they substitute PTO for unpaid family care leave. See 2 Cal. Code Reg. § 7297.5(d)(2) . For more information on family care and medical leave of absence requirements, see § 2.09 of this Guide.

(n29)Note 13. Eligible employees may receive up to 6 weeks of partial wage replacement when absent from work for the injury or illness of a spouse, parent, domestic partner or child, or for the purpose of bonding following a birth, an adoption, or the placement of a foster child. See *Wilcox, California Employment Law*, § 8.28[5] (Matthew Bender). Except as otherwise provided by a collective bargaining agreement, employers may require employees to first use up to two weeks of earned, unused vacation or PTO time before receiving FTDI benefits.



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California Employer's Guide to Employee Handbooks and Personnel Policy Manuals

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DIVISION 2 EMPLOYEE HANDBOOKS AND PERSONNEL POLICY MANUALS

Part A. RECOMMENDED GUIDELINES

*1-2 CA Guide to Employee Handbooks § 2.09*

## § 2.09 LEAVES OF ABSENCE

### [1] Model Guideline

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#### LEAVES OF ABSENCE

##### I. Introduction

The Company provides (1) family care, medical, and military family leave for up to 12 or 26 weeks per year, depending on the reason, see section II(D), in accordance with California's Family Rights Act ("CFRA") and the federal Family and Medical Leave Act of 1993 ("FMLA"); (2) pregnancy leave for up to four months in accordance with the California Fair Employment and Housing Act ("FEHA"); (3) disability leave as required to reasonably accommodate employees with a workplace injury or a qualified disability under the Americans with Disabilities Act ("ADA") or the FEHA; and (4) leave for other legally required absences as set forth below. Employees having any questions regarding this policy should contact \_\_\_\_\_ [*specify, e.g., the Personnel Manager*].

##### II. Family Care, Medical and Military Family Leave [See Notes n1, n2]

###### A. Eligibility

To be eligible for family care, medical, and military family leave, an employee must (1) have worked for the Company for at least twelve months prior to the date on which the leave is to commence [See Note n33]; and (2) have worked at least 1,250 hours in the twelve (12) months preceding the leave. [*If employer has more than one facility, the following sentence may be added: However, employees who work at a location where the Company employs fewer than 50 persons within 75-miles are not eligible for family care, medical, or military family leave.*] [See Note n4 4]

An employee returning from fulfilling his or her National Guard or Reserve military obligation will be credited with the hours of service that would have been performed but for the period of military service in determining the 1,250 hours of service. **[See Note n5]**

In the case of a pregnancy or other legally protected disability or medical condition or work-related injury, an employee may not need to satisfy all of the above requirements. In such circumstances, the employee should contact a Human Resources professional for clarification about his or her rights for other types of leave.

#### B. Permissible Uses of Family Care, and Medical Military Leave

"Family care and medical leave" may be requested for (1) the birth or adoption of an employee's child; (2) the placement of a foster child with the employee; or (3) the serious health condition of an employee's child, domestic partner, spouse, or parent; or (4) an employee's own serious health condition. **[See Notes n6,n7,n8]**

A serious health condition is an illness, injury, impairment, or physical or mental condition that involves either an overnight stay in a medical care facility, or continuing treatment by a health care provider for a condition that either prevents the employee from performing the functions of the employee's job, or prevents the qualified family member from participating in school or other daily activities.

Subject to certain conditions, the continuing treatment requirement may be met by a period of incapacity of more than three consecutive calendar days combined with at least two visits to a health care provider or one visit and a regimen of continuing treatment, or incapacity due to pregnancy, or incapacity due to a chronic condition. Other conditions may meet the definition of continuing treatment. **[See Note n9] [See Note n10]**

"Military exigency leave" may be requested when there is a qualifying military exigency as defined by the U.S. Department of Labor arising out of the fact that an employee's military retiree or reservist spouse, child, or parent is on active duty (or has been notified of an impending call or order to active duty) in support of a contingency operation as defined by law. Qualifying military exigencies may include attending certain military events, arranging for alternative childcare, addressing certain financial and legal arrangements, attending certain counseling sessions, and attending post-deployment reintegration briefings. This leave does not extend to employees whose family member is on active duty or call to active duty status of the Regular Armed Forces, nor does it apply to most state calls to active duty. **[See Note n11]**

"Military caregiver leave" may be requested to care for a covered servicemember if the employee is the covered servicemember's spouse, child, parent, or next of kin. For purposes of this leave, a covered servicemember is a current member of the Armed Forces, including a member of the National Guard or Reserves, who has a serious injury or illness incurred in the line of duty on active duty that may render the servicemember medically unfit to perform his or her duties for which the servicemember is undergoing medical treatment, recuperation, or therapy; or is in outpatient status or is on the temporary disability retired list. **[See Note n12]**

#### C. Substitution of Paid Leave

Employees are required to substitute accrued vacation time and other paid personal leave (except sick leave) for all family care and medical leaves. Employees are required to substitute sick leave only for medical leaves. Employees may elect to substitute sick leave [to attend to an illness of a child, parent, spouse or domestic partner of the employee] [or for other types of family care leave.] **[See Note n13]**

## D. Amount of Leave

### 1. Family Care, Medical, and Military Caregiver Leave

Provided all the conditions of this policy are met, an employee may take a maximum of 12 weeks of family care, medical, and military exigency leave in a rolling 12-month period measured backwards from the date the employee's leave commences. **[See Note n14]**

Employees who are unable to work due to pregnancy disability will be granted the greater of 12 weeks leave or the amount of leave to which the employee may be entitled under California state law for a pregnancy-related disability or in connection with childbirth. **[See Note n15]** See Section III of this Guide. Family care leaves for the birth, adoption, or foster care placement of a child must be concluded within one year of the birth, adoption, or placement. **[See Note n16]**

### 2. Military Caregiver Leave

Provided all the conditions of this policy are met, an employee may take a maximum of 26 weeks of military caregiver leave in a single 12-month period, inclusive of the time the employee takes for a family care, medical, or military exigency leave during that period. This 12-month period will be measured forward from the first day leave is taken. Spouses who are both employed by the Company may take a maximum combined total of 26 weeks in the 12-month period for the care of the servicemember and the birth, adoption, or foster care of their child or to care for an ill parent, provided that no more than 12 weeks of this combined 26-week period may be taken for reasons other than to care for the servicemember. **[See Note n17]**

### 3. Intermittent Leave

Medical leave for the employee's own serious health condition, family care leave for the serious health condition of the employee's spouse, parent, or child, and military caregiver leave may be taken intermittently or on a reduced schedule when medically necessary. **[See Note n18]** Where the intermittent or reduced schedule leave is for planned medical treatment, the employee must make an attempt to schedule the treatment so as not to disrupt unduly the Company's operations. **[See Note n19]** Where the family care leave is to be taken in connection with the birth, adoption, or foster placement of a child, the minimum duration for each period of leave is two weeks, except that the employee may request leave of less than two weeks duration on any two occasions. **[See Note n20]** Military exigency leave also may be taken intermittently or on a reduced schedule. **[See Note n21]**

## E. Leave's Effect on Pay

Except to the extent that other paid leave is substituted for family care, medical, and military family leave, such leave is unpaid. **[See Note n22]** However, employees may be entitled to California State Disability Insurance (SDI). Employees also may be entitled to Paid Family Leave (PFL) for up to six (6) weeks in any twelve month period during leaves to care for qualifying family members. PFL provides a partial wage replacement for absences from work to care for a seriously ill or injured family member or for bonding with a minor child within one year of the birth or placement of the child in connection with foster care or adoption. Employee contributions provide funding for this program. PFL is administered like SDI by the California Employment Development Department. PFL must be taken concurrently with family care leave and does not entitle an employee to take any additional time off. In addition, an employee must use up

to two weeks of any accrued but unused vacation before the employee will be eligible to receive PFL. **[See Note n23]**

[After the exhaustion of accrued vacation time and sick leave, or on the eighth day following the onset of the employee's own serious health condition, an employee taking family care and a medical leave for the employee's own serious health condition will receive the difference between the SDI benefits or workers' compensation benefits that, for a period of up to \_\_\_\_\_ weeks/months during any approved medical leave, the employee receives or would have received had he or she made prompt application and a fixed percentage of his or her monthly salary as follows:] **[See Note n24]**

[If the Company chooses to bridge the difference between SDI and employee's salary the Company *may set forth a schedule of salary continuation, such as the following*]

Percent of Salary Furnished During Disability Leave (less state benefits.)	Years of Service (measured from date of hire or rehire)
State Benefits Only	Less than 1
50%	More than 1 but less than 2
60%	More than 2 but less than 3
70%	More than 3 but less than 4
80%	More than 4 but less than 5
90%	More than 5 but less than 6
100%	More than 6

#### F. Leave's Effect on Benefits

During an employee's family care, medical, and military family leave, the Company will continue to pay for the employee's participation in the Company's group health plans, [pension and retirement plans, and supplemental unemployment benefit plans], to the same extent and under the same terms and conditions as would apply had the employee not taken leave. **[See Note n25]**

Thus, the employee must continue to pay his or her share of the health plan premiums during the leave. If the employee substitutes paid leave for the unpaid leave, such payments will be deducted from the employee's pay through the regular payroll deductions. **[See Note n26]** Otherwise, the employee must make arrangements with the Company for the payment of such premiums. **[See Note n27]** All other benefits will be governed in accordance with the terms of each benefit plan and are the sole responsibility of the employee. **[See Note n28]**

If the employee fails to pay his or her share of the premiums during leave, or if the employee fails to return from the leave at the expiration of 12 weeks (or 26 weeks in the case of a military caregiver leave) for a reason other than the recurrence, continuation, or onset of a serious health condition for which leave under this policy is allowed or other circumstances beyond the employee's control, the Company can recover any health plan premiums paid by the Company on the employee's behalf during any periods of the leave. **[See Note n29, n30]**

Employees on family care, medical, and military family leave accrue employment benefits such as sick leave, vacation benefits, or seniority only when paid leave is being substituted for unpaid leave and only if the employee would otherwise be entitled to such accrual. **[See Notes n31, n32, n33]**

Use of FMLA leave will not result in the loss of any employment benefit that accrued prior to the start of an employee's leave. **[See Note n34]**

## G. Procedure for Requesting Family Care, Medical and Military Family Leave

### 1. Notice Requirements

Employees must notify the Company of their request for family care, medical, military exigency, or military caregiver leave as soon as they are aware of the need for such leave. **[See Note n35]** For foreseeable family care, medical, and military caregiver leave, the employee must provide 30 calendar days' advance notice to the Company of the need for leave, if possible. For events that are unforeseeable 30 days in advance, the employee must notify the Company as soon as is practicable and generally must comply with the Company's normal call-in or notice procedures. **[See Note n36]** If the leave is requested in connection with a planned, non-emergency medical treatment, the employee must make an attempt to schedule such treatment so as to avoid unduly disrupting Company operations, and may be requested to reschedule the treatment so as to minimize disruption of the Company's business. **[See Note n19]**

If an employee fails to provide the requisite 30-day advance notice for foreseeable events without any reasonable excuse for the delay, the Company reserves the right to delay the taking of the leave until at least 30 days after the date the employee provides notice of the need for family care or medical leave. **[See Notes n37, n38]**

All requests for family care, medical, military exigency, and military caregiver leave should include enough information to make the Company aware that the employee needs qualifying leave, and the anticipated timing and duration of the leave, if known. Sufficient information may include that the employee is unable to perform job functions, the family member is unable to perform daily activities, the need for hospitalization or continuing treatment by a health care provider, or circumstances supporting the need for military family leave. Employees also must inform the Company if the requested leave is for a reason for which FMLA leave was previously taken or certified. **[See Note n51]**

Any requests for extensions of leave under this policy must be received as soon as is practicable and must include the revised anticipated date(s) and duration of the leave. To the extent permitted by law, the Company reserves the right to deny requests for extensions or deny reinstatement to an employee who exceeds the leave amounts provided by this policy or fails to provide requested medical certification. In addition, if you have a disability, you may be eligible for leave under the Americans with Disabilities Act (ADA) or state law. For more detailed information on extended leaves, please contact [ ]. **[See Note n40]**

Once the Company is aware of the employee's need for leave, it will inform the employee whether he or she is eligible under the FMLA. If the employee is eligible, the notice will specify any additional information required as well as the employees' rights and responsibilities. If the employee is not eligible, the Company will provide a reason for the ineligibility. **[See Note n41]**

### 2. Certification

Any request for medical leave for an employee's own serious health condition, for family care leave to care for a child, spouse, domestic partner or parent with a serious health condition or for a serious injury, or for military caregiver leave must be supported by medical certification from a health care provider. **[See Note n42]** For military caregiver leave, the employee must provide confirmation of a family relationship to the seriously ill or injured servicemember. **[See Note n45]** Employees generally must provide the required certification within 15 calendar days after the Company's request for certification. **[See Note n44]** For foreseeable leaves, employees must provide the required medical

certification before the leave begins. When this is not possible, employees must provide the required certification within 15 calendar days after the Company's request for certification, unless it is not practicable under the circumstances to do so, despite the employee's good faith efforts. **[See Notes n45]**

The medical certification for a child, spouse, domestic partner or parent with a serious health condition or for the serious injury or illness of a qualifying service member must include (a) the date on which the serious health condition or serious injury or illness commenced; (b) the probable duration of the condition or injury or illness; (c) the health care provider's estimate of the amount of time needed for family care; (d) the health care provider's assurance that the health care condition or injury or illness warrants the participation of the employee to provide family care; and (e) in the case of intermittent or reduced schedule leave where medically necessary, the probable duration of such a schedule. **[See Notes n46, n47]**

The medical certification for leave for the employee's own serious health condition must include (a) the date on which the serious health condition commenced; (b) the probable duration of the condition; (c) a statement that, due to the serious health condition, the employee is unable to perform the essential functions of his or her position; and (d) in the case of intermittent leave or reduced schedule leave where medically necessary, the probable duration of such a schedule. In addition, the certification may, at the employee's option, identify the nature of the serious health condition involved. **[See Note n48]**

Failure to timely provide the required certification may result in the denial of foreseeable leave until such certification is provided. In the case of unforeseeable leaves, failure to timely provide the required certification may result in a denial of the employee's continued leave. **[See Note n45]** Where the employee's need for leave due to the employee's own serious health condition, or the serious health condition of the employee's covered family member, lasts beyond a single leave year, the Company may require the employee to provide a new medical certification in each subsequent leave year. **[See Note n49]** Any request for an extension of the leave also must be supported by an updated medical certification.

The Company has developed forms for use in obtaining medical certifications that satisfy the requirements of this policy. For military caregiver leave, the Company will accept Invitational Travel Orders (ITOs) or Invitational Travel Authorizations (ITAs) in lieu of its medical certification form. **[See Notes n50, n51]**

It is the employee's responsibility either to furnish a complete and sufficient certification or to furnish the health care provider providing the certification with any necessary authorization from the employee or the employee's family member in order for the health care provider to release a complete and sufficient certification to the Company to support the employee's leave request. **[See Notes n52, n53]**

Where permitted by law, if the Company has reason to doubt the validity of the medical certification provided by the employee, the Company may require the employee to obtain a second opinion from a doctor of the Company's choosing at the Company's expense. **[See Note n54]** If the employee's health care provider providing the original certification and the doctor providing the second opinion do not agree, the Company may require a third opinion, also at the Company's expense, performed by a mutually agreeable doctor who will make a final determination. It is the employee's responsibility to furnish his or her health care provider with the necessary authorization for the disclosure of medical information to the doctor(s) who will provide the second and third opinions. If the employee fails to provide the necessary authorization, the request for leave may be denied, in accordance with applicable law. **[See Notes n55, n56]**

#### H. Designation of Protected Leave

Once the Company has enough information to determine whether the leave is FMLA-qualifying, the Company will inform the employee if leave will be designated as FMLA-protected and, if known at that time, the amount of leave that

will be counted against the employee's leave entitlement. **[See Note n57]** If the Company determines that the leave is not protected, the Company will notify the employee.

#### I. Recertification

The employee taking leave because of his or her own serious medical condition or the serious medical condition of a family member may be required, except in cases of military caregiver leave, to provide the Company with recertification at appropriate intervals. **[See Note n58]** For purposes of recertification, the employer may request the same information as allowed by law for the original certification. As part of that request, the Company may provide the health care provider with a record of the employee's absence pattern to confirm whether such a pattern is consistent with the need for leave. **[See Note n59]** The employee must provide the requested recertification within 15 calendar days of such a request, unless it is not practicable to do so despite the employee's diligent, good faith efforts. **[See Note n50]**

#### J. Return to Work Certification

Where the leave is for the employee's own serious health condition, the Company requires **[see Note n61]** employees to provide medical certification that he or she is fit for duty and able to return to work. **[See Note n62]** The Company may delay restoring the employee to employment or terminate the employee without such certificate. **[See Notes n63, n64]**

#### K. Leave's Effect on Reinstatement

Employees timely returning from a leave covered under this policy are entitled to reinstatement to the same or equivalent position consistent with applicable law. **[See Note n65]** The Company may deny reinstatement to employees who are among the highest paid ten percent of all employees employed by the Company within 75 miles of the employees' worksite and whose reinstatement would cause substantial and grievous economic injury to the Company's operations. **[See Notes n66]** **[See Note n67]** An employee has no greater right to reinstatement than if he or she had been continuously employed rather than on leave. The Company will comply with all applicable laws pertaining to reinstatement of employees, including where required, the reasonable accommodation of employees who have been on an approved leave. **[See Note n68]**

The Company complies with applicable family care, medical leave, and military family leave laws. Under the FMLA it is unlawful for any employer to: interfere with, restrain, or deny the exercise of any right provided under the FMLA; or discharge or discriminate against any person for opposing any practice made unlawful by the FMLA or for involvement in any proceeding under or relating to the FMLA. If an employer has done so, an employee may file a complaint with the U.S. Department of Labor or may bring a private lawsuit against an employer. The FMLA does not affect any federal or state law prohibiting discrimination, or supersede any state or local law or collective bargaining agreement that provides greater family or medical leave rights. If you have questions, or would like further clarification about your rights under the FMLA or other types of leave, please contact the Human Resources Department. **[See Note n69]**

### III. Pregnancy-Related Disability Rights

#### A. Leaves of Absence and Transfers

Any employee who is disabled on account of pregnancy, childbirth, or related conditions may take a pregnancy-related disability leave for the period of actual disability of up to four months, in addition to any family care or medical leave to

which the employee may be entitled under Section II of this policy (Family Care, Medical and Military Family Leaves). **[See Note n70]** Pregnancy-related disability leaves may be taken intermittently, or on a reduced-hours schedule, as medically necessary. **[See Note n71]**

Moreover, an employee is entitled to a reasonable accommodation for pregnancy, childbirth, or related medical conditions if she so requests and provides the Company with medical certification from her health care provider. In addition to other forms of reasonable accommodation, a pregnant employee is entitled to transfer temporarily to a less strenuous or hazardous position or to less hazardous or strenuous duties if she so requests, the transfer request is supported by proper medical certification, and the transfer can be reasonably accommodated. **[See Note n72]**

#### B. Substitution of Paid Leave for Pregnancy-Related Disability Leave

An employee taking pregnancy-related disability leave must substitute any available sick pay for her leave and may, at her option, substitute any accrued vacation time for her leave. **[See Note n73]** The substitution of paid leave for pregnancy-related disability leave does not extend the total duration of the leave to which an employee is entitled.

#### [C. Leave's Effect on Benefits

*If employer has a salary continuation policy for employees on leave for other disability or family care leave, add:* If an employee taking a pregnancy-related disability leave is also eligible for family care, medical, and military family leave under Section II of this policy, then the employee is entitled to the Company's continuation of benefits, as described in Section II(F), up to a maximum of 12 weeks in a 12-month period. **[See Note n74]**

#### D. Other Terms and Conditions of Leave

The provisions of the Company's Family Care, Medical and Military Family Leave policy regarding the leave's effect on pay (Section II(E)), notice requirements (Section II(G)(1)), medical certification requirements (Section II(G)(2)) **[see Note n75]** and reinstatement (Section II(K)) **[see Note n76]** also apply to all pregnancy-related disability leaves. However, for pregnancy-related disabilities, there is no process for obtaining more than one medical opinion, and there is no reinstatement exception for key employees. For the purpose of applying those provisions, an employee's pregnancy-related disability is considered to be a serious health condition.

### IV. Other Disability Leaves

In addition to medical or pregnancy-related disability leaves described in Sections II and III, employees may take a temporary disability leave of absence if necessary to reasonably accommodate a workplace injury or a disability under the ADA or the FEHA. **[See Note n77]** Any disability leave under this section will run concurrently with any medical leave to which the employee is entitled under Section II of this policy.

*[EITHER, if the employer has no salary continuation policy]*

Disability leaves under this section will be unpaid.

*[OR, if the employer has a salary continuation policy for employees as described in Section II(E)]*

For the first [*specify, e.g., 90, or length of time specified in the employer's short-term disability plan*] days of disability leave, the employee will be covered by the Company short-term disability policy, which provides for salary continuation for up to \_\_\_\_\_ weeks/months as described in Section II(E), above. After \_\_\_\_\_ days, the employee is covered by the Company's long-term disability policy. [For a precise description of long-term disability benefits, employees should obtain a copy of the policy from the Company's disability insurance carrier or from the Human Resources Department.]

[CONTINUE]

Employees taking disability leave must comply with the Family Care, Medical and Military Family Leave provisions regarding substitution of paid leaves (Section II(C)), notice (Section II(G)(1)), and medical certification (Section II(G)(2)). For the purpose of applying these provisions, a disability leave will be considered to be a medical leave.

If a disability leave under this section extends beyond 12 weeks in a 12-month period, the employee will not be entitled to any continued employer contributions towards any employee benefit plan unless otherwise required by law. [**See Note n78**] An employee, however, may elect to continue participating in such benefit plans, at the employee's own expense, to the extent permitted by such plans

The duration of a leave under this section shall be consistent with applicable law, but in no event shall the leave extend past the date on which an employee becomes capable of performing the essential functions of his or her position, with or without reasonable accommodation. For a full explanation of leave duration and reinstatement rights, employees should contact the \_\_\_\_\_ [*specify, e.g., Human Resources Department*].

## V. Other Leaves Of Absence

The Company also grants eligible employees leaves of absence for military leave, jury or witness duty, certain court appearances, appearances at school or daycare activities, emergency duty as a volunteer firefighter, a reserve peace officer, or emergency rescue personnel, to vote in a statewide election, for bereavement leave, for leave related to domestic violence, or crime victims leave. [Unless otherwise required by law, employees will not be paid for such leaves of absence.] [**See Note n79**]

Employees wishing to take a leave of absence for one of these reasons should refer to the procedures outlined below or contact [Human Resources].

### A. Military Leave Of Absence

[EITHER--Short Version Of Policy]

The Company will grant employees a military leave of absence to the extent required by applicable federal and state law. [**See Note n80**]

[OR--Long Version Of Policy]

Full-time employees who must be absent from employment due to their participation in the uniformed services or other military duty will be granted time off with[out] pay. Part-time employees will be granted time off without pay. [During

such absence, full-time employees will be paid their base rate of pay for a period of [30] days, less all amounts compensated by the military.] [Payment for the 30 days will occur after the employee has returned to work for the Company. In order to receive payment, the employee must submit a copy of his or her military pay vouchers, as well as approved timesheets.] Employees may request to substitute accrued vacation for any unpaid portion of the military leave.

Employees must notify their immediate supervisor as soon as they know the required dates of service (unless such notice is precluded by military necessity or is otherwise impossible or unreasonable) and, if requested, furnish the supervisor with a copy of the official orders or instructions. Upon return from an excused military leave, the employee will be reinstated to his or her former position, or another position, to the extent required by applicable law. In order to be eligible for reinstatement, the employee must (1) report to the Company or submit an application for employment within the period required by federal and state laws; and (2) provide a certificate of satisfactory completion of service, as well as appropriate documentation to establish that the employee is eligible for reinstatement.

Vacation and sick-leave benefits do not accrue during any unpaid period of military leave.

An employee whose service is completed in 30 or fewer days will continue receiving health benefits on the same terms as he or she received prior to commencing military leave. For service beyond 30 days, the employee has the ability to continue health benefits pursuant to applicable federal and state law. Upon an employee's return to work, the Company will count the time spent on military duty as time worked (1) for determining eligibility for FMLA or CFRA leave; and (2) for retirement plan eligibility, vesting, and benefit accrual; and (3) for other benefits that are based on seniority. **[See Note n80]**

#### B. Military Spouse Leave **[See Note n81]**

Qualified California employees will be given up to 10 days leave during that time in which the employee's spouse or domestic partner is on leave from deployment in a combat zone with the active duty or reserve military or national guard during a period of military conflict. Employees may use accrued vacation time to cover this absence. If the employee has no accrued vacation, the employee must request time off without pay.

Qualifying employees are employees who work an average of 20 hours per week and have a spouse or domestic partner who is serving as (1) a member of the U.S. Armed Forces and who has been deployed during a period of military conflict to an area designated as a combat theater or combat zone by the President of the United States or (2) a member of the Armed Forces Reserve Components or the National Guard and has been deployed during a period of military conflict.

Qualifying employees who wish to request this leave must provide the Company with a written request for such leave within two business days of receiving official notice that the military spouse or domestic partner will be on leave from deployment. The employee must also provide written documentation to the Company certifying that the military member will be on military leave from deployment.

#### C. Jury and Witness Duty

The Company will provide employees time off to serve, as required by law, on a jury or grand jury if the employee provides reasonable advance notice. The Company will also provide employees with time off to appear in court or other judicial proceedings as a witness to comply with a valid subpoena or other court order. **[See Note n82]**

*[EITHER, if the employer has no salary continuation policy]*

Leaves under this section will be unpaid.

*[OR, if the employer has a salary continuation policy for employees]*

Employees will be granted a paid leave of absence of up to *[specify number of days]* business days per year for the purpose of fulfilling jury duty. Any jury duty that extends beyond \_\_\_\_\_*[specify number of days]* business days per year will be unpaid.

[CONTINUE]

However, exempt employees who work any portion of a workweek in which they also serve on jury duty or appear as a witness will receive their full salary for that workweek. Employees may elect to substitute accrued vacation during any unpaid leave due to jury duty or a witness appearance.

Employees are required to provide reasonable advance notice of the need for jury/witness leave. Employees also are expected to report to work each day or portion of a day they are not performing jury/witness duty.

#### D. Leave For Educational/Daycare Purposes

Employees will be granted time off without pay for up to 40 hours per calendar year, but no more than eight hours in any calendar month, to participate in the activities of schools or licensed child daycare facilities attended by their children. **[See Note n83]** Employees must substitute accrued vacation, [personal leave, or compensatory time off] for purposes of a planned absence under this Section.

Employees wishing to take time off under this Section must provide their supervisors with reasonable notice of the planned absence. If both parents of a child are employed by the Company at the same worksite, the request for time off under this Section will be granted to the first parent to provide notice of the need for time off. The request from the second parent will be accommodated if possible.

[The Company reserves the right to request that the employee furnish written verification from the school or daycare facility as proof that the employee participated in school or daycare activities on the specific date and at a particular time. Failure to provide written verification is grounds for disciplinary action.]

#### E. Volunteer Firefighter, Reserve Peace Officer, and Emergency Rescue Personnel

Nonexempt employees will be granted time off [without pay] to perform emergency duties as a volunteer firefighter, reserve peace officer, or emergency rescue personnel. [Employees who are volunteer firefighters also are eligible for leave of up to 14 days per calendar year for fire or law enforcement training.] **[See Note n84]** Exempt employees who work any portion of a workweek in which they also perform such emergency duties or training will receive their full salary for that workweek. **[See Note n79]** Otherwise, exempt employees will be granted time off without pay.

Employees may substitute vacation pay for any unpaid portion of leave to perform such emergency duties or training.

#### F. Voting Time Off

Employees who do not have sufficient time outside of their regular working hours to vote in a statewide election may request time off to vote. If possible, employees should make their request at least two days in advance of the election. Up to two hours of paid time off will be provided, at the beginning or end of the employee's regular shift, whichever will allow the most free time for voting and the least time off work. **[See Note n85]**

#### G. Bereavement Leave

Employees [who have completed their probationary period] will be allowed up to three consecutive working days off to arrange and attend the funeral of an immediate family member. For purposes of this policy an employee's immediate family is defined to include the employee's current spouse, domestic partner, father, mother, sister, brother, children, current parent in-law, grandparents, and grandchildren. [Regular full-time] employees will be paid their regular base rate of pay for each day of absence. [All other employees will not be paid during bereavement leave.]

If an employee requires more than three days off for bereavement leave, the employee may request additional unpaid leave or may request the opportunity to use any accrued vacation time. **[See Note n86]**

#### H. Leave Related To Domestic Violence or Sexual Assault

The Company will provide time off to an employee who has been the victim of domestic violence or sexual assault to seek any relief, including, but not limited to, a temporary restraining order, restraining order, or other injunctive relief, to help ensure the health, safety, or welfare of the victim or his or her child. This includes time off for court proceedings, services from a domestic violence shelter, program or rape crisis center, counseling, medical attention, and participation in safety planning programs. The Company requires reasonable advance notice of the leave when feasible. If time off is taken due to an emergency, the employee must, within 15 days of the absence, provide the Company with certification of the need for the leave such as a police report, court order, documentation from a healthcare provider, victims advocate, or counselor. **[See Note n87]**

#### I. Crime Victims' Leave

The Company will provide time off to an employee to attend judicial proceedings related to a crime, if that employee is a victim of crime, an immediate family member of a victim, a registered domestic partner of a victim, or the child of a registered domestic partner of a victim. **[See Note n88]** The Company requires that where feasible, in advance of taking leave, the employee provide it with a copy of the notice of each scheduled proceeding that is provided to the victim by the agency responsible for providing notice. If advance notice is not possible, the employee is required to provide the Company with a copy of the notice within a reasonable time.

### **[2] Drafting Checklist**

#### **REQUIRED INFORMATION**

This policy has been drafted to satisfy the requirements of general notice distribution under the FMLA and CFRA. See *29 C.F.R. § 825.300(a)(3)*. Information that is recommended but not required to be in the policy has been noted. See *29 C.F.R. § 825.300(a)(3)-(4)* and *29 C.F.R. Appendix C to § 825*.

**[3] Notes****Legal Topics:**

For related research and practice materials, see the following legal topics:

Labor & Employment Law  
Leaves of Absence  
General Overview  
Labor & Employment Law  
Leaves of Absence  
Family & Medical Leave Act  
General Overview  
Labor & Employment Law  
Leaves of Absence  
Military Leave  
Labor & Employment Law  
Leaves of Absence  
Short-Term Leave

**FOOTNOTES:**

(n1)Note 1. This model guideline has been drafted to comply with California's Moore-Brown-Roberti Family Rights Act (CFRA), *Gov. Code § 12945.2* and the federal Family and Medical Leave Act of 1993 (FMLA), *29 U.S.C. § 2611 et seq.* The CFRA applies to California employers that employ 50 or more employees within any state in the United States, the District of Columbia or any territory or possession of the United States. See *Gov. Code § 12945.2(c)(2)(A)*. The FMLA applies to California employers that employ 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. See *29 U.S.C. § 2611(4)(A)(i)*. California employers who meet the 50 employees/20 workweek threshold must comply with both the CFRA and the FMLA. If differences exist between the two laws, the law that provides the greater family or medical leave rights governs and controls the language used in this guideline. See *29 U.S.C. § 2651(b)*.

Regulations implementing the FMLA and the CFRA require employers who provide written guidance to employees concerning employee benefits or leave rights, such as in an employee handbook, to include in the employee handbook or other document information concerning family leave entitlements and employee obligations, or to distribute such information to new employees at the time of hire. See *29 C.F.R. § 825.301(a)(1)-(4)*; *2 Cal. Code Reg. § 7297.9(a)*.

For full discussion of the CFRA and FMLA, see *Wilcox, California Employment Law*, §§ 8.20-8.33 (Matthew Bender).

(n2)Note 2. On January 28, 2008, President Bush signed the National Defense Authorization Act ("NDAA"), Pub. L. No. 110-181, which, as discussed in detail below, created two new types of FMLA leave: military caregiver leave and exigency leave.

(n3)Note 3. Under state law, employees are not eligible for family care and medical care leave unless they have more than 12 months of service. In contrast, the FMLA provides that employees are eligible if they have at least 12 months of service. Compare *Gov. Code § 12945.2(a)* with *29 U.S.C. § 2611(2)(A)(i)*. Because the FMLA definition is the more generous by one day, this provision is written in accordance with the FMLA definition.

(n4)Note 4. Federal and state law exclude from the definition of "eligible employee" an employee who works at a location where the employer employs less than 50 persons within 75 miles of that location. See *29 U.S.C. § 2611(2)(B)(ii)*; *Gov. Code § 12945.2(b)*.

(n9)Note 5. See *29 C.F.R. 825.110(b)(2)(i)*.

(n10)Note 6. "Parent," for all leaves other than the military family leaves, means a biological, adoptive, step or foster father or mother, or any other individual who stood *in loco parentis* to the employee when the employee was under the age of 18, or 18 or older and "incapable of self care because of a mental or physical disability." This term does not include parents-in-law. See *29 C.F.R. § 825.122 (b)-(c)*. For military caregiver leave, the term "parent" means a covered servicemember's biological, adoptive, step or foster father or mother, or any other individual who stood *in loco parentis* to the covered servicemember. This term does not include parents-in-law. See *29 C.F.R. § 825.122 (i)*. The term "son or daughter" for all leaves other than the military family leaves under the FMLA, or "child" under the CFRA,

means a biological child, as well as an adopted child, a foster child, a stepchild, a legal ward, or a child of a parent who stands *in loco parentis* to a child who is either (1) under 18 years of age; or (2) 18 years of age or older and "incapable of self-care because of a mental or physical disability." See 29 U.S.C. Section 2611(12); Gov. Code § 12945.2(c)(1); 2 Cal. Code Reg. 7297.0(c). For the military family leaves, the definition of "son" or "daughter" differs in that he or she can be of any age. See 29 C.F.R. § 825.122(g)-(h). The FMLA defines "spouse" as "a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides, including common law marriage in states where it is recognized." 29 C.F.R. § 825.122(a)(a). CFRA defines spouse as a "partner in marriage" as that term is defined in Family Code Section 300. See 2 Cal. Code Reg. § 7297.0(p).

(n11)Note 7. The California Domestic Partner Rights and Responsibilities Act of 2003 (the "Act") became effective January 1, 2005, and is codified at Family Code §§ 297 and 297.5. It gives domestic partners the same rights, protections and benefits--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 spouses. The Act is applicable only to domestic partners who have registered with the State of California, *i.e.*, filed a declaration of domestic partnership with the Secretary of State. Pursuant to the Act, domestic partners will have the same right to leave under CFRA as that given to spouses and their children. This does not affect the employee's FMLA entitlement.

(n12)Note 8. The permissible uses of family care, medical, and military family leave included in this guideline conform to the FMLA and the CFRA. Of course, if employers choose to provide their employees with additional uses of family care, medical, and military family leave, such as to care for an individual not included in the federal and state laws (e.g., a sibling with a serious health condition), they may modify this policy to do so. Employers who so modify their policies, however, still must provide their employees with 12 weeks of unpaid leave to care for a spouse, child, or parent with a serious health condition, for the employee's own serious health condition, or in connection with the birth, adoption or foster care placement of an employee's child. See 29 C.F.R. § 825.700(a). In other words, leave to care for a sibling, for example, is in addition to the 12 weeks of unpaid leave to which the employee is entitled under the federal and state laws.

(n13)Note 9. The term "serious health condition" ordinarily does not cover short-term conditions for which treatment and recovery are very brief since such conditions generally would be covered by the employer's sick leave policy. See 29 C.F.R. § 825.113(d); but see *Miller v. AT&T Corporation* (4th Cir. 2001) 250 F.3d 820, 831-32 (holding that the flu, under certain circumstances, may constitute a serious health condition under the FMLA). The FMLA regulations define, a "serious health condition" as an illness, injury, impairment, or physical or mental condition that involves (1) inpatient care in a medical facility that involves any period of incapacity (defined to mean inability to work, attend school, or perform other regular daily activities) or subsequent treatment in connection with such inpatient care; or (2) continuing treatment by a health care provider. To qualify as "continuing treatment by a health care provider under FMLA" there must be either (a) a period of incapacity of more than three consecutive full calendar days that involves treatment two or more times within the first day of incapacity, unless extenuating circumstances exist, at the direction of a health care provider or a single treatment by a health care provider and a regimen of continuing treatment (the first (or only) in-person treatment visit must take place within seven days of the first day of incapacity); (b) any period of incapacity due to pregnancy or prenatal care; (c) any incapacity or treatment for incapacity due to a chronic serious health condition; (d) a period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective; or (e) any period of absence to receive multiple treatments at the direction of a health care provider for a condition that would likely result in a period of incapacity of more than three consecutive days in the absence of medical intervention. See 29 C.F.R. § 825.115. However, the CFRA incorporates the old FMLA regulations of 1995 to the extent they are not inconsistent with the CFRA. See 2 C.C.R. § 7297.10. The California Fair Employment and Housing Commission (FEHC) has declined to incorporate the new FMLA regulations into the CFRA. However, the FEHC does plan to revise the CFRA to conform to the new FMLA regulations, to some extent. See <http://www.fehc.ca.gov/act/regulation/asp> (last visited Mar. 30, 2009). Until the FEHC makes such revisions, where the CFRA is silent on an issue, the old FMLA regulations of 1995 should govern. See 2 C.C.R. § 7297.10. Despite the fact that the new FMLA regulations call for specific timing of doctor's visits in order to meet the criteria for "serious health

condition," the 1995 FMLA regulations have no such requirement. Therefore, for leaves under the CFRA, there is no requirement that treatment occur "within 30 days of the first day of incapacity," nor is there a requirement that "the first or only in-person treatment visit must take place within seven days of the first day of incapacity." See *29 C.F.R. § 825.114 (1995)* .

Throughout this policy, such conflicts between the CFRA and the new FMLA regulations have been flagged.

(n26)Note 10. Although incapacity due to pregnancy and prenatal care are included in the FMLA definition of "serious health condition," they are not included in the CFRA definition. The serious health condition need not be physical in nature. An eligible employee may take a medical leave to provide psychological support to a family member with a serious health condition. See *29 C.F.R. § 825.124(a)* ; see also *Tellis v. Alaska Airlines, Inc.* (9th Cir. 2005) 414 F.3d 1045, 1047 and *Scamihorn v. General Truck Drivers, Office, Food and Warehouse Union, Local 952* (9th Cir. 2002) 282 F.3d 1078 .

(n27)Note 11. See *29 C.F.R. § 825.126*.

(n28)Note 12. See *29 C.F.R. § 825.127*.

(n29)Note 13. The FMLA and the CFRA give both the employer and the employee the right to substitute other available (e.g. vocation, sick leave, PTO) leave in lieu of some or all of the required family care and medical leave. See *29 U.S.C. § 2612(d)(2)(A)* ; *Gov. Code § 12945.2(e)* . As written, this model guideline imposes an across-the-board requirement that such other leave be exhausted. An employer, however, may decide to leave this choice to the employee or retain the discretion to require the substitution of other available leave for family care or medical leave on a case-by-case basis. Under the CFRA, however, an employer may not require unilaterally that sick leave be substituted for a family care and medical leave unless it is for the employee's own medical condition. See *Gov. Code § 12945.2(e)* . Rather, under the CFRA the employee and employer must mutually agree to the use of sick leave for family care leave and medical 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. Under *Labor Code section 233* , however, any employer who provides sick leave is required to permit employees to use up to one-half of their annual accrual of sick leave to care for an ill child, parent, spouse or domestic partner. In contrast to the CFRA, the FMLA provides that employers may require employees to exhaust their accrued sick leave for leaves taken for the serious health condition of the employee or the employee's spouse, child, or parent if the employer's sick leave policy normally allows for such other usage. Because the CFRA provision and *Labor Code Section 233* are more generous to employees, they have been adopted in this guideline.

Although the CFRA permits employers to require employees to use any accrued vacation time or other paid accrued time off during their family or medical leave, the CFRA regulations specify that employers may only require employees to use such paid time if the employee asks for leave for what would be a CFRA-qualifying purpose. If the employee requests to use vacation or other paid accrued time off without reference to a CFRA-qualifying purpose, the employer may not ask whether the employee is taking time off for a CFRA-qualifying purpose. See *2 Cal. Code Reg. § 7297.5(b)(2)(A)* .

The FMLA regulations generally require employers to notify employees within five business days after the employee has apprised the employer of the need for leave that the leave will be counted against the employee's annual FMLA leave entitlement. See *29 C.F.R. § 825.300(d)(1)*. If the employer fails to notify the employee within the required time period, the regulations expressly prohibit the employer from retroactively designating the leave as FMLA leave. See *29 C.F.R. § 825.208(c)* ; see also *29 C.F.R. 825.700(a)* ("If an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA leave entitlement.") The U.S. Supreme Court, however, invalidated those regulations to the extent they required an employer to provide more than 12 weeks of FMLA leave. See *Ragsdale v. Wolverine WorldWide* (2002) 535 U.S. 81 . Nevertheless, employers should promptly notify the employee that the leave will be designated as FMLA leave once the employer has sufficient knowledge to determine that the leave qualifies as FMLA leave.

(n30)Note 14. For all leave other than military caregiver leave, which must be measured rolling forward, the FMLA and the CFRA regulations provide employers with four alternative methods of calculating the 12-month period: (i) the calendar year; (ii) any fixed 12-month "leave year," such as a fiscal year, or a year starting on the employee's "anniversary" date; (iii) the 12-month period measured forward from the date any employee's first FMLA/CFRA leave begins; or (iv) a "rolling" 12-month period measured backward from the date an employee uses any FMLA/CFRA leave. See 29 C.F.R. § 825.200(b) ; 2 Cal. Code Reg. § 7297.3(b) . Employers must give advance notice to employees of the method selected for calculating the 12-month period. Otherwise, "the option that provides the most beneficial outcome for the employee will be used." 29 C.F.R. § 825.200(e); see also *Bachelder v. America West Airlines, Inc.* (9th Cir. 2001) 259 F.3d 1112, 1129-30 .

How the 12-month period is calculated has significant ramifications. For instance, if the period is calculated on a fixed 12-month period basis, such as a calendar year, then an employee could be entitled to two 12-week leaves within a short span of time. For example, the employee could take 12 weeks of leave from October through December of Year 1, and then could be eligible to take 12 weeks of leave from January through March of Year 2. If, however, the employer opts to calculate leaves backward on a rolling basis, then each time an employee takes leave for any purpose, the remaining leave entitlement would be the balance of the 12 weeks that has not been used during the immediately preceding 12 months. The benefit of calculating the 12-month period using this method is that it prevents employees from "stacking" leaves. For this reason, this policy, as drafted, calculates leaves backwards on a rolling basis.

(n31)Note 15. Pregnant employees in California must be granted leave for the period they are unable to work due to a pregnancy-related disability up to a maximum of four months, and may qualify for additional leave time under the CFRA of up to 12 weeks to care for and bond with the child. 2 C.C.R. § 7291.7(a); 2 C.C.R. § 7291.13.

(n32)Note 16. See 29 U.S.C. § 2612(a)(2) ; 29 C.F.R. § 825.120(2) ; see also 2 Cal. Code Reg. § 7297.3(d). See Section III

(n33)Note 17. See 29 C.F.R. § 825.127(c)(3) .

(n34)Note 18. The FMLA does not impose a minimum duration for medical leave, family care leave, or for military family leave. The FMLA regulations provide that, in general, an employee may not be required to take more FMLA leave than necessary to address the circumstance that precipitated the need for the leave. However, under both the FMLA and the CFRA regulations, an employer may limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences or use of leave provided that it is not greater than one hour. See 29 C.F.R. § 825.205(a) ; see also 2 Cal. Code Reg. § 7297.3(e) . Employers may make deductions from exempt employees' salary and paid leave banks for leaves of less than one day without affecting the employee's salaried, exempt status under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq. See 29 C.F.R. § 825.206(a) (authorizing employers to deduct from exempt employees' wages "for any hours taken as intermittent or reduced FMLA leave within a workweek"); see also *Hackett v. Lane County* (9th Cir. 1996) 91 F.3d 1289, 1291 ; *Barner v. City of Novato* (9th Cir. 1994) 17 F.3d 1256, 1261 ; *Fire Fighters, Local 2141 v. City of Alexandria, VA.* (E.D. Va. 1989) 720 F. Supp. 1230, 1232 , *aff'd without op.*, (4th Cir. 1990) 912 F.2d 463 (holding that employer's docking of personal or sick leave time is not a deduction of salary that defeats FLSA exemption for "salary basis" employees). In contrast, deducting from an exempt employee's salary for other partial-day absences, as opposed to an employee's available compensatory leave, is impermissible if salaried, exempt status is to be retained. See 29 C.F.R. § 541.602 .

(n35)Note 19. Despite the fact that the new FMLA regulations require an employee to make a "reasonable effort" to schedule treatment to avoid unduly disrupting the employer's operations, 29 C.F.R. § 825.203 , because the CFRA is silent on this issue, the old FMLA regulations of 1995 govern such that a California employee may only be required to make "an attempt" to schedule the treatment to avoid unduly disrupting the employer's operations. 29 C.F.R. § 825.117 (1995) .

(n36)Note 20. Under California law, a company cannot require leave taken for the birth, adoption, or foster care

placement of a child to be taken in one continuous 12-week period. See 2 C.C.R. § 7297.3(d). However, the basic minimum duration for each period of such leave is two weeks, except that the employee may request and the employer must grant leave of less than two weeks duration on any two occasions. *Id.*

(n100)Note 21. 29 C.F.R. § 825.202(d)

(n101)Note 22. 29 C.F.R. § 825.207(a).

(n102)Note 23. *California Unemployment Insurance Code § 3300 et seq.* provides Paid Family Leave (PFL) to qualified employees who take leave to care for a seriously ill child, spouse, parent, domestic partner, or to bond with a new child. Employees taking such leave are entitled to up to six weeks of pay in any 12-month period. PFL replaces approximately 55% of the employee's wages. This payment is financed entirely through employee contributions. Employee contributions for short-term disability will be increased to provide funding for this program. Paid leave runs concurrently with any leave taken by the employee pursuant to the FMLA or CFRA. Employers are required to provide notice of this program to their employees. Employers may require employees to use up to two weeks of accrued but unused vacation before receiving benefits.

(n103)Note 24. Although not required by either the FMLA or CFRA, employers may choose to provide salary continuation to employees taking medical leave. Employees who are disabled for more than seven consecutive days are eligible to receive State Disability Insurance (SDI) benefits. See generally *Unemp. Ins. Code § 2601 et seq.*; see also discussion in *Wilcox, California Employment Law, §§ 80.60-80.70* (Matthew Bender). Employers may supplement these benefits by providing the difference between the state disability benefits or workers' compensation benefits that an employee receives or would have received had the employee applied for these benefits promptly and a fixed percentage of his or her monthly salary. Further, employers may choose to vary the amount of the fixed percentage with an employee's years of service, or set a limit on the amount of time an employee may receive salary continuation.

(n104)Note 25. The CFRA and FMLA require employers to continue to provide an employee with group health insurance benefits for the duration of the leave, at the same level and under the same conditions as if the employee had been employed continuously. See 29 U.S.C. § 2614(c)(1); *Gov. Code § 12945.2(f)(1)*. In other words, to the extent an employer pays for all or part of such health benefits, it must continue to do so during the employee's leave.

The CFRA specifically provides that employers are not required to pay for an employee's participation in pension and retirement plans during the leave period and that the leave period need not be counted for purposes of time accrued under any such plans. See *Gov. Code § 12945.2(f)(2)*. However, in order to comply with the ADA, employers must apply this policy uniformly to all types of leaves. Also, employers should proceed cautiously whenever an employee's participation in a benefit plan may be discontinued. The FMLA requires that an employer reinstate the employee with equivalent benefits at the conclusion of the leave. A lapse in coverage may significantly affect the health, life, or other benefits available to the returning employee and may make it difficult for the employer to meet its reinstatement obligation. See 29 C.F.R. § 825.215(d)(1).

(n105)Note 26. See 29 C.F.R. § 825.210(b).

(n106)Note 27. See 29 C.F.R. § 825.210(c).

(n107)Note 28. This paragraph is not required.

(n108)Note 29. This paragraph is not required.

(n109)Note 30. This provision should be added to the policies of those companies that pay the premiums for their employees. However, employers may only recover their share of premiums paid during unpaid periods of family care, medical, and military family leave. See 29 C.F.R. § 825.213(a). Self-insured employers can only recover the employer's share of allowable premiums as would be calculated under COBRA, excluding the 2% fee for administrative

costs. In that case, the last phrase will read: "... the employer may recover its share of allowable premiums paid to maintain coverage." See *29 C.F.R. § 825.213(e)*.

(n110)Note 31. This paragraph is not required.

(n111)Note 32. This is a sample provision. Under the FMLA, "[a]n employee's entitlement to benefits other than group health benefits during a period of FMLA leave (e.g., holiday pay) is to be determined by the employer's established policy for providing such benefits when the employee is on other forms of leave (paid or unpaid, as appropriate)." *29 C.F.R. § 825.209(h)*.

(n112)Note 33. The FMLA provides that employees may, but are not entitled to, accrue seniority or other employment benefits during any period of family care, medical, and military family leave. See *29 U.S.C. § 2614(a)(3)(A)*. The FMLA regulations state, however, that employees may, but are not entitled to, accrue employment benefits or seniority during any unpaid periods of family care, medical, or military family leave. See *29 C.F.R. § 825.215(d)(2)*. State law expressly addresses this issue only with respect to accrual of seniority during paid leave. The CFRA regulations provide that if the employer's policy allows seniority to accrue when the employees are on paid leave, such as paid sick or vacation leave, then seniority must accrue during any part of a paid CFRA leave. See *2 Cal. Code Reg. § 7297.5(d)(2)*. The provision in this model guideline has been drafted in accordance with the FMLA and CFRA regulations to allow seniority and benefits accrual only in those instances in which the employee substitutes paid leave for family care, medical, and military family leave and the employer's paid leave policy allows for accrual of employment benefits during leave periods. For example, if employees normally accrue vacation or sick days during periods of paid vacation leave, employees substituting vacation leave for family care, medical, and military family leave also should continue accruing these benefits during the paid leave period.

(n113)Note 34. See *29 C.F.R. § 825.100(c)*.

(n114)Note 35. Although employers may waive the FMLA and CFRA notice requirements included in this policy, any such waivers should be uniformly applied.

(n115)Note 36. Unless and until the CFRA regulations are amended to conform to the new FMLA regulations, an employer may request but may not require an employee to comply with the employer's normal call-in or notice procedures for CFRA leaves. *2 C.C.R. § 7297.10*; compare *29 C.F.R. § 825.302(d)* with *29 C.F.R. § 825.302(d) (1995)*.

(n116)Note 37. This paragraph is not required.

(n117)Note 38. Failure of an employee to provide the requisite advance notice for foreseeable events may not result in denial of the request for the leave. Rather, the regulations interpreting the FMLA suggest that an employer that does not receive the requisite notice could delay the leave until 30 days after the notice is provided. See *29 C.F.R. § 825.304(b)*.

(n119)Note 40. This paragraph is not required.

(n120)Note 41. Under the FMLA, within five business days of the time an employer acquires knowledge that leave may be FMLA qualifying, the employer must provide the employee with an "eligibility notice" stating whether the employee is eligible for FMLA leave or, if the employee is not eligible, the notice must give at least one reason why (i.e., the employee has not worked the requisite number of hours). See *29 C.F.R. § 825.300(b)*. At the time the employer provides the eligibility notice, it also must provide a "rights and responsibilities notice" including, at a minimum, the following information: (1) that the leave may be counted against the employee's annual FMLA leave entitlement; (2) any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so; (3) the employee's right to substitute paid leave and whether the employer will require the substitution of paid leave, and the conditions related to any substitution; (4) any requirement for the employee to

make any premium payments to maintain health benefits and the arrangements for making such payments, and the possible consequences of failure to make such payments on a timely basis; (5) the employee's status as a "key employee" and the potential consequences of being a key employee; (6) the employee's right to restoration to the same or an equivalent job upon return from leave; and (7) the employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave. See 29 C.F.R. § 825.300(c).

(n121)Note 42. Employers are permitted by law, but not required, to require medical certification of serious health conditions and serious injury or illness. However, employers are advised to require that such certification accompany all requests for family care, medical, and military family leave. Employers who choose to require medical certification must advise employees within five days of the time that the employee requests the leave of the requirement and the consequences of failure to satisfy the requirement. See 29 C.F.R. § 825.300(c)(1)(ii). This should be done with the eligibility and rights and responsibilities notices.

(n123)Note 44. See 29 C.F.R. § 825.305(b).

(n124)Note 45. The FMLA regulations specify that in the case of foreseeable leaves, employees who fail to provide medical certification after being requested to do so by their employer may be denied the taking of leave until the required certification is provided. The regulations further provide that in the case of unforeseeable leaves, employees who fail to provide medical certification within 15 calendar days may be denied continuation of the leave. See 29 C.F.R. § 825.313(a)-(b).

(n125)Note 46. This paragraph is not required.

(n126)Note 47. Unlike the FMLA, state law does not permit an employer to require that the certification provide a diagnosis or identify the nature of the "serious health condition" at issue. See 29 C.C.R. § 7297.11; compare 29 U.S.C. § 2613(b)(3) with *Gov. Code* § 12945.2(j)(1), (k)(1). However, the CFRA regulations provide that employees may, at their option, identify the nature of the serious health condition involved. See 2 *Cal. Code Reg.* § 7297.0(a)(2). The California Confidentiality of Medical Information Act also imposes restrictions on an employer's ability to obtain medical information about an employee from a health care provider and requires employers to treat such information in a confidential manner. See *Civ. Code* § 56 *et seq.* For discussion of the Act generally, see *Wilcox, California Employment Law*, § 51.13 (Matthew Bender).

(n127)Note 48. This paragraph is not required.

(n128)Note 49. Unless and until the CFRA regulations are amended to conform to the new FMLA regulations, California employers may not require a new medical certification in each subsequent leave year. 2 *C.C.R.* § 7297.10; compare 29 C.F.R. § 825.305(e) with 29 C.F.R. § 825.305 (1995).

(n129)Note 50. This paragraph is not required.

(n130)Note 51. See 29 C.F.R. § 825.310(e).

(n131)Note 52. This paragraph is not required.

(n132)Note 53. The new FMLA amendments provide employers with increased options for responding to deficient certifications. See 29 C.F.R. § 825.305(c) and § 825.307(a)-(c). Note that unless and until the CFRA is amended to conform to the new FMLA regulations, employers in California may only contact an employee's healthcare provider through a healthcare provider representative and only with the employee's permission. 2 *C.C.R.* § 7297.10; compare 29 C.F.R. § 825.307(a) with 29 C.F.R. § 825.307(a) (1995).

(n133)Note 54. See 29 C.F.R. § 825.307(b)-(c). Second and third opinions may not be requested for military

caregiver leave. *29 C.F.R. § 825.310(d)* . California employers may only require a second or third opinion for the employee's own serious health condition. *2 C.C.R. § 7297.4(b)* .

(n134)Note 55. This paragraph is not required.

(n135)Note 56. While the new FMLA regulations permit an employer to deny leave if an employee has failed to provide the necessary authorization, see *29 C.F.R. § 825.307(a)* , denial of leave for this reason may not be permitted under the CFRA. *2 C.C.R. § 7297.10 and 29 C.F.R. § 825.307 (1995)*.

(n136)Note 57. The FMLA and the CFRA regulations require employers to provide their employee's with a "designation notice" within 5 business days of the time the employer has enough information to determine whether leave is FMLA qualifying. See *29 C.F.R. § 825.300(d)(1)* ; *2 Cal. Code Reg. § 7297.4(a)(1)(A)* . While the CFRA regulations do not specify the contents of the notice, the FMLA regulations require that the notice be in writing and contain the following information: (1) whether leave will be designated as FMLA leave and, if not, the reason why; (2) any requirements to substitute paid leave; (3) any requirement for the employee to present a fitness-for-duty certificate to be restored to employment (if the employer will require this certificate to address the employee's ability to perform the essential functions of his or her job, the employer must so indicate and include a list of the essential functions of the employee's position); and (4) the amount of leave that will be counted against the employee's FMLA leave entitlement, if known. See *29 C.F.R. § 825.301(d)(1)-(6)(1)-(6)*.

(n137)Note 58. See *29 C.F.R. § 825.308*; *2 C.C.R. § 7297.4(b)(1), (b)(2)* .

(n138)Note 59. See *29 C.F.R. § 825.308(e)* .

(n140)Note 61. Employers can require certification of an employee's ability to return to work only if this requirement is uniformly applied and if it is consistent with any applicable collective bargaining agreements. See *29 C.F.R. § 825.312(a), (e) and (g)* . If such certification is required, and the employee has been given proper notice of the requirement, the employer may deny reinstatement until the certification is provided. See *29 C.F.R. § 825.312(d)-(e)* .

(n141)Note 62. Under the FLSA, an employer may provide, at or before the time of its designation notice, a list of essential job functions and may request a certification that addresses the employee's ability to perform those functions. *29 C.F.R. § 825.312(b)* and *§ 825.300(d)(3)* . However, requesting a certification as to an employee's ability to perform his or her essential functions is not permissible under the CFRA.

(n142)Note 63. This paragraph is not required.

(n143)Note 64. See *29 C.F.R. § 825.312(e)*.

(n144)Note 65. Under the FMLA and the CFRA regulations, employees who take family care, medical, and military family leave are not entitled to any greater rights to restoration of employment than those to which they would have been entitled had they not taken the leave. See *29 U.S.C. § 2614(a)(3)(B)* ; *2 Cal. Code Reg. § 7297.2(c)(1)* . That is, if an employee's position is eliminated during a reduction-in-force or a restructuring of the employer's business while the employee is on FMLA or CFRA leave, the employer would have no obligation to reinstate the employee under the FMLA or CFRA. See *29 C.F.R. § 825.216(a)* ; *2 Cal. Code Reg. § 7297.2(c)(1)(A)* ; see also *O'Connor v. PCA Family Health Plan, Inc.* (11th Cir. 2000) 200 F.3d 1349, 1354, 1355 (affirming district court holding that because plaintiff's termination during FMLA leave was part of a valid RIF, it did not violate plaintiff's rights under FMLA); *Tomlinson v. Qualcomm, Inc.* (2002) 97 Cal. App. 4th 934 (as part of workforce reduction, employers may terminate employees who are out on FMLA leave). A California employee taking leave under the PDL must be reinstated to the same position, with certain exceptions. See *2 C.C.R. § 7291.9(a)*

(n145)Note 66. See *29 C.F.R. § 825.217* and *2 C.C.R. § 7297.2(2)* .

(n146)Note 67. See *29 U.S.C. § 2614(b)(1)(A)-(C)*; *Gov. Code § 12945.2(r)(1)(A)-(C)*. Although neither the FMLA nor the CFRA defines the term "substantial and grievous economic injury," regulations interpreting the FMLA indicate that the "substantial and grievous economic injury" test will be extremely difficult to meet. See *29 C.F.R. § 825.218*. Moreover, it appears that the "substantial and grievous economic injury" test may be a more stringent standard than the "undue hardship" showing required by the ADA and the FEHA for an employer to avoid the obligation to "reasonably accommodate" a disabled individual. See *42 U.S.C. § 12112(b)(5)*; *Gov. Code § 12940(m)*.

(n147)Note 68. The last four sentences are not required.

(n148)Note 69. This paragraph is required. See *29 C.F.R. § 825.300(3)-(4)* and *29 C.F.R. Appendix C to § 825* to the FMLA regulations.

(n149)Note 70. Unlike the FMLA, the CFRA expressly excludes pregnancy-related disabilities from its coverage. Under the FMLA, a pregnancy-related disability leave may be considered a family care leave for one's own serious health condition; under the CFRA it may not. In California, pregnancy-related disability leaves are governed by *Gov. Code § 12945*, rather than by the CFRA. A female employee is "disabled by pregnancy" under California law if, in the opinion of her health care provider, she is unable because of pregnancy to work at all or is unable to perform one or more of the essential functions of her job or to perform the functions of her job without undue risk to herself, her pregnancy, or to others. See *2 Cal. Code Reg. § 7291.2(g)*. In addition, under this provision of the FEHA, a woman is "disabled by pregnancy" if she suffers from severe morning sickness or needs time off for prenatal care. See *id.* For discussion, see *Wilcox, California Employment Law, § 8.12[3]* (Matthew Bender). Employees may be eligible for up to four months of disability leave on account of pregnancy, childbirth, or related conditions (depending on the actual period of disability), and up to an additional 12 weeks of family care or medical leave. See *Gov. Code § 12945.2(s)*. For further discussion of pregnancy leave requirements, see *Wilcox, California Employment Law, §§ 8.10-8.12* (Matthew Bender).

(n150)Note 71. Pregnancy-related disability leave may be taken intermittently or on a reduced work schedule when medically necessary, as determined by the employee's health care provider. See *2 Cal. Code Reg. § 7291.7(a)(3)*. An employer may, however, limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences or use of leave. See *id.* For examples of how the four-month period is calculated for employees who take leave intermittently or on a reduced work schedule, see *2 Cal. Code Reg. § 7291.7(a)(2)*.

(n151)Note 72. Female employees are entitled to reasonable accommodation for conditions related to pregnancy, childbirth or related medical conditions if they so request on the advice of their health care provider. See *Gov. Code § 12945(b)(1)*. If an employer has a policy permitting the transfer of temporarily disabled employees to less strenuous or less hazardous positions, the FEHA and FEHC regulations regarding pregnancy, childbirth, or related medical conditions make it unlawful to deny such a transfer to an employee affected by pregnancy. See *Gov. Code § 12945(b)(2)*; *2 Cal. Code Reg. § 7291.5(a)(9)*. Even if an employer has no transfer policy, the employer must provide such a transfer to an employee affected by pregnancy if the request for the transfer is based on the advice of a health care provider and if the transfer can be reasonably accommodated. See *Gov. Code § 12945(b)(3)*; *2 Cal. Code Reg. § 7291.6*. The duty to transfer a pregnant employee is not boundless; the law requires only "reasonable" accommodation. Thus, employers are not required to create additional employment that would not otherwise be created, discharge any other employees, transfer another employee with more seniority, or promote any employee (including the pregnant employee) to a position for which the employee is not qualified, unless the employer takes such action to accommodate other temporarily disabled employees. See *Gov. Code § 12945(b)(3)*.

(n152)Note 73. Employees with pregnancy-related disabilities are entitled to use any accrued vacation, in addition to sick leave or other paid leave, during any otherwise unpaid portion of their disability leave. See *Gov. Code § 12945(a)*, *2 Cal. Code Reg. § 7291.11(b)(2)*. An employer may not, however, require that an employee on pregnancy-related disability leave use accrued vacation, but may require the employee to use accrued sick leave. See *2 Cal. Code Reg. § 7291.11(b)*.

(n153)Note 74. An employee who has a pregnancy-related disability, but is not eligible for family care, medical, and military family leave, is not entitled to the continuation of health care benefits described in Note 25 above, unless such benefits are provided for other temporarily disabled employees who are not eligible employees under the CFRA or FMLA. If an employee is eligible for both family care leave and pregnancy disability leave and commences the pregnancy leave first, the 12-week entitlement to paid health insurance benefits begins with the commencement of the pregnancy disability leave. See *Gov. Code § 12945.2(f)(1),(2)*; see also *2 Cal. Code Reg. § 7291.12(c)*.

(n154)Note 75. Employers may require employees who plan to take a pregnancy-related leave to provide reasonable advance notice of the date the leave shall commence and the estimated duration of the leave. See *Gov. Code § 12945(a)*. The regulations interpreting the FEHA further specify that employers may require employees to provide at least 30 days' advance notice, if practicable, before a pregnancy disability leave or transfer is to begin if the need for the leave or transfer is foreseeable. See *2 Cal. Code Reg. § 7291.10(a)(2)*. If it is not practicable to provide 30 days' advance notice, however, employers may only require that notice be given as soon as practicable. See *2 Cal. Code Reg. § 7291.10(a)(3)*. Examples of when the 30-day advance notice requirement may not be practicable include situations in which there is a lack of knowledge of approximately when leave or transfer will be required to begin, there is a change in circumstances, or there is a medical emergency. See *2 Cal. Code Reg. § 7291.10(a)(3)*. Employers may require written confirmation from the employee's physician or other licensed health care practitioner that she is or will be disabled by a pregnancy-related condition so long as it has a similar policy or practice for other temporarily disabled employees. See *2 Cal. Code Reg. § 7291.10(b)*. For discussion, see *Wilcox, California Employment Law, § 8.12[6]* (Matthew Bender).

(n155)Note 76. The regulations interpreting the FEHA provide that an employee returning from pregnancy-related disability leave must be returned to her original job unless either (1) the employee would not otherwise have been employed in her position at the time reinstatement is requested due to legitimate business reasons unrelated to the employee's pregnancy disability leave, or (2) each means of preserving the job for the employee (such as leaving it unfilled or filling it with a temporary employee) would substantially undermine the employer's ability to operate the business safely and efficiently. See *2 Cal. Code Reg. § 7291.9(c)(1)(A), (B)*. The regulations also provide that if the employer is excused from returning the employee to her original job, the employer must provide the employee with a comparable position, unless either (1) there is no comparable position available, or (2) for an employer whose employee takes a pregnancy disability leave which does not qualify as a FMLA leave, a comparable position is available, but filling the available position with the returning employee would substantially undermine the employer's ability to operate the business safely and efficiently. See *2 Cal. Code Reg. § 7291.9(c)(2)(A), (B)*. It should be noted that this standard differs from the reinstatement standard in the CFRA and FMLA in that it permits filling the employee's position if holding it open would substantially undermine the employer's ability to operate the business efficiently. An employer should be cautious about relying on the less restrictive pregnancy leave reinstatement standard in determining whether to fill the absent employee's position if an employer knows or reasonably suspects that an employee will follow a pregnancy leave with a family care leave.

(n156)Note 77. Employees who are disabled within the meaning of the ADA or FEHA may be entitled to unpaid leaves of absence as a form of reasonable accommodation. See *Gov. Code §§ 12926(n), 12940(m)*; *2 Cal. Code Reg. § 7293.9*; *29 C.F.R. § 1630.2(o)*; see also *Jensen v. Wells Fargo Bank* (2000) 85 Cal. App. 4th 245, 263; *Humphrey v. Memorial Hosps. Ass'n* (9th Cir. 2001) 239 F.3d 1128, 1135-36. Neither the regulations interpreting the ADA or the FEHA specify what duration of leave will satisfy the "reasonable accommodation" requirement. Resolution of this issue, therefore, must be made on a case-by-case basis. Thus, while in some circumstances a three-month leave, or a leave of lesser duration, may suffice, in other circumstances, a longer leave may be necessary to constitute a reasonable accommodation. See, e.g., *Nunes v. Wal-Mart Stores, Inc.* (9th Cir. 1999) 164 F.3d 1243, 1247; *Norris v. Allied-Sysco Food Services, Inc.* (N.D. Cal. 1996) 948 F. Supp. 1418, 1439-40. Most courts have concluded, however, that employers are not required to provide leaves of "indefinite duration" as a form of reasonable accommodation. See, e.g., *Wood v. Green* (11th Cir. 2003) 323 F.3d, 1309, 1313-14; *Byrne v. Avon Products, Inc.* (7th Cir. 2003) 328 F.3d 379, 381; *Myers v. Hose* (4th Cir. 1995) 50 F.3d 278, 283; *Hanson v. Lucky Stores, Inc.* (1999) 74 Cal. App. 4th

215, 226-27 (finding that "[r]easonable accommodation does not require the employer to wait indefinitely for the employee's [disability] to be corrected") (citation omitted); but see *Norris*, above (reasoning that, in the case of a very large employer with high turnover and many fungible employees, an unpaid leave of an indefinite or very lengthy duration—even as long as a year—could be a reasonable accommodation); see also *Cehrs v. Northeast Ohio Alzheimer's Research Center and Windsor House, Inc.* (6th Cir. 1998) 155 F.3d 775, 782-83, reh'g, en banc denied (6th Cir. Oct. 16, 1998) (employer has burden of demonstrating that extended leave of absence constitutes undue hardship).

California law also prohibits discrimination against an employee who has filed a workers' compensation claim and limits an employer's right to terminate an employee who is absent due to an industrial or occupational injury or illness. See *Lab. Code § 132a*; *Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal. 3d 658, 667; see also *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 1161, (in addition to seeking relief under *Lab. Code § 132a*, employees discriminated against because of a disability caused by a workplace injury illness can pursue claims under the California Fair Employment and Housing Act, as well as common law wrongful discharge claims). Because ADA reasonable accommodation leaves and workers' compensation-related leaves may exceed an employee's FMLA, CFRA, or pregnancy-disability entitlement, it is recommended that employers adopt a separate policy regarding disability leaves. See *Spaziano v. Lucky Stores, Inc.* (1999) 69 Cal. App. 4th 106, 113 (an employer leave policy that "differentiates between work-related disabilities and those which occur off the job, does not discriminate against pregnant employees").

(n157)Note 78. In 2002, the Worker's Compensation Appeals Board ("WCAB") reversed its long-held position that an employer violates *California Labor Code section 132a* when it stops making employer contributions to an employee's health insurance plan when the employee is on a work-related disability leave of absence. See *Navarro v. AT&T Farming* (2002) 67 Cal. Comp. Cas. 145. In *Navarro*, the WCAB found that such claims are preempted by the Employee Retirement Income Security Act of 1974 (ERISA). Thus, if an employer has a health insurance plan that provides limited continued health coverage for its disabled employees regardless of whether the disability was work-related, an employer not covered by the FMLA or CFRA may now discontinue health insurance for employees on a work-related disability leave in accordance with its health insurance plan. Thus, if they choose, employers not covered by the FMLA or CFRA may now discontinue health insurance for employees on a work-related disability leave. Employers must still, of course, comply with their obligations under COBRA and Cal-COBRA.

(n158)Note 79. While an employer has no legal obligation to pay non-exempt employees for these legally-required absences from work, exempt employees must be paid on a "salary basis" to avoid losing their exempt status under federal law. Federal regulations specifically state that "an employer cannot make deductions from pay for absences of an exempt employee occasioned by jury duty, attendance as a witness, or temporary military leave." See 29 C.F.R. § 541.602(b)(3). Thus, unless an exempt employee performs no work in a particular workweek, the employee should receive his full salary for legally-required absences, offset only by any amounts received as jury or witness fees or as military pay. See 29 C.F.R. § 541.602(a); 29 C.F.R. § 541.602(b)(3).

(n159)Note 80. Employer obligations with respect to an employee's need for military leave may be found in 38 U.S.C. § 4301 et seq. (Uniformed Services Employment and Reemployment Rights Act of 1994) and *Mil. & Vet. Code § 394.5 and § 395.06*. For discussion of military leaves of absence, see *Wilcox, California Employment Law*, §§ 8.40-8.41 (Matthew Bender). *Labor Code § 230.3* prohibits discrimination against an employee who takes time off to perform emergency duty as a volunteer firefighter. For additional discussion, see *Wilcox, California Employment Law*, § 60.03[2][q], [y] (Matthew Bender).

(n160)Note 81. On October 9, 2007, Governor Schwarzenegger signed AB 392, adding *Section 395.10 to the California Military and Veterans Code*. AB 392 creates a new leave of absence right for spouses of military personnel while such personnel are on a leave of absence from deployment. The law applies to all employers with 25 or more employees in the United States. Employees eligible for this leave are employees who work an average of 20 hours per week and have a spouse or domestic partner who is serving as (1) a member of the U.S. Armed Forces and who has been deployed during a period of military conflict to an area designated as a combat theater or combat zone by the

President of the United States or (2) a member of the Armed Forces Reserve Components or the National Guard and has been deployed during a period of military conflict. While the statute refers expressly to "spouses" only, by virtue of the California Domestic Partner Rights and Responsibilities Act of 2003, codified at *Family Code* §§ 297 and 297.5 (extending to domestic partners the same statutory rights extended to spouses), this right also extends to registered domestic partners.

(n161)Note 82. Employers may not discharge or discriminate against an employee for taking time off, as required by law, to serve on a jury or to appear in court as a witness. See *Lab. Code* § 230 . For additional discussion, see *Wilcox, California Employment Law, § 60.03 [2][n]* (Matthew Bender).

(n162)Note 83. *Labor Code* § 230.7 prohibits discrimination against an employee who takes time off as a parent or guardian to appear at school pursuant to a teacher's request under *Education Code* § 48900.1 . Furthermore, *Labor Code* § 230.8 prohibits an employer, who employs 25 or more employees working at the same location, from discriminating against an employee who is a parent, guardian, or grandparent of a child in kindergarten or in grades 1 to 12, or attending a licensed child daycare facility, and who takes off up to 40 hours per year to participate in the child's school or daycare facility activities. The employee is required to use existing vacation, personal leave, or compensatory time off for this purpose (unless inconsistent with a collective bargaining agreement), and may also use unpaid time off "to the extent made available by his or her employer." *Lab. Code* § 230.8(b)(1) . For additional discussion, see *Wilcox, California Employment Law, § 60.03[2][q] , [v] , [y]* (Matthew Bender).

(n163)Note 84. *Labor Code* § 230.3 prohibits discrimination against an employee who takes time off to perform emergency duty as a volunteer firefighter, a reserve peace officer or emergency rescue personnel. In addition, *Labor Code* § 230.4 requires employers with 50 or more employees to provide temporary leaves of absence, up to an aggregate of 14 days per calendar year, to volunteer firefighters for the purpose of engaging in fire or law enforcement training. For additional information, see *Wilcox, California Employment Law, § 60.03[2][y]* (Matthew Bender).

(n164)Note 85. *Election Code* § 14000 requires employers to provide up to two hours of paid time off to employees whose regular work hours will otherwise deprive them of an opportunity to vote in a statewide election. For additional discussion, see *Wilcox, California Employment Law, § 3.07[1][h]* (Matthew Bender).

(n165)Note 86. California law does not require that employers provide employees with time off for bereavement leave. Most employers, however, provide bereavement leave to employees to arrange and attend the funeral of an immediate family member. Moreover, while employers are not required to pay employees taking bereavement leave, employers generally provide full pay to eligible employees for a short duration (e.g., three days). It is unclear whether the California Domestic Partner Rights and Responsibilities Act, discussed in Note 5, will require employers to extend any bereavement leave policies to domestic partners, as bereavement leaves are not mandated by law.

(n166)Note 87. *Labor Code* §§ 230 and 230.1 provide for time off for an employee who is a victim of domestic violence or sexual assault to obtain or attempt to obtain any relief, including, but not limited to, a temporary restraining order, restraining order, or other injunctive relief, to help ensure the health, safety, or welfare of the victim or his or her child. Employers with 25 or more employees must provide unpaid time off to an employee who is a victim of domestic violence or sexual assault. This includes time off for court proceedings, services from a domestic violence shelter, program or rape crisis center, counseling, medical attention, and participation in safety planning programs. The employee is required to give reasonable advance notice of the need for time off where feasible. When an unscheduled absence occurs, the employer may not take any action against the employee if the employee provides within a reasonable time a police report, a court order or other evidence from the court or prosecuting attorney that the employee appeared in court, or documentation from a medical professional, domestic violence or sexual assault victims advocate, or counselor that the employee was undergoing treatment.

(n167)Note 88. *Labor Code* § 230.2 provides for employee leave to attend judicial proceedings related to a crime, if that employee is a victim of crime, an immediate family member of a victim, a registered domestic partner of a

victim, or the child of a registered domestic partner of a victim. An employer may require that where feasible, in advance of taking leave, the employee provide it with a copy of the notice of each scheduled proceeding that is provided to the victim by the agency responsible for providing notice. If advance notice is not possible, an employer may require the employee to provide it with a notice within a reasonable time. No employee may be discharged, or in any manner discriminated against in compensation or other terms, conditions or privileges of employment, because of an absence protected by this law. See *Labor Code § 230.2(f)* .



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California Employer's Guide to Employee Handbooks and Personnel Policy Manuals

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DIVISION 2 EMPLOYEE HANDBOOKS AND PERSONNEL POLICY MANUALS

Part A. RECOMMENDED GUIDELINES

*1-2 CA Guide to Employee Handbooks § 2.09A*

**§ 2.09A LEAVES OF ABSENCE [EMPLOYERS WITH FEWER THAN FIFTY EMPLOYEES]**

**[1] Model Guideline**

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LEAVES OF ABSENCE

**I. Pregnancy-Disability Rights**

A. Leaves of Absence and Transfers

The Company recognizes that employees may be unable to work for temporary but extended periods of time due to pregnancy, childbirth, or related medical conditions ("Pregnancy-Disability"). Accordingly, for any employee who is disabled on account of pregnancy, childbirth, or related medical conditions, the Company provides Pregnancy-Disability leave for the period of actual disability, up to a maximum of four months. **[See Note n1]** Pregnancy-Disability leave may be taken intermittently, or on a reduced-hours schedule, as medically advisable. **[See Note n2]**

Moreover, an employee is entitled to a reasonable accommodation for pregnancy, childbirth, or related medical conditions if she so requests and provides the Company with medical certification from her health care provider. In addition to other forms of reasonable accommodation, a pregnant employee is entitled to transfer temporarily to a less strenuous or hazardous position or to less hazardous or strenuous duties if she so requests, the transfer request is supported by proper medical certification, and the transfer can be reasonably accommodated. **[See Note n3]**

B. Procedure for Requesting Pregnancy-Disability Leave or Transfer

Whenever possible, an employee should submit a written request for Pregnancy-Disability leave or Pregnancy-Disability transfer to the [Human Resources Manager] as soon as she is aware of the need for such leave or transfer. If the leave or transfer is foreseeable, the employee must provide 30 calendar days' advance notice to the Company of the need for Pregnancy-Disability leave or transfer. If it is not practicable for the employee to give 30 calendar days' advance notice of the need for leave or transfer, the employee must notify the Company as soon as practicable after she learns of the need for the Pregnancy-Disability leave or transfer. **[See Note n4]**

If an employee fails to provide the requisite 30 days' advance notice for a foreseeable need for leave or transfer, without any reasonable excuse for the delay, the Company reserves the right to delay the taking of the leave until at least 30 days after the date the employee provides notice of the need for the leave or transfer. **[See Note n5]**

Any request for a Pregnancy-Disability leave must be supported by medical certification from a health care provider, which shall provide the following information: (a) the date on which the employee became disabled due to pregnancy; (b) the probable duration of the period or periods of disability; and (c) an explanatory statement that, due to the disability, the employee is unable to work at all or is unable to perform any one or more of the essential functions of her position without undue risk to herself, her pregnancy, or to other persons. In the case of a Pregnancy-Disability transfer, the medical certification shall provide the following information: (a) the date on which the need to transfer became medically advisable; (b) the probable duration of the period or periods of the need to transfer; and (c) an explanatory statement that, due to the employee's pregnancy, the transfer is medically advisable. Upon expiration of the time period for the leave or transfer estimated by the health care provider, the Company may require the employee to provide another medical certification if additional time is requested for leave or transfer. **[See Note n5]**

#### C. Substitution Of Paid Leave For Pregnancy-Disability Leave

An employee taking Pregnancy-Disability leave must substitute any accrued sick pay for her leave and may, at her option, substitute any accrued vacation time for her leave. **[See Note n6]** Except to the extent that paid leave is substituted for Pregnancy-Disability leave, the Pregnancy-Disability leave will be unpaid. The substitution of paid leave for Pregnancy-Disability leave does not extend the total duration of the leave to which an employee is entitled.

#### D. Leave's Effect on Benefits

Employees on Pregnancy-Disability leave will accrue employment benefits, such as sick leave, vacation leave, and seniority only when paid leave is being substituted for unpaid leave and only if the employee would otherwise be entitled to such accrual. **[See Note n7]**

Employee benefits may be continued during the unpaid portion of the Pregnancy-Disability leave according to the provisions of the Company's various employee benefit plans.

#### E. Reinstatement After Pregnancy-Disability Leave Or Transfer

Unless the Company and the employee have already agreed upon the employee's return date, an employee who has taken a Pregnancy-Disability leave or transfer must notify the [Human Resources Manager] at least two business days before her scheduled return to work or, as applicable, transfer back to her former position. **[See Note n8]** An employee who timely returns to work at the expiration of her Pregnancy-Disability leave will be reinstated to her former position, or a comparable position, whenever possible and consistent with applicable law. **[See Note n9]**

Each employee who has taken a Pregnancy-Disability leave or transfer must be released by her doctor to return to work.

The release should be in writing and submitted to the [Human Resources Manager] on or before the employee's return from a Pregnancy-Disability leave or transfer. **[See Note n10]**

## II. Temporary Disability Leave

### A. Eligibility And Duration

In addition to Pregnancy-Disability leaves, employees may take a temporary disability leave of absence if necessary to reasonably accommodate a workplace injury or a qualified disability under the Americans With Disabilities Act or the Fair Employment and Housing Act. **[See Note n11]**

The duration of a disability leave under this section shall be consistent with applicable law, but in no event shall the leave extend past the date on which an employee becomes capable of performing the essential functions of his or her position, with or without reasonable accommodation. For a full explanation of leave rights, employees should contact the \_\_\_\_\_ [*specify, e.g., Human Resources Department*].

If the disability leave is needed due to a work-related injury, all matters relating to an employee's leave rights, including compensation, benefits, substitution of paid leave, notice and certification requirements, and reinstatement shall be governed by state workers' compensation laws. Employees having questions about such rights should contact \_\_\_\_\_ [*specify, e.g., Human Resources Department*].

### B. Leave's Effect On Pay And Benefits

*[EITHER, if the employer has no salary continuation policy]*

An employee taking temporary-disability leave must substitute any accrued sick pay and vacation pay for the leave. Except to the extent that paid leave is substituted for temporary-disability leave, the temporary-disability leave will be unpaid.

Group insurance benefits may be continued during the temporary-disability leave period. However, the cost of such coverage, including the Company's premium payment, becomes the responsibility of the employee. **[See Note n12]** The employee and the [Human Resources Department] should agree upon a payment schedule before the employee's leave begins.

*[OR, if the employer has a salary continuation policy for employees]*

For the first \_\_\_\_ [*specify, e.g., 90, or length of time specified in the employer's short-term disability plan*] days of disability leave, the employee may be eligible to receive short-term disability benefits under the Company's short-term disability plan. After \_\_\_\_ [*specify length of time in the employer's short-term disability plan*] days, the employee may be eligible to receive long-term disability benefits under the Company's long-term disability plan. For a precise description of short-term and long-term disability benefits, as well as eligibility requirements, employees should obtain a copy of the policy from the Company's disability insurance carrier or from the Human Resources Manager.

### C. Procedure for Requesting Disability Leave

Unless the circumstances render it impractical, a temporary-disability leave must be approved in advance by \_\_\_\_\_ [*specify person or department that must approve leave, e.g., the Human Resources Manager*]. Whenever possible, an employee should submit a written request for disability leave to \_\_\_\_\_ [*specify person or department that must approve leave, e.g., the Human Resources Manager*] as soon as the employee is aware of the need for such leave or transfer. Any request for a disability leave must be supported by medical certification from a health care provider, which shall provide the following information: (a) the date on which the employee became disabled; (b) the probable duration of the period or periods of disability; and (c) an explanatory statement that, due to the disability, the employee is unable to work at all or is unable to perform any one or more of the essential functions of his or her position without undue risk to the employee or to other persons. The certification should also explain what accommodations, if any, will assist the employee with performing the essential functions of his or her position.

#### D. Reinstatement After Temporary-Disability Leave

Each employee who has taken a temporary-disability leave must keep \_\_\_\_\_ [*specify person or department that must approve leave, e.g., the Human Resources Manager*] advised of the disability status and must contact \_\_\_\_\_ [*specify person or department that must approve leave, e.g., the Human Resources Manager*] at least two weeks prior to the expiration of the scheduled leave to discuss the employee's return to work. An employee desiring to return to work from temporary-disability leave shall be reinstated in accordance with applicable law and shall be given his or her former position when staffing requirements permit. The Company cannot, however, guarantee that the employee's former position, or any other position, will be available upon the expiration of the scheduled leave.

Each employee who has taken a temporary-disability leave must be released by a doctor to return to work. The release should be in writing and submitted to the \_\_\_\_\_ [*specify person or department that must approve leave, e.g., the Human Resources Manager*] on or before the employee's return from temporary-disability leave.

#### E. Other Legally Required Leaves Of Absence

*[Employers adopting this guideline should refer to Section V of the Leaves of Absence Guideline at § 2.09 of this Manual for the "Other Leaves of Absence."]* **[See Note n13]**

#### **[2] Drafting Checklist**

##### **RECOMMENDED PROVISIONS**

1. A statement that employees who are disabled on account of a Pregnancy-Disability are entitled to four months of leave **[See Note n1]**;
2. A statement regarding whether Pregnancy-Disability leave may be taken intermittently, or on a reduced-hours schedule, as well as whether the employee affected by the pregnancy is entitled to be transferred to a less strenuous position **[See Notes n2,n3]**;
3. The procedures for requesting a Pregnancy-Disability or Temporary-Disability leave **[See Notes n4,n5,n11]**;
4. A statement as to whether employees are required to substitute paid leave for otherwise unpaid Pregnancy-Disability leave **[See Note n6]**;

5. A description of the effect of leave on employees' pay and benefits [**See Notes n7,n11**];
6. A statement that employees returning from a Pregnancy-Disability leave or Temporary-Disability leave are entitled to reinstatement to the same or a comparable position consistent with applicable law [**See Notes n8,n9,n11**];
7. A statement regarding the eligibility requirements and duration of a Temporary-Disability leave [**See Note n11**]; and
8. Guidelines regarding other legally required leaves of absence [**See Note n13**].

### **OPTIONAL PROVISIONS**

1. A requirement that, before returning to work from a Pregnancy-Disability leave or a Temporary-Disability leave, the employee provide medical certification that he or she is able to return to work [**See Notes n10,n11**]; and
2. Provisions regarding other available leaves of absence (e.g., bereavement leave) [**See Note n13**].

### **[3] Notes**

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Labor & Employment LawLeaves of AbsenceGeneral OverviewLabor & Employment LawLeaves of AbsenceFamily & Medical Leave ActCoverage & DefinitionsDenials & RequestsLabor & Employment LawLeaves of AbsenceFamily & Medical Leave ActCoverage & DefinitionsRestoration of Job & BenefitsLabor & Employment LawLeaves of AbsenceShort-Term Leave

#### **FOOTNOTES:**

(n1)Note 1. California employers with five or more employees must provide employees with a reasonable leave of absence of up to four months, as needed, for disability due to pregnancy, childbirth, or related medical condition. See *Gov. Code § 12926(d)* ("employer" does not include a religious association or corporation not organized for profit); *Gov. Code § 12945(a)*. Thus, even though an employer may not be subject to the requirements of FMLA or CFRA, any employer with five or more employees is still required to provide pregnancy-disability leave to employees. A female employee is "disabled by pregnancy" if, in the opinion of her health care provider, she is unable because of pregnancy to work at all or is unable to perform one or more of the essential functions of her job or to perform the functions of her job without undue risk to herself, her pregnancy, or to others. See *2 Cal. Code Reg. § 7291.2(g)*. In addition, under this provision of the FEHA, a woman is "disabled by pregnancy" if she suffers from severe morning sickness, or needs time off for prenatal care. *Id.* See also, *Wilcox, California Employment Law § 8.12[3]* (Matthew Bender).

(n2)Note 2. Pregnancy-disability leave may be taken intermittently or on a reduced work schedule when medically necessary as determined by the employee's health care provider. See *2 Cal. Code Reg. § 7291.7(a)(3)*. An employer may, however, limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences or use of leave. See *id.* For examples of how the four-month period is calculated for employees who take leave intermittently or on a reduced work schedule, see *2 Cal. Code Reg. § 7291.7(a)(2)*.

(n3)Note 3. In addition to the leave rights referenced in Note 1, female employees are entitled to reasonable accommodation for conditions related to pregnancy, childbirth, or related medical conditions if they so request on the

advice of their health care provider. See *Gov. Code § 12945(b)(1)* . If an employer has a policy permitting the transfer of temporarily disabled employees to less strenuous or less hazardous positions, the FEHA and FEHC regulations regarding pregnancy, childbirth, or related medical conditions make it unlawful to deny such a transfer to a pregnant employee who requests such a transfer. See *Gov. Code § 12945(b)(2)* ; 2 *Cal. Code Reg. § 7291.5(a)(9)*. Even if an employer has no transfer policy, the employer must provide such a transfer to a pregnant employee if the request for the transfer is based on the advice of a health care provider and if the transfer can be reasonably accommodated. See *Gov. Code § 12945(b)(3)* ; 2 *Cal. Code Reg. § 7291.6*; see also *Wilcox, California Employment Law, § 41.51[5]* (Matthew Bender).

The duty to transfer a pregnant employee is not boundless; the law requires only "reasonable" accommodation. Thus, employers are *not* required to create additional employment that would not otherwise be created, discharge any other employee, transfer another employee with more seniority, or promote any employee (including the pregnant employee) to a position for which the employee is not qualified, unless the employer takes such action to accommodate other temporarily disabled employees. See *Gov. Code § 12945(b)(3)* .

(n4)Note 4. Employers may require employees who plan to take a pregnancy-related leave to provide reasonable advance notice of the date the leave shall commence and the estimated duration of the leave. See *Gov. Code § 12945(a)* . The regulations interpreting the FEHA further specify that employers may require employees to provide at least 30 days' advance notice, if practicable, before a pregnancy disability leave or transfer is to begin if the need for the leave or transfer is foreseeable. See 2 *Cal. Code Reg. § 7291.10(a)(2)* . If it is not practicable to provide 30 days' advance notice, however, employers may only require that notice be given as soon as practicable. See 2 *Cal. Code Reg. § 7291.10(a)(3)* . Examples of when the 30-day advance notice requirement may not be practicable include situations in which there is a lack of knowledge of approximately when the leave or transfer will need to begin, there is a change in circumstances, or there is a medical emergency. See 2 *Cal. Code Reg. § 7291.10(a)(3)* . Employers may require an employee to provide written confirmation from her physician or other licensed health care practitioner that she is or will be disabled by a pregnancy-related condition, so long as the employer has a similar policy or practice for other temporarily disabled employees. See 2 *Cal. Code Reg. § 7291.10(b)* . For discussion, see *Wilcox, California Employment Law, § 8.12[6]* (Matthew Bender).

(n9)Note 5. An employer may require, as a condition of granting a pregnancy disability leave or transfer, that the employee provide medical certification of the need for leave or transfer if the employer requires certification of other similarly situated employees. See 2 *Cal. Code Reg. § 7291.10(b)* . The policy as drafted satisfies the requirements of the FEHC regulations relating to the information that an employer can request in a medical certification, as well as the notice requirements of the FEHC regulations. See 2 *Cal. Code Reg. §§ 7291.10(a)* , *7291.2(d)(1)*.

(n10)Note 6. Employees with pregnancy-related disabilities are entitled to use any accrued vacation leave, in addition to sick leave or other paid leave, during any otherwise unpaid portion of their disability leave. See *Gov. Code § 12945(a)* ; 2 *Cal. Code Reg. § 7291.11(b)(2)*. An employer may not, however, require that an employee on pregnancy-related disability leave use accrued vacation leave, but may require the employee to use accrued sick leave. See 2 *Cal. Code Reg. § 7291.11(b)* .

(n11)Note 7. An employee who has a pregnancy-related disability, but is not eligible for family care and medical leave, is not entitled to the continuation of health care benefits unless such benefits are provided for other temporarily disabled employees. See 2 *Cal. Code Reg. § 7291.11(c)* .

(n12)Note 8. Unless the employee and the employer have agreed on a date for the employee's return from a pregnancy disability leave, an employer must reinstate the employee to her former position or a comparable position within two business days, where feasible, after the employee notifies the employer of her readiness to return to work. See 2 *Cal. Code Reg. § 7291.9(b)(2)* . Upon the employee's reinstatement, benefits must be resumed in the same manner and at the same levels as provided when the leave began, without any new qualification period, physical exam, etc. See 2 *Cal. Code Reg. § 7291.11(d)* .

(n13)Note 9. The regulations interpreting the FEHA provide that an employee returning from pregnancy-related disability leave must be returned to her original job unless either (1) the employee would not otherwise have been employed in her position at the time reinstatement is requested for legitimate business reasons unrelated to the employee's pregnancy disability leave (such as a layoff pursuant to a plant closure), or (2) each means of preserving the job for the employee (such as leaving it unfilled or filling it with a temporary employee) would substantially undermine the employer's ability to operate the business safely and efficiently. See *2 Cal. Code Reg. § 7291.9(c)(1)(A), (B)*. The regulations also provide that if the employer is excused from returning the employee to her original job, the employer must provide the employee with a comparable position, unless either (1) there is no comparable position available, or (2) for an employer whose employee takes a pregnancy disability leave that does not qualify as a FMLA leave, a comparable position is available, but filling the available position with the returning employee would substantially undermine the employer's ability to operate the business safely and efficiently. See *2 Cal. Code Reg. § 7291.9(c)(2)(A), (B)*. It should be noted that this standard differs from the reinstatement standard in the CFRA and FMLA in that it permits filling the employee's position if holding it open would substantially undermine the employer's ability to operate the business efficiently.

(n26)Note 10. As a condition of an employee's return from a pregnancy-disability leave or transfer, an employer may require that the employee obtain a release to "return to work" from a health care provider stating that she is able to resume her original job duties. See *2 Cal. Code Reg. § 7291.10(c)*. The employer may only require such certification if the employer has a uniformly applied practice or policy of requiring such releases from other similarly situated employees returning to work after a non-pregnancy related disability leave. See *2 Cal. Code Reg. § 7291.10(c)*.

(n27)Note 11. See Note 41 of Section 2.09 of this Guide.

(n28)Note 12. See Note 42 of § 2.09 of this Guide.

(n29)Note 13. See § 2.09 of this Guide, Notes 43-52. Although not required by either the FMLA or CFRA, employers with fewer than fifty employees may choose to provide leave to employees who qualify for wage replacement under Paid Family Leave (PFL). See § 2.09 of the Guide, Note 19.



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California Employer's Guide to Employee Handbooks and Personnel Policy Manuals

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DIVISION 2 EMPLOYEE HANDBOOKS AND PERSONNEL POLICY MANUALS

Part A. RECOMMENDED GUIDELINES

*1-2 CA Guide to Employee Handbooks § 2.10*

## § 2.10 OPEN DOOR

### [1] Model Guideline

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#### OPEN DOOR

The Company has an Open Door Policy that encourages employees to participate in decisions affecting them and their daily professional responsibilities. Employees who have job-related concerns or complaints are encouraged to discuss them with their supervisor or any other management representative with whom they feel comfortable. The Company believes that employee concerns are best addressed through this type of informal and open communication. **[See Note n1]**

Employees are encouraged to raise work-related concerns with their immediate supervisor, or with a supervisor or other management representative of their choice, as soon as possible after the events that cause the concern. Employees are further encouraged to pursue discussion of their work-related concerns until the matter is fully resolved. Although the Company cannot guarantee that in each instance the employee will be satisfied with the result, the Company will attempt in each instance to explain the result to the employee if the employee is not satisfied. The Company will also attempt to keep all such expressions of concern, the results of any investigation, and the terms of the resolution confidential. In the course of investigating and resolving the matter, however, some dissemination of information to others may be necessary or appropriate. **[See Note n2]** [No employee will be disciplined or otherwise penalized for raising a good-faith concern]. **[See Note n3]**

Employees who conclude that work-related concerns should be brought to the attention of the Company by written complaint and formal investigation may avail themselves of the "Internal Complaint Review Procedure" set forth in this Handbook/Manual.

### [2] Drafting Checklist

**RECOMMENDED PROVISIONS**

1. A definition and statement of purpose [See Note n1];
2. A designation of the management representatives with whom the employee is free to raise work-related problems;
3. A confidentiality provision; and
4. A reference to the Internal Complaint Review Procedure.

**OPTIONAL PROVISIONS**

1. A restriction against retaliation [See Note n3].

**[3] Notes****Legal Topics:**

For related research and practice materials, see the following legal topics:

Labor & Employment Law Employment Relationships General Overview Labor & Employment Law Wrongful Termination Breach of Contract Employer Handbooks

**FOOTNOTES:**

(n1)Note 1. For discussion of open door policies, see *Wilcox, California Employment Law, § 62.03[4]*, [b] (Matthew Bender).

(n2)Note 2. For discussion of confidentiality in connection with handling internal complaints, see § 2.11[3] of this Guide, Note 1.

(n3)Note 3. Although employers should not retaliate against employees for expressing good-faith concerns, inclusion of a non-retaliation provision may make it more difficult either to discipline an employee for expressing complaints that are not made in good faith or to take adverse action against an employee who happened to complain, even though the action taken is, in fact, unrelated to the employee's complaint. Regardless of whether such a provision is included, the employer has an obligation under both federal and state law not to retaliate against employees who complain about discrimination. See 29 U.S.C. § 623(d) (ADEA); 42 U.S.C. § 2000e-3 (Title VII); 42 U.S.C. § 12203(a) (ADA); Gov. Code § 12940(h) (FEHA); see also discussion in *Wilcox, California Employment Law, §§ 41.1-41.132* (Matthew Bender).



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DIVISION 2 EMPLOYEE HANDBOOKS AND PERSONNEL POLICY MANUALS

Part A. RECOMMENDED GUIDELINES

*1-2 CA Guide to Employee Handbooks § 2.11*

## **§ 2.11 INTERNAL COMPLAINT REVIEW PROCEDURE**

### **[1] Model Guideline**

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#### INTERNAL COMPLAINT REVIEW

##### A. Purpose and Scope

The purpose of this Internal Complaint Review Policy is to afford all employees of the Company the opportunity to seek internal resolution of their work-related concerns. This policy is intended to supplement the Open Door Policy set forth in this Handbook/Manual, which states the Company's philosophy that all employees have free access to their immediate supervisors or to other Company supervisors of their choice to informally express their work-related concerns.

##### B. Procedure

#### **1. Filing of Complaint**

Employees should file written complaints with \_\_\_\_\_ [*specify, e.g., the Personnel Department*] as soon as possible after the events that give rise to the employee's work-related concerns. The written complaint should set forth in detail the bases for the employee's complaint.

#### **2. Investigation**

The \_\_\_\_\_ [*specify, e.g., the Personnel Department*] will date and log all written complaints and send the employee an acknowledgment that the complaint is under review.

The \_\_\_\_\_ [*specify, e.g., the Personnel Department*] or his/her/its designee will investigate the complaint, meeting separately with the employee and with others who either are named in the complaint or who may have knowledge of the facts set forth in the complaint. The Company will attempt to treat all internal complaints and their investigation as confidential, recognizing, however, that in the course of investigating and resolving internal complaints some dissemination of information to others may be necessary or appropriate. **[See Note n1]**

On completion of the investigation, the \_\_\_\_\_ [*specify, e.g., the Personnel Department*] will orally report its findings and conclusions to the employee. If the complaint is resolved to the employee's satisfaction, the terms of the resolution should be recorded and signed by both the employee and a representative of the \_\_\_\_\_ [*specify, e.g., the Personnel Department*]. **[See Notes n2,n3]**

### C. Appeal

If the complaint is not resolved to the employee's satisfaction, the employee may submit a written request for review of the complaint to the \_\_\_\_\_ [*specify designated manager*]. On completion of the appeal review, the employee should receive an oral explanation of the conclusion reached and the reasons for that conclusion. Decisions resulting from appeal reviews by the \_\_\_\_\_ [*specify designated manager*] will be final. **[See Notes n4,n5]**

### [D. Non-Retaliation

If an employee has filed a complaint in good faith, the employee will not be disciplined or otherwise penalized for lodging the complaint. If an employee believes that he or she is being retaliated against for lodging a complaint, the employee should immediately notify the \_\_\_\_\_ (*specify, e.g., Personnel Department.*) **[See Note n6]**

### **[2] Drafting Checklist**

#### RECOMMENDED PROVISIONS

1. A definition and statement of purpose;
2. A confidentiality provision **[See Note n1]**;
3. The procedures to be followed by the employee and the Company **[See Notes n2,n3,n4]**; and
4. A provision for appeal to a designated manager **[See Note n4]**.

#### OPTIONAL PROVISIONS

1. A restriction on the types of complaints that may be raised through this process (e.g., discipline, harassment, and so forth);
2. A description of any additional steps that the Company may wish to include;
3. A provision for an internal complaint review hearing or meeting;

4. Time limits that the employee or employer must observe in the process;
5. An arbitration provision [See Note n5]; and
6. A nonretaliation provision [See Note n6].

### [3] Notes

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law  
 Collective Bargaining & Labor Relations  
 Arbitration  
 General Overview  
 Labor & Employment Law  
 Discrimination  
 Title VII of the Civil Rights Act of 1964  
 Remedies  
 Alternative Dispute Resolution  
 Labor & Employment Law  
 Employment Relationships  
 Employment Contracts  
 Conditions & Terms  
 Arbitration Provisions  
 General Overview  
 Labor & Employment Law  
 Wrongful Termination  
 Breach of Contract  
 Employer Handbooks  
 Labor & Employment Law  
 Wrongful Termination  
 Breach of Contract  
 Express Contracts

#### FOOTNOTES:

(n1)Note 1. An employer should not promise strict confidentiality because some disclosure of the internal complaint ordinarily will be necessary in order to investigate and resolve it. At the same time, employers should restrict dissemination of such information to those who have a clear need to know, and should consider maintaining separate secure files on internal complaints, rather than keeping such information in the personnel file where persons who do not need to know the information are more likely to see it. If information regarding internal investigations is disclosed improperly to persons who do not need to know it, the employer faces a potential risk of liability for invasion of privacy, intentional and negligent infliction of emotional distress, and defamation, among other things. For a full discussion of issues relating to employee privacy, see *Wilcox, California Employment Law, Chs. 50, 51* (Matthew Bender).

(n2)Note 2. In addition to dating and logging the complaint, a record should be kept of the investigation and the resolution of the complaint. However, the employer should be aware that such documents are ordinarily discoverable in litigation. Accordingly, admissions against interest and other damaging statements should be avoided. For a discussion of issues relating to the discovery of personnel documents in wrongful termination litigation, see generally *Wilcox, California Employment Law, § 61.04[1][c]* (Matthew Bender).

(n3)Note 3. An employer's complaint procedure must be reasonable--that is, able to be understood by large segments of the employer's workforce. What is "reasonable" depends on the employment circumstances and the capabilities of the employees. See *Adams v. O'Reilly Auto., Inc.* (8th Cir. 2008) 538 F.3d 926 (granting summary judgment to employer in part because employer complaint procedure was reasonable: the complaint procedure included multiple channels for reporting sexual harassment and contained confidentiality and no retaliation provisions, and was widely disseminated through training videos and handbooks for all new employees as well as by posters on permanent display in the workplace); *EEOC v. V & J Foods, Inc.* (7th Cir. 2007) 507 F.3d 575 (holding that employee's failure to follow employer's established complaint procedures was not fatal to employee's hostile work environment claim because employer's procedures were confusing and not written to be understood by the employer's typical employee, an average teenager).

(n4)Note 4. This model guideline has only two levels of response, the personnel manager and a higher-level designated manager. In smaller companies, the designated manager might be the president of the company. In larger companies, the designated manager might be a department or division head, with the employer adding a third and final level of appeal to the president of the company, the vice president of human resources, or some other appropriate corporate officer. For additional discussion of different types of grievance procedures, see *Wilcox, California*

*Employment Law*, § 62.03[4][a] (Matthew Bender).

(n9)Note 5. This guideline does not address what occurs if an employee ultimately is dissatisfied with the employer's resolution of his or her complaint. The employee may, for example, pursue the complaint through litigation. In order to avoid court action, employers may want to offer employees final and binding arbitration as a means of settling an existing claim. The most effective way to make arbitration mandatory and exclusive is, after a specific claim has arisen, to enter into a written settlement and arbitration agreement signed by both the employee and the employer. See generally *Code Civ. Proc. § 1281* (validity of arbitration agreements in absence of grounds for revocation). Short of that, an employer can place an arbitration clause in an employee handbook or personnel manual, but it is not clear under current law that this would bind employees--that is, require that they use arbitration rather than go to court. Several courts have concluded that arbitration clauses in handbooks and manuals are merely optional--something an employee can use or not use as he or she sees fit. See, e.g., *Nelson v. Cyprus Bagdad Copper Corp.* (9th Cir. 1997) 119 F. 3d 756, 761-62 (holding that arbitration provision contained solely in employee handbook unilaterally issued by employer is not enforceable) *cert. denied* (1998) 523 U.S. 1072, 118 S. Ct. 1511, 140 L. Ed. 2d 665 . While this may have a salutary effect--resolving some claims that otherwise would go to litigation--it is less beneficial from the employer's perspective than a provision that avoids litigation altogether.

For additional discussion of formal grievance procedures, including arbitration, see *Wilcox, California Employment Law*, § 62.03[4][a] (Matthew Bender). For a discussion of the effect of arbitration agreements as a bar to civil actions for wrongful termination, see *Wilcox, California Employment Law*, §§ 60.09[8] , 90.10 -90.20 (Matthew Bender); see also *Armendariz v. Foundation Health Psychare Services, Inc.* (2000) 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669 (discussing requirements for enforceability of mandatory employment arbitration agreements); *Ontiveros v. DHL Express (USA), Inc.*, (2008) 164 Cal. App. 4th 494 (same).

(n10)Note 6. Although employers should not retaliate against employees for expressing good-faith concerns, inclusion of a non-retaliation provision may make it more difficult either to discipline an employee for expressing complaints that are not made in good faith or to take adverse action against an employee who has complained, even though the action taken is, in fact, unrelated to the complaint. Regardless of whether such a provision is included, the employer has an obligation under both federal and state law not to retaliate against employees who complain about discrimination. See 29 U.S.C. § 623(d) (ADEA); 42 U.S.C. § 2000e-3 (Title VII); 42 U.S.C. § 12203(a) (ADA) ; *Gov. Code § 12940(h)* (FEHA); see also discussion in *Wilcox, California Employment Law*, §§ 41.130-41.132 (Matthew Bender).



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California Employer's Guide to Employee Handbooks and Personnel Policy Manuals

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DIVISION 2 EMPLOYEE HANDBOOKS AND PERSONNEL POLICY MANUALS

Part A. RECOMMENDED GUIDELINES

*1-2 CA Guide to Employee Handbooks § 2.12*

## § 2.12 TERMINATION, DISCIPLINE, AND RULES OF CONDUCT

### [1] Model Guideline

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#### TERMINATION, DISCIPLINE, AND RULES OF CONDUCT

##### I. Termination

###### A. Voluntary Termination

The Company will consider an employee to have voluntarily terminated his or her employment if an employee does any of the following: **[See Note n1]**

- (1) Elects to resign from the Company;
- (2) Fails to return from an approved leave of absence on the date specified by the Company; or
- (3) Fails to report for work without notice to the Company for three consecutive days.

###### B. Involuntary Termination

An employee may be terminated involuntarily for reasons that may include poor performance, misconduct, or other violations of the Company's rules of conduct as set forth below. **[See Note n2]** [Notwithstanding this list of rules, the Company reserves the right to discharge or demote any employee with or without cause and with or without prior notice.] **[See Note n3]**

### C. Termination Due to Reorganizations, Economics, or Lack of Work

From time to time, the Company may need to terminate an employee as a consequence of reorganizations, job eliminations, economic downturns in business, or lack of work. Should the Company consider such terminations necessary, the Company will attempt to provide all affected employees with advance notice when practical. **[See Note n4]** [Layoff benefits associated with such terminations, if any, will be as specified in the notice.] **[See Note n5]**

## II. Discipline and Rules of Conduct

Employees are expected to observe certain standards of job performance and good conduct. When performance or conduct does not meet Company standards, the Company will endeavor, when it deems appropriate, to provide the employee a reasonable opportunity to correct the deficiency. If, however, the employee fails to make the correction, he or she will be subject to discipline up to and including termination.

The rules set forth below are intended to provide employees with notice of what is expected of them. Necessarily, however, such rules cannot identify every type of unacceptable conduct and performance. Therefore, employees should be aware that conduct not specifically listed below but which adversely affects or is otherwise detrimental to the interests of the Company, other employees, or customers, may also result in disciplinary action.

### A. Job Performance

Employees may be disciplined for poor job performance, including but not limited to the following:

- (1) Unsatisfactory work quality or quantity;
- (2) Poor attitude (for example, rudeness or lack of cooperation);
- (3) Excessive absenteeism, tardiness, or abuse of rest break and meal period policies; **[See Note n6]**
- (4) Failure to follow instructions or Company procedures; or
- (5) Failure to follow established safety regulations.

### B. Misconduct

Employees may be disciplined for misconduct, including but not limited to the following:

- (1) Insubordination;
- (2) Dishonesty;
- (3) Theft;
- (4) Discourtesy;

## 1-2 CA Guide to Employee Handbooks § 2.12

- (5) Misusing or destroying Company property or the property of another on Company premises;
- (6) Violating conflict of interest rules;
- (7) Disclosing or using confidential or proprietary information without authorization;
- (8) Falsifying or altering Company records, including an application for employment;
- (9) Interfering with the work performance of others;
- (10) Altercations;
- (11) Harassing, including sexually harassing, employees or customers;
- (12) Being under the influence of, [manufacturing, dispensing, distributing], using, or possessing alcohol or illegal [or controlled] substances on Company property or while conducting Company business; **[See Note n7]**
- (13) Gambling on Company premises or while conducting Company business;
- (14) Sleeping on the job or leaving your work location/work site without authorization; **[See Note n8]**
- (15) Possessing a firearm or other dangerous weapon on Company property or while conducting Company business; [or]
- (16) Being convicted of a crime that indicates unfitness for the job or raises a threat to the safety or well-being of the Company, its employees, customers, or property; [or]
- (17) Failing to report to the Company, within five days, any conviction under any criminal drug statute for a violation occurring in the workplace]. **[See Note n7]**

### C. Attendance

In addition to the general rules stated above, employees may be disciplined for failing to observe the following specific requirements relating to attendance:

- (1) Reporting to work on time, observing rest break and meal period policies, and obtaining approval to leave work early; and
- (2) Notifying the supervisor in advance of anticipated tardiness or absence.

### D. Discipline Procedure

Except as set forth below, discharge or demotion for poor performance ordinarily will be preceded by an oral warning and a written warning. **[See Note n9]**

The Company reserves the right to proceed directly to a written warning, demotion, or termination for misconduct or performance deficiency, without resort to prior disciplinary steps, when the Company deems such action appropriate.

### III. Exit Interview

Employees who leave the Company for any reason may be asked to participate in an exit interview. **[See Note n10]** This interview is intended to permit terminating employees the opportunity to communicate their views regarding their work with the Company, including job duties, job training, job supervision, and job benefits. At the time of the interview, employees are expected to return all Company-furnished property, such as uniforms, tools, equipment, I.D. cards, keys, credit cards, documents, and handbooks. Arrangements for clearing any outstanding debts with the Company and for receiving final pay also will be made at this time. **[See Note n11]**

### IV. Employment at Will

Nothing in this Guideline is intended to alter the at-will status of employment with the Company. Either you or the Company may terminate the employment relationship at any time with or without cause and with or without prior notice. The Company reserves the right to terminate any employment relationship, to demote, or to otherwise discipline an employee without resort to the above disciplinary procedures.] **[See Note n3]**

### V. Severance Pay **[See Note n12]**

In the event of an involuntary termination for reasons other than misconduct or other violation of the Company's rules of conduct or a termination due to reorganizations, economics, or lack of work, an employee will be provided severance pay in accordance with the severance pay schedule and policies in effect at the time of the termination. **[See Note n13]** This severance pay is provided voluntarily by the Company to assist employees through the period following a termination. Employees who are entitled to severance pay, pay in lieu of notice, or other payments as a consequence of their termination, or under any other contractual or legal requirement, are not entitled to severance pay under this provision, except and only to the extent that the severance pay provided under this provision exceeds any severance pay, pay in lieu of notice, or other compensation to which the employees may otherwise be entitled as a consequence of their termination. **[See Note n14]** Employees will be notified at or before the time of their termination of the amount of severance pay they will receive in connection with their termination. Currently, severance pay is provided in accordance with the schedule set forth below:

Years of Employment	Amount of Severance Pay
Less than One Year	No severance pay
One to Five Years	One Week for each Year of Employment
Five to Ten Years	Two Weeks for each Year of Employment
More than Ten Years	Three Weeks for each Year of Employment]

### **[2] Drafting Checklist**

#### **RECOMMENDED PROVISIONS**

##### A. Termination

1. A statement of the circumstances constituting voluntary termination **[See Note n1]**;

2. A statement of possible reasons for involuntary termination;
3. A reservation of right to terminate due to reorganizations, economics, or lack of work [**See Note n4,n5**]; and
4. A provision for an exit interview [**See Note n10**].

#### B. Discipline and Rules of Conduct

1. A statement that employees must follow the employer's rules of conduct;
2. A provision allowing employees to correct deficient performance or conduct if possible;
3. A reservation of the right to discipline employees for conduct not specified;
4. A reservation of the right to skip the progressive discipline steps when the Company believes it appropriate to do so;
5. A statement of reasons for which employees may be disciplined for poor job performance;
6. A statement of grounds on which employees may be disciplined for misconduct;
7. Attendance rules, which may serve as a basis for discipline; and
8. A description of discipline procedure [**See Note n9**].

### OPTIONAL PROVISIONS

#### A. Termination

1. A provision requesting or requiring that employees give two weeks' notice of voluntary termination;
2. A provision that the employer will give the employee two weeks' notice of involuntary termination, or severance pay in lieu of notice [**See Note n5**];
3. A schedule of severance pay [**See Notes n5,n13,n14**];
4. A reservation of right to terminate employees at will, and to demote or to otherwise discipline an employee without resort to specific disciplinary procedures [**See Note n3**]; and
5. A policy setting forth severance pay rights [**See Notes n5,n12,n13,n14**].

#### B. Discipline and Rules of Conduct

1. A provision for suspending an employee pending investigation of misconduct or violation of rules; and
2. A provision permitting certain managerial employees to be terminated after one warning only.

### [3] Notes

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Labor & Employment Law Discrimination Disability Discrimination Coverage & Definitions Disabilities Alcohol & Drug Abuse Labor & Employment Law Discrimination Disability Discrimination Defenses & Exceptions Alcohol & Drug Use Labor & Employment Law Employment Relationships At-Will Employment General Overview Labor & Employment Law Employment Relationships At-Will Employment Duration of Employment Labor & Employment Law Wrongful Termination Breach of Contract Employer Handbooks Labor & Employment Law Wrongful Termination Breach of Contract For Cause Standard Labor & Employment Law Wrongful Termination Breach of Contract Implied Contracts Labor & Employment Law Wrongful Termination Defenses Employee Misconduct

**FOOTNOTES:**

(n1)Note 1. For discussion of issues relating to "voluntary" termination, see *Wilcox, California Employment Law*, § 62.05[1] (Matthew Bender).

(n2)Note 2. The Americans With Disabilities Act (ADA), as amended, and the California Fair Employment and Housing Act (FEHA) potentially limit an employer's right to discipline or terminate an employee for performance problems or misconduct attributable to a disability. See 42 U.S.C. § 12112(a), (b); 29 C.F.R. § 1630.4; *Gov. Code* § 12940(a). Whenever considering termination or discipline, therefore, employers should preliminarily determine whether the employee has an underlying mental or physical disability that might explain the employee's problems. It is important that the employee's immediate supervisor be consulted as a matter of course. See *Kimbro v. Atlantic Richfield Co.* (9th Cir. 1989) 889 F.2d 869, 874-77 (supervisor's knowledge that employee's disability caused excessive absences and tardiness was imputed to employer who had no actual knowledge, subjecting employer to liability for terminating employee), *cert. denied* (1990) 498 U.S. 814. If the possibility of a disability exists, a more thorough investigation of the employee's situation should be undertaken and legal counsel consulted to determine the employer's legal rights and obligations under the ADA and FEHA.

(n3)Note 3. Under *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 681-682, 254 Cal. Rptr. 211, 765 P.2d 373, termination guidelines that specify grounds for termination and/or provide for progressive discipline may by themselves be sufficient to create an implied contract that employees may be terminated only for cause. Further, even if the Handbook includes a general "at-will" statement, such as the one set forth in Section 2.03 of this Guide, it is still possible that a court might find the "at-will" statement to be contradicted by the handbook's termination guidelines, and so leave it to a jury to decide which actually represents the employer's and employee's intended "contract." See *Walker v. Blue Cross of California* (1992) 4 Cal. App. 4th 985, 993-94, 6 Cal. Rptr. 2d 184 (despite language in employee handbook that employment relationship is at-will, existence of implied contract to terminate only for cause must be determined at trial); *Wilkerson v. Wells Fargo Bank* (1989) 212 Cal. App. 3d 1217, 1226-28, 261 Cal. Rptr. 185 (at-will provisions in employee handbook and operations manual do not establish at-will employment as a matter of law but are factors to be considered by jury in determining terms of employment contract), *disapproved on other grounds*, *Cotran v. Rollins Hudig Hall Int'l, Inc.* (1998) 17 Cal. 4th 93, 102-03, 69 Cal. Rptr. 2d 900, 948 P.2d 412. Accordingly, if an employer wants to have termination guidelines (which most should) while at the same time preserving "at-will" status, the employer should consider including the bracketed language in Paragraph I(B) of the guideline relating to termination without cause, together with the language in Paragraph IV. This may not eliminate the problem altogether, but it should at least improve the odds in the employer's favor. See *Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal. 4th 317, 340 n.11, 100 Cal. Rptr. 2d 352, 8 P.3d 1089 ("The more clear, prominent, complete, consistent, and all-encompassing the disclaimer language set forth in handbooks, policy manuals, and memoranda disseminated to employees, the greater the likelihood that workers could not form any reasonable contrary understanding"). Moreover, whether or not an employer adopts at-will policies, it is always a good practice to investigate an employee's alleged misconduct prior to taking disciplinary action. This will also improve the employer's position should an employee file a wrongful termination action. See *Cotran v. Rollins Hudig Hall Int'l, Inc.* (1998) 17 Cal. 4th 93, 108, 69 Cal. Rptr. 2d 900, 948 P.2d 412 (an employer must come to a "reasoned conclusion ... supported

by substantial evidence gathered through an adequate investigation that included notice of the claimed misconduct and a chance for the employee to respond").

It is also recommended that employers include a statement clearly reserving the right to demote or otherwise discipline an employee without resort to specified disciplinary procedures. See *Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal. 4th 454, 46 Cal. Rptr. 2d 427, 904 P.2d 834 (recognizing a cause of action for wrongful demotion).

A more effective means of creating and preserving at-will status is to include an at-will clause in the employer's handbook or manual and to require employees to sign an Acknowledgment of Receipt form patterned after the model in Section 2.19 of this Guide. A signed Acknowledgment form permits the employer to argue that the employee had clear notice of his or her status, that no contrary agreements existed at the time of the signature, and that no inconsistent agreements may be formed in the future without the written authorization of a designated company officer. See, e.g., *Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal. App. 4th 1359, 1387-88, 88 Cal. Rptr. 2d 802, 824-26 (employee could not overcome presumption of at-will employment status, in part, because employee signed form acknowledging receipt of employee handbook containing at-will language); see also *Dore v. Arnold Worldwide, Inc.*, 39 Cal. 4th 384, 46 Cal. Rptr. 3d 668, 139 P.3d 56 (2006) (employee's countersignature on offer letter containing clear and unambiguous language that the employment was at-will manifested employee's understanding of and agreement to at-will status). To view California Supreme Court briefs related to the *Dore* case that are available on *Lexis.com*, go to 2006 CA S. Ct. Briefs 124494 .

(n4)Note 4. Both the federal Worker Adjustment and Renotification Act (the "federal WARN Act") ( 29 U.S.C. §§ 2101 et seq. ) and the California WARN Act ( *Labor Code* §§ 1400 et seq. ) require certain employers to give written notice to employees under certain specified circumstances prior to reductions-in-force or relocations. For discussion, see *Wilcox, California Employment Law*, § 60.03[3][s] (Matthew Bender).

(n9)Note 5. The employer generally is not required to provide layoff or severance pay by law. If layoff pay is set forth in the handbook or a layoff notice, that constitutes a promise that must be honored. See *Blau v. Del Monte Corp.* (9th Cir. 1984) 748 F.2d 1348, 1352-56 , cert. denied (1985) 474 U.S. 865, 106 S. Ct. 183, 88 L. Ed. 2d 152 . If the employer elects to provide layoff pay, the employer should establish the amount based on seniority or other criteria for exempt and nonexempt employees. The employer also should bear in mind that layoff pay provisions may be subject to the Employee Retirement Income Security Act (ERISA). See 29 U.S.C. §§ 1002(1) , 1003(a); 29 C.F.R. § 2510.3-1(a)(3) . If the layoff provisions are subject to ERISA, the employer should make reference in the policy to the summary plan and tell employees to check with the benefits department for further information. Finally, under both the federal WARN Act and the California WARN Act, employers that fail to provide the 60-day notice required for a covered plant closing or mass layoff may voluntarily provide salary and benefit continuation corresponding to the period of time for which the employer failed to give notice in lieu of such notice. If the salary and benefit continuation is not voluntary, however, it may not be used to set off liability for the lack of sufficient notice under both the federal WARN Act and the California WARN Act. See 29 U.S.C. § 2104(a)(2) ; *Labor Code* § 1402(c)(2) . For that reason, employers may wish to stress the voluntariness of any layoff or severance pay and indicate that employees entitled to payments under either the federal WARN Act or the California WARN Act are not also entitled to layoff or severance pay. For additional discussion of issues relating to severance pay and to layoffs, see *Wilcox, California Employment Law*, §§ 4.01[2][c] , 62.05[3] (Matthew Bender).

(n10)Note 6. When an employee's excessive absenteeism or tardiness is related to a disability, the employer may be required to make reasonable accommodations in the form of a leave or a modified work schedule, and disciplining the employee may subject the employer to liability under the ADA, FEHA, or Rehabilitation Act. See, e.g., *Kimbrow v. Atlantic Richfield Co.* (9th Cir. 1989) 889 F.2d 869, 874-77 (employer liable for discrimination for terminating employee whose excessive absences and tardiness were due to handicapping migraine headache condition because employer did not attempt to accommodate employee by granting leave of absence), cert. denied (1991) 498 U.S. 814 ; *Humphreys v. Memorial Hosp. Assoc.* (9th Cir. 2001) 239 F.3d 1128 (where employer terminated plaintiff for

excessive absenteeism, court found that jury could reasonably find a causal link between the absenteeism and employee's obsessive-compulsive disorder and conclude that defendant terminated employee because of her disability); but see *Walders v. Garrett* (E.D. Va. 1991) 765 F. Supp. 303, 309-11, *aff'd without op.*, (4th Cir. 1992) 956 F.2d 1163 (reasoning that regular, predictable attendance is an essential function of most jobs and, therefore, employer was not required to accommodate disabled employee's high rate of unpredictable absences); see also discussion in Note 2. Accordingly, employers should consult legal counsel before disciplining or terminating disabled employees for absenteeism or tardiness.

In addition to the above limitations, an employer may not consider time absent due to statutorily protected family care and medical leave in determining excessive absenteeism. See 29 C.F.R. §§ 825.220(c), 825.215. Employers are also prohibited from counting sick leave taken pursuant to *Labor Code section 233* to care for an ill child, parent, spouse, or domestic partner as a basis for disciplinary action. See *Lab. Code § 234*.

(n11)Note 7. The Drug-Free Workplace Act of 1988 (41 U.S.C. § 701 *et seq.*) requires that certain federal contractors and recipients of federal grants agree to provide a drug-free workplace. 41 U.S.C. §§ 701(a)(1), 702(a)(1). California also enacted a Drug-Free Workplace Act in 1990, extending similar requirements to state contractors and recipients of state grants. See *Gov. Code § 8350 et seq.* Covered contractors and grantees must publish statements notifying their employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the workplace, and specifying actions that will be taken against employees for violations of those prohibitions. In addition, employees must be informed of their obligation to report to their employer, within five days, any conviction under any criminal drug statute for violations occurring in the workplace. See 41 U.S.C. §§ 701(a)(1)(D)(ii), 702(a)(1)(D)(ii); see generally § 2.33 of this Guide (Drug-Free Workplace Guideline and accompanying notes). The ADA expressly authorizes employers to hold employees to the behavior standards of the Drug-Free Workplace Act, to prohibit the use of illegal drugs and alcohol in the workplace, and to require that employees not come to work under the influence of drugs or alcohol. See 42 U.S.C. § 12114(c)(1)-(3). Moreover, employees currently using illegal drugs are not considered disabled under the ADA and, therefore, are not entitled to its protections. See 42 U.S.C. § 12114(a). Similarly, under California law, employers do not have to reasonably accommodate employees using medical marijuana under the California Compassionate Use Act of 1996. *Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal. 4th 920, 70 Cal. Rptr. 3d 382, 174 P.3d 200 (an employee terminated for off-duty use of medical marijuana cannot state a claim for wrongful termination in violation of public policy). Under the ADA, employers may hold employees who use illegal drugs and alcoholic employees to the same behavior and performance standards as other employees. See 42 U.S.C. § 12114(c)(4). Under California law, however, covered employers must reasonably accommodate employees who voluntarily wish to enter drug or alcohol rehabilitation programs so long as this accommodation does not impose an undue hardship on the employer. See *Lab. Code § 1025 et seq.* Employers also should note that disciplining an employee for drug use when the employee is not in fact currently using illegal drugs can subject an employer to liability under the ADA. See 42 U.S.C. § 12114(b). While alcoholic employees may be held to the same performance standards as other employees, they are still protected as disabled persons under the ADA and may require accommodation. Because the ADA is ambiguous in its approach toward alcoholic employees with job performance problems, consultation with legal counsel is advisable in such situations. Finally, with respect to the model guideline set out in this section, if the employer permits the use or possession of alcoholic beverages in the workplace or during working time, such as during social functions or lunch or dinner meetings, this guideline should be revised to limit the misconduct regarding alcohol to use or possession that is unauthorized by the employer. See also §§ 2.32 (Inspections on Company Premises), 2.33 (Drug-Free Workplace), and 2.34 (Employee assistance Program) of this Guide.

(n12)Note 8. As with other performance and behavior problems that are due to disabilities, an employer's ability to discipline a disabled employee for sleeping on the job may be limited by the ADA or FEHA. See *Overton v. Reilly* (7th Cir. 1992) 977 F.2d 1190, 1195 (if employee's sleeping on the job is caused by disability or by medication being taken for disability and employee is still able to perform job's essential functions, employer may be required to accommodate); see also discussion in Note 2.

(n13)Note 9. Both the oral warning and the written warning should cover four issues: (1) the nature of the poor performance; (2) what is required to correct the poor performance; (3) how long the employee has to correct the poor performance (e.g., "We will review your performance again in 30 days, but immediate sustained improvement in your performance is expected, and the Company reserves the right to impose more severe discipline, up to and including discharge, before the lapse of 30 days if immediate improvement is not shown"); and (4) the consequences of failure to correct the poor performance (e.g., "Failure to correct the deficiencies that I have identified will lead to more severe discipline, up to and including discharge.") For additional discussion of discharge procedures, see *Wilcox, California Employment Law* § 62.05[4] (Matthew Bender). A written memo of an oral warning should include the date, the name of the employee, the subject discussed, and a summary of the discussion. The memo is retained in the employee's personnel file. The employee's signature is advisable but not required. If the employee signs the memo, he or she is entitled to a copy. See *Lab. Code* § 432 ("If an employee or applicant signs any instrument relating to the obtaining or holding of employment, he shall be given a copy of the instrument upon request."). For a discussion of compliance with company discharge procedures to avoid litigation, see generally *Wilcox, California Employment Law*, § 62.05[4] (Matthew Bender).

Employers should be aware that courts may apply the same degree of scrutiny to routine disciplinary decisions as to discharge decisions. See *Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal. 4th 454, 46 Cal. Rptr. 2d 427, 904 P.2d 834 (recognizing a cause of action for wrongful demotion). Employers who issue progressive discipline policies thus should (1) treat disciplinary action short of discharge (such as demotion) with the same seriousness as discharge; (2) document such disciplinary action accordingly; and (3) train managers in the importance of complying with proper procedures.

(n26)Note 10. For discussion of exit interviews, see *Wilcox, California Employment Law*, § 62.05[1][a], [4][d] (Matthew Bender).

(n27)Note 11. In general, an employer may not lawfully deduct amounts owed the employer from an employee's paycheck without the employee's express written authorization. See *Lab. Code* §§ 221, 224, 225.5; *Barnhill v. Robert Saunders & Co.* (1981) 125 Cal. App. 3d 1, 6, 177 Cal. Rptr. 803; D.L.S.E. Interpretive Bulletin No. 85-3 (Feb. 6, 1985); but see *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal. 4th 557, 59 Cal. Rptr. 2d 186, 927 P.2d 296 (voiding all "written interpretive policies" of the D.L.S.E. for failure to adopt such policies in compliance with the Administrative Procedure Act; such written interpretive policies include, for example, portions of the D.L.S.E. Operations & Procedures Manual and portions of the D.L.S.E. Interpretive Bulletins), *cert. denied* (1997) 520 U.S. 1248, 117 S. Ct. 1862, 137 L. Ed. 2d 1062. For a discussion of the weight to be accorded D.L.S.E. interpretations of statutory law, see *Wilcox, California Employment Law*, § 1.05[3][c] (Matthew Bender). For a full discussion of rules governing deductions from employees' paychecks, see *Wilcox, California Employment Law*, § 4.10 (Matthew Bender).

(n28)Note 12. Employers generally are not required to provide severance pay. If the employer provides severance pay, however, it may become legally obligated to continue payment of severance pay. See Note 5.

(n29)Note 13. Employers should make it clear that they do not intend to bind themselves forever to any particular severance pay plan to avoid a contractual or ERISA limitation on the ability to modify or eliminate severance pay obligations. Compare *Joanou v. Coca-Cola Co.* (9th Cir. 1994) 26 F.3d 96, 98-99 (employer entitled to modify severance plan) with *Dependahl v. Falstaff Brewing Corp.* (E.D. Mo. 1980) 491 F. Supp. 1188 (employer found liable for reducing severance plan), *aff'd in part and rev'd in part on other grounds* (8th Cir.) 653 F.2d 1208, *cert. denied*, (1981) 454 U.S. 968. Given current legal uncertainties regarding employer's abilities to modify, eliminate, or dovetail severance pay with either federal or California WARN Act payments, as detailed in Note 14, employers should consult legal counsel before modifying, eliminating, or claiming an offset against liabilities for severance payments under either the federal or California WARN Act.

(n30)Note 14. Employees whose layoffs are covered by the federal or California WARN Act are entitled to 60 days' advance notice. See 29 U.S.C. § 2102(a). If an employer fails to give the required notice, the employer is liable

for the lost pay and benefits employees would have received had they been retained through the full 60-day notice period. See *29 U.S.C. § 2104(a)(1)*; *Lab. Code § 1402(a)*, (b). This liability may be reduced by salary and benefits voluntarily provided to employees during the notice period. See *29 U.S.C. § 2104(a)(2)*; *Lab. Code § 1402(c)*. The sample policy is designed to avoid an argument that employees may receive duplicative severance and WARN payments. As written, employees entitled to WARN payments are not entitled to severance pay, except to the extent that the severance pay may exceed the amount of pay due under WARN. This attempt to dovetail severance and WARN payments, however, has not been tested in court. Thus, employers should consult legal counsel before relying on this provision.



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DIVISION 2 EMPLOYEE HANDBOOKS AND PERSONNEL POLICY MANUALS

Part A. RECOMMENDED GUIDELINES

*1-2 CA Guide to Employee Handbooks § 2.13*

## § 2.13 POLICY AGAINST HARASSMENT

### [1] Model Guideline

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#### POLICY AGAINST HARASSMENT

##### **I. Purpose Of Policy**

The Company is committed to providing a workplace free of unlawful harassment. This includes sexual harassment (which includes harassment based on gender [See Note n1], gender identity, pregnancy, childbirth, or related medical conditions), as well as harassment based on such factors as race, color, creed, religion, national origin, citizenship, ancestry, age, physical disability, mental disability, medical condition, marital status, sexual orientation, domestic partner status, family care or medical leave status, veteran status, or any other basis protected by federal or state laws. [See Note n2] The Company strongly disapproves of and will not tolerate harassment of employees by managers, supervisors, or co-workers. [See Note n3] Similarly, the Company will not tolerate harassment by its employees of non-employees with whom the Company employees have a business, service, or professional relationship. [See Note n4] The Company also will attempt to protect employees from harassment by non-employees in the workplace. [See Note n5]

##### **II. Harassment Defined**

Harassment includes [verbal, physical, and visual conduct that creates an intimidating, offensive, or hostile working environment or that interferes with an employee's work performance. Such conduct constitutes harassment when (1) submission to the conduct is made either an explicit or implicit condition of employment; (2) submission or rejection of the conduct is used as the basis for an employment decision; or (3) the harassment interferes with an employee's work performance or creates an intimidating, hostile, or offensive work environment.

Harassing conduct can take many forms and may include], but is not limited to, the following (when based upon an employee's protected status as noted above: slurs, jokes, statements, gestures, assault, impeding or blocking another's movement or otherwise physically interfering with normal work, pictures, drawings, or cartoons, violating someone's "personal space," foul or obscene language, leering, stalking, staring, unwanted or offensive letters or poems, offensive email or voicemail messages.

Sexually harassing conduct in particular may include all of these prohibited actions, as well as other unwelcome conduct, such as requests for sexual favors, conversation containing sexual comments, and other unwelcome sexual advances. Sexually harassing conduct can be by a person of either the same or opposite sex. **[See Note n6]**

### **III. Reporting And Investigating Harassing Conduct**

[The Company understands that victims of harassment are often embarrassed and reluctant to report acts of harassment for fear of being blamed, concern about being retaliated against, or because it is difficult to discuss sexual matters openly with others. However, no employee should have to endure harassing conduct, and the Company therefore encourages employees to promptly report any incidents of harassment so that corrective action may be taken]. Any incidents of harassment, including work-related harassment by any Company personnel or any other person, should be reported immediately to \_\_\_\_\_ [*specify official, e.g., the Personnel Manager*], who is responsible for investigating harassment complaints. An employee is not required to complain to the \_\_\_\_\_ [*specify official, e.g., the Personnel Manager*] if that person is the individual who is harassing the employee, but may instead report the harassment to his or her immediate supervisor or any other member of management. Supervisors and managers who receive complaints or who observe harassing conduct should immediately inform the \_\_\_\_\_ [*specify official, e.g., the Personnel Manager*] or other appropriate company official so that an investigation may be initiated. **[See Note n7]**

Every reported complaint of harassment will be investigated thoroughly and promptly. **[See Note n8]** [Typically, the investigation will include the following steps: an interview of the employee who lodged the harassment complaint to obtain complete details regarding the alleged harassment; interviews of anyone who is alleged to have committed the acts of harassment to respond to the claims; and interview of any employees who may have witnessed, or who may have knowledge of, the alleged harassment. The \_\_\_\_\_ (*specify official, e.g., the Personnel Manager*), or other company official responsible for the investigation, will notify the employee who lodged the harassment complaint of the results of the investigation]. The investigation will be handled in as confidential a manner as possible consistent with a full, fair, and proper investigation.

[In addition to notifying the Company about harassment or retaliation complaints, affected employees may also direct their complaints to the California Department of Fair Employment and Housing ("DFEH"), which has the authority to conduct investigations of the facts. The deadline for filing complaints with the DFEH is one year from the date of the alleged unlawful conduct. If the DFEH believes that a complaint is valid and settlement efforts fail, the DFEH may seek an administrative hearing before the California Fair Employment and Housing Commission ("FEHC") or file a lawsuit in court. Both the FEHC and the courts have the authority to award monetary and non-monetary relief in meritorious cases. Employees can contact the nearest DFEH office or the FEHC at the locations listed in the Company's DFEH poster or by checking the State Government listings in the local telephone directory]. **[See Note n9]**

### **IV. Corrective Action**

The Company will not tolerate retaliation against any employee for making a good faith complaint of harassment or for cooperating in an investigation. **[See Note n10]** If harassment or retaliation is established, the Company will take

corrective action. **[See Note n11]** Corrective action may include, for example: training, referral to counseling, or disciplinary action ranging from a verbal or written warning to termination of employment, depending on the circumstances. **[See Note n12]** [With regard to acts of harassment by customers or vendors, corrective action will be taken after consultation with the appropriate management personnel.] **[See Note n13]**

#### **[V. Anti-Harassment Training]**

Every Company employee is required to undergo Sexual Harassment training within his/her first three (3) months of employment and at least once every two (2) years thereafter. In addition, all employees hired as or promoted to a supervisory or management position must undergo at least two (2) hours of interactive sexual harassment training within the first six (6) months of assuming a new supervisory or management position. Additionally, all supervisors and managers must complete at least two (2) hours of interactive sexual harassment training at least once every two (2) years thereafter. An employee who fails to comply with this section may be subject to disciplinary action, up to and including termination of employment.] **[See Note n14]**

#### **[2] Drafting Checklist**

##### **RECOMMENDED PROVISIONS**

1. A statement that the employer is committed to providing a workplace that is free of sexual harassment and other forms of harassment **[See Note n1,n2]**;
2. A statement that the employer disapproves of and will not tolerate harassment of its employees, whether by co-workers, managers or supervisors **[See Note n3]**;
3. A statement that the employer will not tolerate sexual harassment by its employees or non-employees with whom the employees have a business, service or professional relationship **[See Note n4]**;
4. A statement that the employer will attempt to protect its employees from harassment by non-employees in the workplace **[See Note n5]**;
5. A description or examples of the type of behavior that constitutes harassment, including sexual harassment **[See Note n6]**;
6. A statement encouraging employees to report any incident of harassment, and designating the person who is responsible for investigating such matters **[See Note n7]**;
7. A statement that managers who receive complaints or who observe harassing conduct are expected to report such matters to the person responsible for conducting investigations **[See Note n7]**;
8. A statement emphasizing that employees who wish to complain may bypass their immediate supervisor if the supervisor is the person engaging in harassment **[See Note n7]**;
9. A statement that the employer will investigate complaints of harassment thoroughly, promptly, and in a confidential manner **[See Note n8]**;
10. A statement that the employer will not tolerate retaliation against employees who complain about harassment **[See Note n10]**; and

11. A statement that the employer will discipline employees who violate the guideline, including the range of disciplinary action that might be taken [See Notes n11,n12].

### OPTIONAL PROVISIONS

1. A statement setting forth information equivalent to the information contained on the DFEH information sheet regarding harassment [See Note n9];
2. A statement that the employer will take corrective action in regard to acts of harassment by non-employees [See Note n13]; and
3. A statement that the employees will receive anti-harassment training at regular intervals. [See Note n14].

### [3] Notes

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment LawAffirmative ActionGeneral OverviewLabor & Employment LawDiscriminationGeneral OverviewLabor & Employment LawDiscriminationActionable DiscriminationLabor & Employment LawDiscriminationHarassmentGeneral OverviewLabor & Employment LawDiscriminationHarassmentNational Origin HarassmentLabor & Employment LawDiscriminationHarassmentRacial HarassmentHarassing ConductLabor & Employment LawDiscriminationHarassmentSexual HarassmentGeneral Overview

#### FOOTNOTES:

(n1)Note 1. Under California law, "gender" is defined as the employee's actual sex or the employer's perception of the employee's sex, and includes the employer's perception of the employee's identity, appearance, or behavior, whether or not that identity, appearance, or behavior is different from that traditionally associated with the employee's sex at birth. *Penal Code* § 422.56 ; see also *Gov. Code* § 12926(p) (defining "sex" as including "gender" pursuant to *Penal Code* § 422.56 ).

(n2)Note 2. Sexual harassment, as well as harassment on the basis of any of the other classifications protected by state or federal law, is a form of prohibited discrimination. See *Gov. Code* § 12940(j) (FEHA); See also *Gov. Code* § 12945.2(1) (prohibiting discrimination against individuals for taking family care leave or for participating in any inquiry or proceeding related to family care leave rights); *29 U.S.C. § 623* (prohibiting age discrimination); *38 U.S.C. § 4311* (prohibiting discrimination on the basis of veteran status); *29 C.F.R. § 1604.11* (EEOC guidelines on sexual harassment); *29 C.F.R. § 1606.8* (EEOC guidelines on national origin harassment). The FEHA defines harassment because of sex to include "sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions." See *Gov. Code* § 12940(j)(4)(c) .

(n3)Note 3. Under California law, employers are required to "take all reasonable steps necessary to prevent discrimination and harassment from occurring." *Gov. Code* § 12940(k) ; cf. *29 C.F.R. § 1604.11(f)* (an employer "should take all steps necessary to prevent sexual harassment from occurring"). Both state and federal regulations provide that such steps may include "affirmatively raising the subject of harassment, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under California [and federal] law, and developing methods to sensitize all concerned." *2 Cal. Code Reg. § 7287.6(b)(3)* (FEHC regulations regarding FEHA); See *29 C.F.R. § 1604.11(f)* (EEOC regulations regarding Title VII). Under California law, failure to take "all reasonable steps necessary to prevent" harassment from occurring is a separate violation. *Gov. Code* § 12940(k) . California employers also were required to begin training all supervisors

about sexual harassment prevention by January 1, 2006. Under this law, each supervisor must receive at least two hours of interactive training regarding sexual harassment every two years. See *Gov. Code § 12950.1*. See Note 14. In addition, the FEHA imposes a responsibility on employers to distribute specified information regarding the prohibition of sexual harassment. See *Gov. Code § 12950*; see also Note 9. Moreover, the FEHC takes the position that adoption of a policy against harassment is a necessary element of compliance with *Gov. Code § 12940(k)*. See, e.g., *DFEH v. Madera County* (1990) FEHC Dec. No. 90-03. An employer who fails to adopt and publish a policy prohibiting harassment and providing a mechanism for employees to come forward with such complaints will substantially diminish its ability to defend against lawsuits based on harassment. See, e.g., *Meritor Savings Bank v. Vinson* (1986) 477 U.S. 57, 72-73, 106 S. Ct. 2399, 91 L. Ed. 2d 49. Indeed, for purposes of both state and federal law, an employer's adoption and dissemination of a comprehensive and effective policy prohibiting sexual harassment may limit the employer's liability for claims that it had constructive knowledge of a sexually hostile work environment if the harassment is never reported to the employer. See, e.g., *State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal. 4th 1026, 1044, 6 Cal. Rptr. 3d 441, 79 P.3d 556; *Farley v. Am. Cast Iron Pipe Co.* (11th Cir. 1997) 115 F.3d 1548, 1553-54 (concluding that employees must utilize procedural mechanisms established by employer when the employer "has developed and promulgated an effective and comprehensive anti-sexual harassment policy, aggressively and thoroughly disseminated the information and procedures contained in the policy to its staff, and demonstrated a commitment to adhering to this policy"). An employer's harassment policy and complaint procedure, however, must be "reasonable" -- that is, able to be understood by large segments of the employee's workforce. What is "reasonable" depends on the employment circumstances and the capabilities of the employees. See *EEOC v. V&J Foods, Inc.* (7th Cir. 2007) 507 F.3d 575 (holding that employee's failure to follow employer's established complaint procedures was not fatal to employee's hostile work environment claim because employer's harassment policy and procedures were confusing and not written to be understood by the employer's typical employee, an average teenager). Finally, employers should be aware that they may be liable for harassment by co-workers as well as by managers and supervisors. See *Gov. Code § 12940(j)(1)*; 29 C.F.R. § 1604.11(d). Thus, good reason exists for employers in California to adopt anti-harassment policies that clearly communicate the employer's disapproval of such behavior. For discussion of the prohibition against harassment under state and federal equal employment laws, see *Wilcox, California Employment Law*, § 41.80 (Matthew Bender).

(n4)Note 4. The California Fair Employment and Housing Act prohibits employers from harassing independent contractors, as well as other non-employees providing services pursuant to a contract. See *Gov. Code § 12940(j)(1)*. Moreover, the Unruh Civil Rights Act provides a cause of action for sexual harassment that occurs as part of a "professional relationship." Specifically, *Civil Code Section 51.9* provides that a person is liable for sexual harassment when the plaintiff proves that (1) "[t]here is a business, service, or professional relationship between the plaintiff and defendant"; (2) the plaintiff cannot "easily terminate the relationship"; (3) "[t]he defendant has made sexual advances, solicitations, sexual requests, demands for sexual compliance by the plaintiff, or engaged in other verbal, visual, or physical conduct of a sexual nature or of a hostile nature based on gender"; (4) the defendant's conduct was "unwelcome and pervasive or severe"; and (5) "[t]he plaintiff has suffered or will suffer economic loss or disadvantage or personal injury" as a result of the defendant's conduct. While *Civil Code Section 51.9* does not expressly purport to hold employers liable for sexual harassment by their employees or third persons, such as customers or clients, there is a potential for employer liability under the doctrine of respondeat superior. See 2 Cal. Code Reg. § 7286.6(b) (application of respondeat superior principles to discriminatory acts by supervisors, managers, and agents under FEHA). Thus, employers should take reasonable measures, such as adopting an expanded anti-harassment policy, to prevent conduct that is prohibited by *Civil Code Section 51.9*. See Note 3, above.

(n9)Note 5. Under California's Fair Employment and Housing Act, an employer "may ... be responsible" for sexual harassment by non-employees against employees, applicants, or persons providing services pursuant to contract. *Gov. Code § 12940(j)(1)*. The employer may be found liable "where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action." *Gov. Code § 12940(j)(1)*. In determining an employer's liability for acts of nonemployees, courts also must take into consideration "the extent of the employer's control and any other legal responsibility which the employer may have with respect to the

conduct of those nonemployees." *Id.*

(n10)Note 6. In order to communicate effectively the employer's intent, an anti-harassment policy should expressly define harassment to include sexual harassment and should describe the types of behavior that constitute sexual or other forms of harassment. This guideline, as drafted, incorporates both the definition of harassment promulgated by the EEOC and that issued by the FEHC. See, e.g., *29 C.F.R. § 1604.11(a)*; *2 Cal. Code Reg. § 7287.6(b)(1)*. Under California law, unwanted sexual behavior that would otherwise not be pervasive or severe enough to constitute actionable sexual harassment, when coupled with acts or threats of violence, may create a hostile work environment. See *Sheffield v. Los Angeles County* (2003) 109 Cal. App. 4th 153, 162-64, 134 Cal. Rptr. 2d 492. The United States Supreme Court has held that same-sex harassment, even if not motivated by sexual desire, is actionable under Title VII. See *Oncale v. Sundowner Offshore Servs., Inc.* (1998) 523 U.S. 75, 79-80, 118 S. Ct. 998, 140 L. Ed. 2d 201. See Note 3, above.

(n11)Note 7. To help fulfill its independent obligation under *Government Code § 12940(k)* and *(j)* to take "all reasonable steps necessary" to prevent harassment from occurring, an employer should have in place not only an anti-harassment policy, but a procedure for filing complaints. See, e.g., *DFEH v. Guill, Blankenbaker, and Lawson* (1989) FEHC Dec. No. 89-15, modified on remand, FEHC Dec. No. 91-16; see also Note 12. Employees should be encouraged not only to report incidents of harassment, but to report such incidents to the appropriate officials designated by the employer. This guideline, as drafted, assumes that the employer will want one person, who has been trained to investigate and resolve complaints of harassment, to be the neutral official responsible for handling such complaints. Thus, employees who are being harassed, as well as managers or others who may be aware of such harassment, are directed to report the matter to the personnel manager or other designated official. Employers should train their managers to report harassment to the designated official, as an employer may be found to have had adequate notice of a complaint of harassment when an employee complains to a member of management other than the person designated to receive complaints. See *Nichols v. Azteca Restaurant Enterprises, Inc.* (9th Cir. 2001) 256 F.3d 864, 876 n.10. Although an employee's failure to report an incident of harassment will not necessarily shield an employer from liability, it may limit an employer's liability under federal law against certain hostile work environment claims. See, e.g., *Burlington Indus., Inc. v. Ellerth* (1998) 524 U.S. 742, 763-65, 118 S. Ct. 2257, 141 L. Ed. 2d 633; *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 807-08, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (both holding that an employer may avoid vicarious liability under Title VII if the employer can show that it took reasonable steps to prevent and promptly remedy harassment and that the complaining employee unreasonably failed to take advantage of the employer's complaint procedures). A similar but more limited defense is available to employers under California law based on the doctrine of "avoidable consequences." *State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal. 4th 1026, 1044, 6 Cal. Rptr. 3d 441, 79 P.3d 556. An employer may limit its liability for harassment under the Fair Employment and Housing Act if (1) the employer took reasonable steps to prevent and correct workplace sexual harassment; (2) the employee unreasonably failed to use the preventive and corrective measures that the employer provided; and (3) reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered. The sexual harassment policy should emphasize to employees that they may bypass the designated official if that person is the person who is harassing them. See also, Note 3, above.

(n12)Note 8. An effective anti-harassment policy must communicate the employer's intent to treat complaints of harassment seriously. It is important, therefore, to inform employees that their complaints will be investigated promptly and thoroughly. See, e.g., *DFEH v. Guill, Blankenbaker, and Lawson* (1989) FEHC Dec. No. 89-15, modified on remand, FEHC Dec. No. 91-16; see also Note 5. Because victims of sexual harassment, in particular, may find it difficult to come forward in the first place, and because of the sensitive issues that often surround such complaints, it is important as well to emphasize that the investigation of such complaints will be handled in a confidential manner to the extent consistent with a full, fair and proper investigation.

(n13)Note 9. California employers are required to distribute to each employee an information sheet prepared by the DFEH regarding sexual harassment, or an equivalent statement. If the employer opts to provide "equivalent information" instead of using the DFEH information sheet, the information provided must include (at a minimum) the

following: (1) a statement of the illegality of sexual harassment; (2) the definition of sexual harassment under state and federal law; (3) a description of sexual harassment, utilizing examples; (4) a description of the internal complaint process of the employer; (5) a description of the legal remedies and complaint process available through the DFEH and the FEHC; (6) directions on how to contact the DFEH and the FEHC; and (7) information regarding the protection against retaliation for filing a complaint with, or otherwise participating in, an investigation, proceeding, or hearing conducted by the DFEH or FEHC. See *Gov. Code § 12950(b)*. The fact that the required information does not reach an individual will not in and of itself result in employer liability in a sexual harassment action, nor will compliance insulate the employer from liability. See *Gov. Code § 12950(d)*. In light of the foregoing, employers may elect to include the information required to be distributed to employees in an employee handbook. With the inclusion of the first of the three optional ending paragraphs, the model policy satisfies all seven elements of the 1992 notice law. This optional ending paragraph satisfies elements one, five, six, and seven of the FEHA notice law. This paragraph refers employees to a DFEH employment poster, which all employers are required to post. The model policy's definition of harassment satisfies elements two and three of the FEHA notice law. The model policy also describes the employer's internal complaint procedure, as required by element four of the FEHA notice law. However, it would be advisable not to rely exclusively on the employee handbook to establish distribution of the required information. Instead, employers should consider distributing separately either the DFEH information sheet on harassment or equivalent language, such as that included in the model policy. See *Gov. Code § 12950(c)* (information must be distributed in manner that ensures distribution to each employee, such as including the information with employee's pay). For further discussion, see *Wilcox, California Employment Law, § 41.140[1][f], [g]* (Matthew Bender).

(n26)Note 10. One effective means of assuring that employees do come forward with their complaints is to assure them that the employer will not tolerate any retaliation against them. In any event, employers should be aware that retaliation against an employee who complains about sexual harassment or other forms of harassment covered by this guideline is a separate violation of federal and state anti-discrimination laws. See *29 U.S.C. § 623(d)* (ADEA); *42 U.S.C. § 2000e-3(a)* (Title VII); *Gov. Code § 12940(h)* (FEHA); *2 Cal. Code Reg. 7287.8*. In addition, the DFEH takes the position that an employer policy must provide assurance of non-retaliation. See, e.g., *DFEH v. Guill, Blankenbaker, and Lawson* (1989) FEHC Dec. No. 89-15; see also Note 11. For a discussion of employer liability for retaliation, see *Wilcox, California Employment Law, §§ 41.130-41.132* (Matthew Bender).

(n27)Note 11. When disciplining an employee for engaging in sexually harassing conduct, the employer need not be correct in its conclusion that the harassment in fact occurred. Instead, the employer need only have an objectively reasonable and good faith belief that the sexual harassment occurred. See *Cotran v. Rollins Hudig Hall Int'l, Inc.* (1998) *17 Cal. 4th 93, 108, 69 Cal. Rptr. 2d 900, 948 P.2d 412* (reasoning that an employer must come to a "reasoned conclusion ... supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond"). Thus, in order to protect itself from potential liability, an employer should thoroughly and promptly investigate any harassment complaint before taking disciplinary action against the alleged offender.

(n28)Note 12. According to the FEHC, "the force with which an employer responds to specific incidents of harassment is as important a part of its efforts to deter harassment as are implementation of a policy against harassment and other affirmative steps taken in advance of any actual incidents." *DFEH v. Guill, Blankenbaker, and Lawson* (1989) FEHC Dec. No. 89-15, p. 18, modified on remand, FEHC Dec. No. 91-16. An employer policy will more effectively deter unwanted behavior if it informs employees that discipline will be imposed--as well as the range of discipline that may be imposed--if harassment is established.

(n29)Note 13. As noted above, employers who know or should know of harassing conduct by non-employees, such as vendors or customers, and who fail to take corrective action when such action is appropriate may be liable for such harassment. See *Gov. Code § 12940(j)(1)*; *29 C.F.R. § 1604.11(e)*; see also Note 3, above. Thus, if the optional provision dealing with harassment by non-employees is included, the employer also should include the optional provision that informs employees that appropriate corrective action will be taken in regard to acts of harassment by such persons.

(n30)Note 14. As noted above, California law requires that employers with 50 or more employees (including employees who do not live or work in California) must train their employees regarding the prohibition on harassment, discrimination, and retaliation. At a minimum, the training must be provided by trainers or educators with "knowledge and expertise" in the prevention of harassment, discrimination, and retaliation and must include the following mandatory content: (1) the definitions of sexual harassment; (2) statutory provisions and case law principles regarding harassment, discrimination and retaliation; (3) the types of conduct that constitute sexual harassment; (4) remedies; (5) strategies for prevention; (6) practical examples that illustrate harassment, discrimination, and retaliation; (6) limited confidentiality of complaint process; (7) reporting procedures and resources for victims; (8) employer obligation to investigate; (9) training on what to do if you are personally accused; and (10) policy information. See *Gov. Code* § 12950.1.



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California Employer's Guide to Employee Handbooks and Personnel Policy Manuals

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DIVISION 2 EMPLOYEE HANDBOOKS AND PERSONNEL POLICY MANUALS

Part A. RECOMMENDED GUIDELINES

*1-2 CA Guide to Employee Handbooks § 2.14*

## § 2.14 WORKPLACE VIOLENCE

### [1] Model Guideline

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#### VIOLENCE IN THE WORKPLACE

##### I. Statement of Policy

The Company recognizes that workplace violence is a concern among employers and employees across the country. The Company is committed to providing a safe, violence-free workplace. In this regard, the Company strictly prohibits employees, consultants, customers, visitors, or anyone else on Company premises or engaging in a Company-related activity from behaving in a violent or threatening manner. Moreover, the Company seeks to prevent workplace violence before it begins and reserves the right to address certain behaviors, even in the absence of violent behavior. **[See Note n1]**

The Company believes that prevention of workplace violence begins with recognition and awareness of potential early warning signs and has established procedures within \_\_\_\_\_ *[specify department, e.g., Facilities or Human Resources]* for responding to any situation that presents the possibility of violence. **[See Note n2]**

##### II. Workplace Violence Defined

Workplace violence includes, but is not limited to, the following:

- (1) Threats of any kind;
- (2) Threatening, physically aggressive, or violent behavior, such as intimidation of or attempts to instill

fear in others;

(3) Other behavior that suggests a propensity towards violence, which can include belligerent speech, excessive arguing or swearing, sabotage, or threats of sabotage of Company property, or a demonstrated pattern of refusal to follow Company policies and procedures;

(4) Defacing Company property or causing physical damage to the facilities; or

(5) With the exception of security personnel, bringing weapons or firearms of any kind on Company premises, in Company parking lots, or while conducting Company business.

### **III. Reporting**

If any employee observes or becomes aware of any of the above-listed actions or behavior by an employee, customer, consultant, visitor, or anyone else, he or she should notify \_\_\_\_\_ [*specify department, e.g., Facilities or Human Resources*] immediately.

Further, employees should notify \_\_\_\_\_ [*specify department, e.g., Facilities or Human Resources*] if any restraining order is in effect, or if a potentially violent nonwork-related situation exists that could result in violence in the workplace. [See Note n3]

### **IV. Investigation**

All reports of workplace violence will be taken seriously and will be investigated promptly and thoroughly. In appropriate circumstances, the Company will inform the reporting individual of the results of the investigation. To the extent possible, the Company will maintain the confidentiality of the reporting employee and of the investigation. The Company may, however, need to disclose results in appropriate circumstances, for example, in order to protect individual safety. The Company will not tolerate retaliation against any employee who reports workplace violence. [See Note n4]

### **V. Corrective Action and Discipline**

If the Company determines that workplace violence has occurred, the Company will take appropriate corrective action [See Note n5] and will impose discipline on offending employees. The appropriate discipline will depend on the particular facts but may include written or oral warnings, probation, reassignment of responsibilities, suspension, or termination. If the violent behavior is that of a non-employee, the Company will take appropriate corrective action in an attempt to ensure that such behavior is not repeated.

Under certain circumstances, the Company may forego disciplinary action on the condition that the employee takes a medical leave of absence. In addition, the Company may request that the employee participate in counseling, either voluntarily or as a condition of continued employment. [See Note n6]

### **[VI. Employee Assistance Program**

Any employee who believes that he or she may have a problem that could lead to violent behavior is encouraged to use the Company's Employee Assistance Program. The EAP is a professional, confidential counseling service that is

available to all personnel and members of their household to assist in resolving emotional difficulties, marital and family conflict, stress, chemical dependency, conflicts at work, and other concerns. The EAP counselor can help to clarify a problem and to develop an action plan during the counseling session. EAP services are prepaid by the Company.]

[Further information regarding the Company's Employee Assistance Program may be obtained from your supervisor or from (*name*)\_\_\_\_\_]

## [2] Drafting Checklist

### RECOMMENDED PROVISIONS

1. A statement of the employer's commitment to a violence-free workplace [See Note n1];
2. A definition of workplace violence [See Note n1];
3. A requirement that employees report action or behavior amounting to workplace violence to the person or department designated by the employer to respond to workplace violence [See Notes n2,n3];
4. A statement that the employer will investigate all reports of workplace violence [See Notes n2,n5];
5. A statement that the employer will not retaliate against employees who report workplace violence or potential workplace violence [See Note n4]; and
6. A statement that the employer will take corrective action if it determines that workplace violence occurred [See Note n5].

### OPTIONAL PROVISIONS

1. A statement referring to the availability of the employer's Employee Assistance Program (if there is one) for an employee who believes he or she may have a problem that could lead to violent behavior [see § 2.31 (model guidelines regarding employee assistance programs)].

## [3] Notes

### Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law Occupational Safety & Health Compliance & Defenses Labor & Employment Law Occupational Safety & Health Duties & Rights Labor & Employment Law Workplace Violence

### FOOTNOTES:

(n1)Note 1. The California Division of Occupational Safety and Health (DOSH) has issued its Guidelines for Workplace Security (referred to in these notes as "DOSH Guidelines"). The DOSH Guidelines describe the scope of the workplace violence problem, the three major types of workplace violence, and the preventive measures that employers--depending on the nature of the workplace--may be required to adopt.

The DOSH Guidelines identify a "Type I" event as a violent act by an assailant with no legitimate relationship to the workplace who enters the workplace to commit a robbery or other criminal act. A "Type II" event involves a violent act by a recipient of a service provided by the employer, such as a client, patient, customer, passenger, criminal suspect

inmate, or prisoner. A "Type III" event involves a violent act by a current or former employee, supervisor, or manager, or another person who has some employment-related involvement with the employer, such as an employee's spouse or lover, an employee's relative or friend, or another person who has a dispute with an employee.

According to the DOSH Guidelines, every employer should perform an initial assessment to identify workplace security factors. If an employer has employees who are known to be at risk for a Type I or a Type II event, the employer must integrate an effective workplace security component into its existing Injury and Illness Prevention Program ("IIPP"). See *8 Cal. Code Reg. § 3203*. The DOSH Guidelines also state that an employer at risk for a Type III event needs to establish procedures to respond to workplace security hazards and train employees as necessary. In short, it is wise for every California employer to develop a workplace security component to its IIPP. Readers should note, however, that this Guideline is not an effective IIPP workplace security component. Rather, it is intended to satisfy the requirement in the DOSH Guidelines that employers "establish a clear anti-violence management policy" to aid in preventing Type III events from occurring. DOSH has issued a draft Model IIPP for Workplace Security. It is recommended that any employer having a workplace with a known risk for workplace violence obtain a copy of the model program from a local DOSH office, and consult with their workers' compensation insurance carrier, the DOSH Consultation Service, or legal counsel to ensure that the employer's IIPP for workplace security satisfies all legal requirements.

In addition, DOSH has published voluntary Guidelines for Security and Safety of Health Care and Community Service Workers, which offers guidance for preventing workplace violence in the health care and community service industries. These guidelines apply to a wide array of health care and social service workers. It is recommended that any employer in the health care industry obtain a copy of these guidelines and consult with legal counsel to ensure that the employer's IIPP for workplace security satisfies these guidelines.

(n2)Note 2. The DOSH Guidelines make clear that during any DOSH workplace security inspection, the employer's compliance will be evaluated based, in part, on the employer's effectiveness in identifying, investigating, and correcting workplace security hazards and on whether the employer has provided workplace violence prevention training to employees.

(n3)Note 3. This provision is intended to address the comment in the DOSH Guidelines that "[d]omestic and other types of societal violence are now spilling over into the workplace and employers need to take appropriate precautions to protect at-risk employees."

(n4)Note 4. The California Labor Code prohibits an employer from discriminating or retaliating against an employee because that employee has complained to DOSH, or his or her employer or representative, about unsafe working conditions or because the employee has refused to work under hazardous conditions. See *Lab. Code §§ 6310, 6311*; see also discussion in *Wilcox, California Employment Law, § 21.49* (Matthew Bender).

(n9)Note 5. If an employer becomes aware of a workplace security hazard (for example, as the result of an investigation) it should take corrective action. The DOSH Guidelines provide several examples of steps that may be taken to prevent known risks of workplace violence, such as controlling access into and out of the workplace, placing barriers between clients and service providers, installing alarm systems, or establishing a buddy system to be used in specified emergency situations. Moreover, under certain circumstances, an employer may also obtain injunctive relief to protect its employees against actual or threatened workplace violence. See *Code Civ. Proc. § 527.8*; see also discussion in *Wilcox, California Employment Law, § 21.71* (Matthew Bender). An employer who is aware of or should be aware of workplace security hazards, but fails or refuses to take corrective action may not only violate DOSH standards, but may expose itself to potential tort liability as well. But see *Arendell v. Auto Parts Club, Inc.* (1994) 29 Cal. App. 4th 1261, 1264-66, 35 Cal. Rptr. 2d 83 (holding that workers' compensation is exclusive remedy for employee injured as a result of employer's failure or refusal to take preventive or remedial security measures); *Vuillemainroy v. American Rock & Asphalt, Inc.* (1999) 70 Cal. App. 4th 1280, 1283-86, 83 Cal. Rptr. 2d 269 (holding that workers' compensation is exclusive remedy for employee killed as a result of alleged criminal negligence

of employer in failing to maintain safe trucks).

(n10)Note 6. Employers who refer employees to counseling may unknowingly subject themselves to potential liability under the Americans With Disabilities Act ("ADA"). For example, the Ninth Circuit Court of Appeals has held that an employer may have "regarded" its employee as disabled under the ADA because the employer, among other things, referred the employee to its Employee Assistance Program after the employer received a number of complaints that the employee was hostile and abusive to other employees, "including manhandling, berating and threatening employees." *Holihan v. Lucky Stores, Inc.* (9th Cir. 1996) 87 F.3d 362, 364-66 .



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California Employer's Guide to Employee Handbooks and Personnel Policy Manuals

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DIVISION 2 EMPLOYEE HANDBOOKS AND PERSONNEL POLICY MANUALS

Part A. RECOMMENDED GUIDELINES

*1-2 CA Guide to Employee Handbooks § 2.15*

## **§ 2.15 COMPANY PROPERTY; CONFIDENTIAL AND PERSONAL INFORMATION**

### **[1] Model Guideline**

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#### **COMPANY PROPERTY; PROPRIETARY, CONFIDENTIAL AND PERSONAL INFORMATION**

The security of Company property is of vital importance to the Company. Company property includes not only tangible property, like desks and computers, but also intangible property such as confidential information. It is critical for the Company to preserve and protect its confidential information, as well as the confidential information of customers, suppliers, and third parties. All employees are responsible for ensuring that proper security is maintained at all times.

#### **I. Confidential and Personal Information**

"Confidential Information" means all information, not generally known, belonging to, or otherwise relating to the business of the Company or its clients, customers, suppliers, vendors, affiliates or partners, regardless of the media or manner in which it is stored or conveyed, that the Company has taken reasonable steps to protect from unauthorized use or disclosure. Confidential Information includes but is not limited to trade secrets as well as other proprietary knowledge, information, and know-how; non-public intellectual property rights, including business plans and strategies; manufacturing techniques; formulae; processes; designs; drawings; discoveries; improvements; ideas; conceptions; test data; compilations of data; and developments, whether or not patentable and whether or not copyrightable.

"Personal Information" includes personally-identifiable information about employees, consultants or other individuals, such as Social Security numbers, background information, credit card or banking information, health information, or other non-public information entrusted to the Company. **[See Note n1]** There are laws in the United States and other countries that protect certain types of personal information, and employees should not disclose personal information about the other individuals to any third party or from one country to another without prior managerial approval. **[See**

**Note n2]**

Given the nature of the Company's business, protecting Confidential and Personal Information is of vital concern to the Company. This information is one of the Company's most important assets. It enhances the Company's opportunities for future growth, and indirectly adds to the job security of all employees.

Failure to take reasonable measures to protect the Company's Confidential Information may jeopardize its status as a trade secret. [See Note n3] While employed by the Company, employees must not use or disclose any Confidential or Personal Information that they produce or obtain during employment with the Company, except to the extent such use or disclosure is required in connection with performing their jobs. Employees may not use or disclose Confidential or Personal Information for any reason after the employment relationship with the Company ends. [See Note n4] Misuse or unauthorized disclosure of Confidential or Personal Information may result in immediate termination, as well as potential personal and criminal liability. Nothing in this Guideline restricts an employee from discussing his or her wages or other terms and conditions of employment with coworkers or others, to the extent protected by law. [See Note n5]

[All employees should be required to sign a written confidentiality agreement]. [See Note n6]

**II. Obligations on Termination**

On termination of employment, whether voluntary or involuntary, all Company documents, computer records, and other tangible Company property in the employee's possession or control must be returned to the Company immediately.

**III. Security**

To avoid loss of Company property, the Security Department maintains and promulgates security procedures, which include maintaining control of entrances, exits, restricted areas, document control, and record keeping. Specific procedures regarding the protection of Company property, traffic throughout the facilities, and designation of restricted areas are issued by the Security Department and posted on Company bulletin boards [and on the Company's intranet]. [In addition, employees are expected to comply with Company policies regarding the authorized and secure use of the Company's computer technology, as described in the Company's Security Regulations and in the Technology Use and security guideline of this Manual.] Employees are expected to abide by all of the company's security procedures.

Avoiding loss or theft of Confidential or Personal Information is an important part of each employee's job. Accordingly employees must observe good security practices. Employees are expected to keep Confidential Information secure from outside visitors and all other persons who do not have legitimate reason to see or use such information. Employees are not to remove Company property without authorization. [See Note n4] Failure to adhere to Company policies regarding Confidential and Personal Information will be considered grounds for dismissal.

Given the sensitivity of Confidential and Personal Information, employees may only dispose of such information by secure methods approved by the Company. If an employee has any doubt or question about how to handle Confidential or Personal Information, the employee should consult with the Company's Security Department.

**[2] Drafting Checklist \_\_\_\_\_****RECOMMENDED PROVISIONS**

1. A statement of employee responsibility to ensure security of company property;

2. A statement of employer policy regarding the misuse of company property, including proprietary, confidential and personal information;
3. A statement of what constitutes Confidential and Personal information [See Note n1];
4. A requirement that on termination, employees will return all company property; and
5. A statement of employees' duty to observe security policies and procedures.

### **OPTIONAL PROVISIONS**

1. A requirement that employees sign an agreement that both during and after their employment they will not use or disclose trade secrets or other confidential information except as expressly authorized by the Company [See Note n2];
2. A cross reference to the employer's guideline on Technology Use and Security (if the employer has one) [See Note n7];
3. A cross reference to the employer's security procedures; and
4. A cross reference to the employer's guideline on Inspections on Company Premises (if the employer has one) [See Note n8].

### **[3] Notes**

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Business & Corporate Law Corporations Governing Documents & Procedures Records & Inspection Rights General Overview Labor & Employment Law Employment Relationships Employment Contracts Conditions & Terms Trade Secrets & Unfair Competition Trade Secrets Labor & Employment Law Wrongful Termination Breach of Contract Employer Handbooks Trade Secrets Law Misappropriation Actions Elements Confidentiality Trade Secrets Law Misappropriation Actions Unfair Competition Trade Secrets Law Ownership Rights Employee Nondisclosure

### **FOOTNOTES:**

(n1) Note 1. Many countries regulate the collection, use, disclosure, and cross-border transfer of personally-identifiable information about employees, customers, or other individuals. These laws may limit the types of information that an employer may collect about its employees, how this information can be used and shared, and whether the information can be made available in other countries (e.g., through a global employee directory or shared databases). This model guideline focuses on the types of personal information most commonly protected by United States law, and is not designed to cover the data protection or privacy requirements of other countries. Companies with employees or facilities located outside the United States are strongly encouraged to seek legal advice concerning applicable data protection and privacy laws in those jurisdictions.

(n2) Note 2. An increasing number of state and federal laws mandate the protection of personal information about

employees and other individuals. For example, California law requires businesses to "implement and maintain reasonable security procedures and practices" to safeguard the "personal information" of California residents. See *Cal. Civ. Code § 1798.81 .5*. For purposes of this statute, "personal information" is defined as an individual's first name or first initial and last name when combined with any of the following data elements, if either the name or data element is not encrypted or redacted: (a) Social Security number, (b) driver's license number or California identification card number, (c) account number, credit or debit card number, in combination with any required security code, access code or password that would permit access to an individual's financial account, or (d) any individually identifiable information about an individual's medical history or medical treatment or diagnosis by a health care professional. See *Cal. Civ. Code § 1798.81 .5(d)*. In addition, California's data security breach notification statute requires a company to provide notice to California residents (such as employees or customers) whose personal information was, or is reasonably believed to have been, acquired by an unauthorized person. See *Cal. Civ. Code § 1798.82* . Many other states have implemented similar data security breach notification statutes.

Certain types of personal information about employees may be protected by other types of laws as well. For example, California's Confidentiality of Medical Information Act ("COMIA") significantly restricts the use and disclosure of medical information about employees. See *Cal. Civ. Code § 56 et seq.* Employers who maintain self-insured health plans also may be covered by the Health Insurance Portability and Accountability Act ("HIPAA") and its privacy regulations. This model guideline provides a broad definition of "personal information" that is intended to encompass the most commonly-applicable statutes for California employers, but each employer should assess the privacy obligations to which it is subject.

(n3)Note 3. See *Polimaster Ltd. v. Rae Sys., 2005 U.S. Dist. LEXIS 33847* (N.D. Cal. Sept. 6, 2005) (denying preliminary injunction based on finding that company failed to take reasonable measures to protect the alleged trade secret).

(n4)Note 4. Trade secrets are protected by statute under the Uniform Trade Secrets Act. See *Cal. Civ. Code § 3426 et seq.* A "trade secret" is defined by the Act as information that (1) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. See *Civ. Code § 3426.1(d)* . A claim for misappropriation of trade secrets may be brought by an employer under the Act. The model guideline above is written to provide broader protection than is available under the Act. The guideline prohibits misuse of the employer's proprietary and confidential information without regard to whether it is a trade secret. If an employee or former employee misuses an employer's proprietary or confidential information, the employer may be able to obtain damages and/or injunctive relief under a common-law claim for unfair competition. See, e.g., *Readylink v. Healthcare v. Cotton* (2005) 126 Cal. App. 4th 1006, 1017-21, 24 Cal. Rptr. 3d 720 (affirming grant of preliminary injunction with modification); *Morlife, Inc. v. Perry* (1997) 56 Cal. App. 4th 1514, 1527-29, 66 Cal. Rptr. 2d 731 (affirming grant of permanent injunction); *Courtesy Temporary Service, Inc. v. Camacho* (1990) 222 Cal. App. 3d 1278, 1286-91, 272 Cal. Rptr. 352 (affirming grant of preliminary injunction); *Klamath-Orleans Lumber, Inc. v. Miller* (1978) 87 Cal. App. 3d 458, 466-67, 151 Cal. Rptr. 118 (affirming award of damages); see generally Wilcox, California Employment Law, Ch. 70 (Matthew Bender).

(n9)Note 5. California law prohibits an employer from requiring an employee to refrain from discussing the amount of his or her wages. See *Cal. Lab. Code § 232* . More generally, the National Labor Relations Act prohibits employers from adopting policies that would interfere with the right of employees to discuss their wages and other terms and conditions of employment, even in a nonunion workplace. See, e.g., *Cintas Corp. v. NLRB* (D.C. Cir. 2007) 375 U.S. App. D.C. 371, 181 L.R.R.M. 2615, 154 Lab. Cas (CCH) p10,815.

(n10)Note 6. A separate written confidentiality agreement is recommended if confidentiality is a critical issue. Although the cases are in conflict regarding whether such an agreement may provide greater protection against misuse of confidential or proprietary information than is available under the Uniform Trade Secrets Act or under common law unfair competition, such an agreement may be useful as a means of establishing the existence of a mutual understanding

between the employer and employee that certain information is intended to be kept confidential. See, e.g., *Whyte v. Schlage Lock Co.* (2002) 101 Cal. App. 4th 1443, 1454 ; *Morlife, Inc. v. Perry* (1997) 56 Cal. App. 4th 1514, 1523, 66 Cal. Rptr. 2d 731 . For further discussion, see *Wilcox, California Employment Law*, § 70.07 (Matthew Bender).

(n11)Note 7. See § 2.16 of this Guide (Technology Use and Security Guideline and accompanying Notes).

(n12)Note 8. See § 2.32 of this Guide (Inspections on Company Premises Guideline and accompanying Notes).



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DIVISION 2 EMPLOYEE HANDBOOKS AND PERSONNEL POLICY MANUALS

Part A. RECOMMENDED GUIDELINES

*1-2 CA Guide to Employee Handbooks § 2.16*

## **§ 2.16 TECHNOLOGY USE AND SECURITY**

### **[1] Model Guideline**

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#### **TECHNOLOGY USE AND SECURITY**

The Company provides various Technology Resources to authorized employees to assist them in performing their job duties for the Company. Each employee has a responsibility to use the Company's Technology Resources in a manner that increases productivity, enhances the Company's public image, and is respectful of other employees. Failure to follow the Company's policies regarding Technology Resources may lead to disciplinary measures, up to and including termination of employment. [Moreover, the Company reserves the right to advise appropriate legal authorities of any violation of law by an employee]. [Company employees are reminded that, in addition to the requirements of this policy, all usage of Technology Resources is also subject to Company's "Company Property; Proprietary, Confidential, And Personal Information" policy].

#### **I. Technology Resources Definition**

Technology Resources consist of all electronic devices, software, and means of electronic communication including any of the following: personal computers and workstations; laptop computers; mini and mainframe computers; computer hardware such as disk drives and tape drives; peripheral equipment such as printers, modems, fax machines, and copiers; computer software applications and associated files and data, including software that grants access to external services, such as the Internet; electronic mail; telephones; mobile phones; personal organizers and other handheld devices; pagers; voicemail systems; and instant messaging systems.

#### **II. Authorization**

Access to the Company's Technology Resources is within the sole discretion of the Company. Generally, employees are given access to the Company's various technologies based on their job functions. Only employees whose job performance will benefit from the use of the Company's Technology Resources are authorized to access and use the necessary technology. Additionally, employees must successfully complete Company-approved training before they are authorized to access and use the Company's Technology Resources. [See Note n1]

### III. Use

The Company's Technology Resources are to be used by employees only for the purpose of conducting Company business. [Employees may, however, use the Company's Technology Resources for the following incidental personal uses as long as such use does not interfere with the employee's duties, is not done for pecuniary gain, does not conflict with the Company's business, and does not violate any Company policy: [See Note n2 ]

1. To use the telephone system for brief and necessary personal calls;
2. To send and receive necessary and occasional personal communications;
3. To prepare and store incidental personal data (such as personal calendars, personal address lists, and similar incidental personal data) in a reasonable manner; and
4. To access the Internet for brief personal searches and inquiries during meal times or other breaks, or outside of work hours, provided that employees adhere to all other usage policies.

The Company assumes no liability for loss, damage, destruction, alteration, receipt, transmission, disclosure, or misuse of any personal data or communications transmitted over or stored on the Company's Technology Resources. The Company accepts no responsibility or liability for the loss or non-delivery of any personal electronic mail or voicemail communications or any personal data stored on any Company property. The Company strongly discourages employees from storing any personal data on any of the Company's Technology Resources.] [See Note n3]

### IV. Improper Use

#### A. Prohibition Against Harassing, Discriminatory and Defamatory Use

The Company is aware that employees use electronic mail for correspondence that is less formal than written memoranda. Employees must take care, however, not to let informality degenerate into improper use. As set forth more fully in the Company's "Policy Against Harassment," the Company does not tolerate discrimination or harassment based on gender, pregnancy, childbirth (or related medical conditions), race, color, religion, national origin, ancestry, age, physical disability, mental disability, medical condition, marital status, sexual orientation, family care or medical leave status, veteran status, or any other status protected by state and federal laws. Under no circumstances shall employees use the Company's Technology Resources to transmit, receive, or store any information that is discriminatory, harassing, defamatory, obscene, indecent, threatening, or that otherwise could adversely affect any individual, group, or entity (*e.g.*, sexually explicit or racial messages, jokes, or cartoons). [See Note n4]

#### B. Prohibition Against Violating Copyright Laws

Employees shall not use the Company's Technology Resources to copy, retrieve, forward, or send copyrighted materials

unless the employee has the author's permission or is accessing a single copy only for the employee's reference. **[See Note n5]**

#### C. Other Prohibited Uses

Employees shall not use the Company's Technology Resources for any illegal purpose, violation of any Company policy, in a manner contrary to the best interests of the Company, in any way that discloses confidential or proprietary information of the Company or third parties, or for personal or pecuniary gain.

### V. Company Access To Technology Resources

All messages sent and received, including personal messages, and all data and information stored on the Company's Technology Resources (including on its electronic mail system, voicemail system, or computer systems) are Company property regardless of the content. As such, the Company reserves the right to access all of its Technology Resources including its computers, voicemail, and electronic mail systems, at any time, in its sole discretion.

#### A. No Reasonable Expectation Of Privacy

[Although the Company does not wish to examine personal information of its employees,][O]n occasion, the Company may need to access its Technology Resources including computer files, electronic mail messages, and voicemail messages. Employees should understand, therefore, that they have no right of privacy with respect to any messages or information created, collected, or maintained on the Company's Technology Resources, including personal information or messages. **[See Notes n6,n7]** The Company may, at its discretion, inspect all files or messages on its Technology Resources at any time for any reason. **[See Note n8]** The Company may also monitor its Technology Resources at any time in order to determine compliance with its policies, for purposes of legal proceedings, to investigate misconduct, to locate information, or for any other business purpose. **[See Notes n9, n10.]**

#### B. Passwords

Certain of the Company's Technology Resources can be accessed only by entering a password. Passwords are intended to prevent unauthorized access to information. Passwords do not confer any right of privacy upon any employee of the Company. Thus, even though employees may maintain passwords for accessing Technology Resources, employees must not expect that any information maintained on Technology Resources, including electronic mail and voicemail messages, are private. **[See Note n11]** Employees are expected to maintain their passwords as confidential. Employees must not share passwords and must not access coworkers' systems without express authorization.

#### C. Data Collection

The best way for employees to ensure the privacy of personal information is not to store or transmit it on the Company's Technology Resources. So that employees understand the extent to which information is collected and stored, examples of information currently maintained by the Company are provided below. The Company may, however, in its sole discretion, and at any time, alter the amount and type of information that it retains.

1. Telephone Use and Voicemail: Records are kept of all calls made from and to a given telephone extension. Although voicemail is password-protected, an authorized administrator can listen to voicemail

messages and also reset the password.

2. Electronic Mail: Electronic mail is backed up and archived. Although electronic mail is password-protected, an authorized administrator can read electronic mail and also reset the password.

3. Desktop Facsimile Use: Copies of all facsimile transmissions are maintained in the facsimile server.

4. Document Use: Each document stored on Company computers has a history that shows which users have accessed the document for any purpose.

5. Internet Use: Internet sites visited, the number of times visited, and the total time connected to each site are recorded and periodically monitored.

#### D. Deleted Information

Deleting or erasing information, documents, or messages maintained on the Company's Technology Resources is, in most cases, ineffective. All employees should understand that any information kept on the Company's Technology Resources may be electronically recalled or recreated regardless of whether it may have been "deleted" or "erased" by an employee. Because the Company periodically backs up all files and messages, and because of the way in which computers reuse file storage space, files and messages may exist that are thought to have been deleted or erased. Therefore, employees who delete or erase information or messages should not assume that such information or messages are confidential or ever were confidential. If a legal dispute arises, or may arise in the future, it may be unlawful to attempt to delete or erase certain information. Employees shall fully comply with Company policy regarding retention or destruction of information.

### VI. The Internet And On-Line Services

The Company provides authorized employees access to online services such as the Internet. The Company expects that employees will use these services in a responsible way and for business-related purposes only. Under no circumstances are employees permitted to use the Company's Technology Resources to access, download, or contribute to Internet sites that contain inappropriate content such as that which is discriminatory, harassing, defamatory, obscene, indecent, threatening, or that otherwise could adversely affect any individual, group, or entity.

[Additionally, employees may not use the Company's Technology Resources to post, comment, send, or otherwise upload any information to any Web sites or other online groups, including web logs (*i.e.*, "blogs"), social networking Web sites, newsgroups, discussion groups, or non-Company email groups, [except in accordance with the Company's Blogging Policy]. These actions will likely generate junk electronic mail and may expose the Company to liability or unwanted attention because of comments or other contributions that employees may make.] The Company strongly encourages employees who wish to access the Internet for non-work-related activities to obtain their own personal Internet access accounts that are unaffiliated with the Company, and to use such accounts at home on their own personal computer without making any reference to the Company. [See Note n12]

### VII. Monitoring

The Company monitors both the amount of time spent using online services and the sites visited by individual employees. The Company reserves the right to limit such access by any means available to it, including revoking access altogether. [The Company, through technological tools, may also prohibit or limit access to certain Web sites

considered inappropriate by the Company or its technology provider.]

### **VIII. Confidential Information**

The Company is very sensitive to the issue of protection of trade secrets and other confidential and proprietary information of both the Company and third parties ("Confidential Information"). [Confidential Information includes all proprietary, confidential, and personal information covered by the Company's guideline in this Manual regarding "Company Property; Proprietary, Confidential, And Personal Information."] Therefore, employees are expected to use good judgment and to adhere to the highest ethical standards when using or transmitting Confidential Information on the Company's Technology Resources.

Confidential Information should not be accessed through the Company's Technology Resources in the presence of unauthorized individuals. Similarly, Confidential Information should not be left visible or unattended. **[See Note n13]** Moreover, any Confidential Information transmitted via Technology Resources should be marked with the following confidentiality legend: "This message contains confidential information. Unless you are the addressee (or authorized to receive for the addressee), you may not copy, use, or distribute this information. If you have received this message in error, please advise [employee's name] immediately at [employee's telephone number] or return it promptly by mail."

Employees should adhere to Company's security policy with regard to Confidential Information and take all appropriate measures to safeguard the confidentiality and security of such information. Employees should avoid sending Confidential Information via the Internet, except when absolutely necessary. Employees should also verify electronic mail addresses before transmitting any messages containing Confidential Information.

### **IX. Software Use**

#### **A. License Restrictions**

All software in use on the Company's Technology Resources is officially licensed software. No software is to be installed or used that has not been duly paid for and licensed appropriately for the use to which it is being put. No employee may load any software on the Company's computers, by any means of transmission, unless authorized in writing in advance by \_\_\_\_\_ (*specify, e.g., Technology Coordinator, Office Manager, etc.*) and thoroughly scanned for viruses or other malware prior to installation.

#### **[X. Software For Home Use**

Before transferring or copying any software from a Company Technology Resource to another computer or other device, employees must obtain written authorization from \_\_\_\_\_ (*specify, e.g., Technology Coordinator, Office Manager, etc.*). It is the employee's responsibility to adhere to applicable licensing requirements, including not making or distributing copies of software to others. Upon departure from the Company, it is the employee's responsibility to remove all Company software from non-Company computers and other devices on which Company software has been installed. If an employee sells or otherwise transfers out of his or her own possession or control his or her own personally owned computer, he or she must delete all Company software prior to such sale or other transfer. Please ask \_\_\_\_\_ (*specify, e.g., Technology Coordinator, Office Manager, etc.*) for assistance if needed.]

#### **[XI. Security**

The Company has installed a variety of programs and devices to ensure the safety and security of the Company's Technology Resources. Any employee found tampering with or disabling any of the Company's security devices will be subject to discipline up to and including termination. [Moreover, the Company reserves the right to advise appropriate legal authorities of any violation of law by an employee [that results in the misappropriation, theft, or unlawful use of Company's property or proprietary information].]

To maintain the effectiveness of the Company's security measures, employees should use only secure networks established by the Company to access or use Confidential Information. Such information may not be downloaded, stored, or copied on any non-Company equipment or media (including personally owned computer, handheld devices, external memory devices, or disks) without prior written approval of \_\_\_\_\_ (*specify, e.g., Technology Coordinator, Office Manager, etc.*). If Confidential Information is downloaded, stored, or copied on non-Company equipment or media, employee must take all appropriate measures to safeguard against loss, theft, damage, or breach of such equipment or media. If Confidential Information is downloaded, stored, or copied on non-Company equipment or media, employees must permanently delete such information prior to selling or otherwise transferring out of their own possession or control such equipment or media. If Confidential Information is downloaded, stored, or copied on non-Company equipment or media and employee resigns, is terminated, or is requested to do so by management, employees must delete all Confidential Information they received, including any and all copies thereof. Similarly, employees may not send Confidential Information to their personal e-mail accounts, even for work-related purposes, without prior written approval of \_\_\_\_\_ (*specify, e.g., Technology Coordinator, Office Manager, etc.*).

Any loss or suspected loss of Confidential Information, or any suspicious activity such as external hacking attempts or unusual internal activity, should be reported immediately to Company management.]

#### **[XII. Remote Access To Technology Resources**

The Company may, at its sole discretion, provide certain employees with remote access systems such as a laptop, BlackBerry, or other personal organizer to allow such employees to handle the tasks associated with their jobs while working away from the office. Employees must take care to ensure the security of all Company-provided equipment. Employees must not share network passwords or other PINs with anyone. As soon as an employee believes Company-provided equipment is lost or that the security and confidentiality of the data on that equipment has been compromised, he or she must notify \_\_\_\_\_ (*specify, e.g., Technology Coordinator, Office Manager, etc.*). If Company-provided equipment is lost, or if it is damaged as a result of carelessness, employees may be responsible for replacement fees. The Company-provided remote access system should only be used for Company-related business. The Company may decide that it is no longer necessary for certain employees to possess a remote access system and their ability to use such systems may be discontinued, in which case such employees are expected to return any Company-issued remote access systems in accordance with Company's "Company Property" policy.

[The Company does not expect or require employees to work on tasks (including e-mail, work product, etc.) during meal periods or after scheduled working times. Any and all use of remote access systems shall be made in compliance with Company's "Hours Of Work, Overtime, And Pay Day policy."]

Use of public or home networks, such as unencrypted WiFi networks, can be a threat to the security and reliability of the Company's Technology Resources. Accordingly, employees must only access Company Technology Resources via means that are specifically approved by \_\_\_\_\_ (*specify, e.g., Technology Coordinator, Office Manager, etc.*.)]

#### **[XIII. Electronic Mail Guidelines**

Employees are expected to use good judgment with respect to use of electronic mail ("e-mail"). While e-mail provides an easy manner with which to communicate, it is not appropriate to say in an e-mail something that would never be said in person or in formal correspondence. All employees should adhere to the following with respect to use of e-mail:

1. *Always ask before sending an e-mail if it is the appropriate medium of communication.* When communicating about a sensitive subject, consider whether e-mail is the appropriate medium or whether using the phone rather than e-mail might be more appropriate (but keep in mind that voicemail is similar to e-mail; voicemail may be stored on a computer server and may be forwarded to third parties).
2. *Use the "front page" test.* Assuming that e-mail is the appropriate medium of communication, each e-mail should be treated as a formal written document. Do not write anything in an e-mail that could not be printed on the front page of the newspaper. Off-the-cuff, sarcastic, or angry comments can come back to haunt the author.
3. *E-mail is part of the workplace environment.* E-mail containing rude and insensitive comments is not only personally embarrassing, but also may serve as the basis for legal liability. Employees and managers should exercise the same care and sensitivity in communicating via e-mail as they would communicating in person or in traditional forms of writing. Offensive e-mail received from others should not be forwarded, and the recipient should ask the sender to refrain from sending inappropriate e-mail.
4. *Provide context.* As with other forms of communication, there is a risk that an e-mail message may be taken out of context. To reduce the risk that the message will be taken out of context, consider including the original message to which the reply e-mail relates.
5. *Know your audience.* When sending an e-mail, always double-check to whom the e-mail is addressed, especially when using the "reply to all" button. Ask whether it is appropriate for each addressee to receive the e-mail and whether sending the e-mail to a particular addressee will result in the unauthorized disclosure of Confidential Information. If in doubt, remove the doubted addressee.
6. *Do not use a home PC for business purposes.* Employees should understand that, if there is any concern that a court hearing a business dispute involving the Company and a third party may require producing one's hard drive from his or her home computer, he or she should not use a home computer for business purposes. E-mail relating to Company business, even though stored on a home computer, is recoverable and discoverable in litigation.]

#### **[XIV. Audits**

The Company may perform auditing activity or monitoring to determine compliance with these policies. Audits of software and data stored on the Company's Technology Resources may be conducted without warning at any time.]

#### **[2] Drafting Checklist \_\_\_\_\_**

##### **RECOMMENDED PROVISIONS**

1. A statement describing which employees are authorized to use the technology;
2. A statement that the Company's technology is to be used only for the Company's benefit;

3. A statement that all stored information is Company property;
4. A statement of policy against using the Company's technology to send messages that make derogatory comments about other individuals or companies or that violate Company policies, such as the Company's anti-harassment policy, or that violate the law **[See Note n4]**;
5. A statement of policy regarding transmission of Company confidential or proprietary information;
6. A statement regarding the retention of electronic mail messages and other information on the Company's Technology Resources;
7. A statement that employees should have no expectation of privacy in information they store on the Company's Technology Resources **[See Notes n6,n7]**;
8. A statement of policy regarding employee use of the Company's Technology Resources for personal messages and information;
9. A statement of policy against installing unauthorized software;
10. A statement of policy regarding Internet access and use;
11. A statement of policy regarding monitoring of the Company's Technology Resources **[See Notes n8, n9,n10]**;
12. A statement of policy regarding discipline for failure to comply with the Company's policy;
13. A cross-reference to Company's "Company Property; Proprietary, Confidential, And Personal Information" policy; and
14. A cross-reference to Company's "Hours Of Work, Overtime, And Pay Day" policy.

### **OPTIONAL PROVISIONS**

1. A cross-reference to the employer's guideline on "Company Property";
2. A cross-reference to the employee's guideline on "Inspections On Company Property";
3. A cross-reference to Company's "Harassment Or Discrimination" policy;
4. A statement of policy regarding remote access of Technology Resources; and
5. A statement of the Company's guidelines on e-mail usage.

### **[3] Notes**

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:  
 Computer & Internet Law Censorship Obscenity & Indecent Speech Computer & Internet Law Civil Actions Public

Disclosure of Private Facts Computer & Internet Law Criminal Offenses Data Crimes & Fraud Computer & Internet Law Privacy & Security General Overview Computer & Internet Law Privacy & Security Company Communications Computer & Internet Law Privacy & Security State Regulation Computer & Internet Law Trade Secret Protection General Overview Constitutional Law Substantive Due Process Privacy Personal Information Labor & Employment Law Employee Privacy General Overview Labor & Employment Law Employee Privacy Invasion of Privacy

#### FOOTNOTES:

(n1)Note 1. During the initial training, employers should review with employees this policy regarding "Technology Use And Security" and have employees sign forms acknowledging that they (1) have been trained in the proper use of the Company's Technology Resources, (2) have been made aware of the Company's "Technology Use And Security" policy, and (3) agree to abide by its terms.

(n3)Note 3. Permitting employees to use the employer's electronic mail or communications system (including Company-sponsored blogs) for nonbusiness-related communications can potentially lead to an obligation to permit employees to use that system to discuss and distribute materials related to unions and union organizing. The key is where and how an employer draws a line between those nonbusiness-related activities it permits and those it prohibits. An employer lawfully may bar employees' nonwork-related use of its e-mail system, provided it does not discriminate against unionizing, collective bargaining, or other protected concerted activity permitted under Section 7 of the National Labor Relations Act ("NLRA"). See *Guard Publ'g Co., 2007 NLRB LEXIS 499, at \*20, 351 N.L.R.B. 1110, 351 N.L.R.B. No. 70, 183 L.R.R.M. (BNA) 1113 (Dec. 16, 2007)* (holding employees do not have a statutory right to use an employer's e-mail system to engage in Section 7 activities); *but see Guard Publ'g Co. v. N.L.R.B. (2009) 571 F.3d 53 (D.C. Cir. 2009)* (concluding that the employer had enforced its e-mail policy in a way that violated the employees' Section 7 rights). The standard for determining whether an employer is discriminating "along Section 7 lines" was narrowed in the NLRB's *Register-Guard* decision. See *Guard Publ'g Co., 2007 NLRB LEXIS 499, at \*35-\*38*. According to the Board's decision, the focus no longer is on whether an employer permits *some* nonbusiness-related e-mail communications, but prohibits *others* because they are union-related. Rather, the test now, according to the NLRB, is whether an employer has drawn a line between permitted and prohibited activities *on Section 7 grounds*. See *id.* at \*35-\*38. This means that an employer may not allow employees to e-mail or solicit for one union but not another or permit solicitation by antiunion employees but not by prounion employees. Nonetheless, an employer is free to draw a line between, for example, charitable solicitations and non-charitable solicitations, between solicitations of a personal nature and solicitations for the commercial sale of a product, and/or between business-related use and nonbusiness-related use. See *id.* at \*38. However, the D.C. Circuit recently attacked the Board's decision in *Register-Guard* and criticized, among other things, the Board's solicitation analysis. *Guard Publ'g Co. v. N.L.R.B. (2009) 571 F.3d 53 (D.C. Cir. 2009)* (concluding that the employer had enforced its e-mail policy in a way that violated the employees' Section 7 rights). Additionally, it is widely expected that the Obama Board will overrule *Register-Guard*. Given this state of the law, employers, therefore, should craft their policies relating to electronic communications carefully to describe what communications are and are not prohibited. Additionally, employers contemplating disciplining employees for conduct in violation of such policies should confirm that the alleged conduct does, in fact, violate the policies and that other employees engaged in sending similar nonunion communications (e.g., solicitations for non-charitable organizations) have been treated similarly.

(n4)Note 4. See § 2.13 of this Guide ("Policy Against Harassment" and accompanying notes). Courts have recognized that plaintiffs may base claims of discrimination and harassment on information disseminated through electronic mail messages. See, e.g., *Strauss v. Microsoft Corp., 1995 U.S. Dist. LEXIS 7433, 68 Fair Empl. Prac. Cas. (BNA) 1576 (S.D.N.Y. June 1, 1995), at \*10-14* (holding that electronic mail demonstrating that plaintiff's supervisor participated in exchange of sexually oriented and offensive communications admissible in plaintiff's sex discrimination suit); *Owens v. Morgan Stanley & Co., Inc., 1997 U.S. Dist. LEXIS 10351, 71 Empl. Prac. Dec. (CCH) P45010, 74 Fair Empl. Prac. Cas. (BNA) 876 (S.D.N.Y. July 16, 1997), at \*7-8* (dismissing discrimination claim based on single racist e-mail message not directed at plaintiff, but noting that such conduct could constitute hostile work environment discrimination if sufficiently severe and pervasive); *Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158 (9th Cir. 2003)*

(dismissing claim for hostile environment harassment because Caltech established the "reasonable care" defense, but noting that "display of pornographic computer images," among other things, established prima facie case for hostile environment harassment).

(n9)Note 5. See *Amn. Geophysical Union v. Texaco*, 60 F.3d 913 (2d Cir. 1994) . If many employees are systematically archiving copyrighted works, the company runs a risk of being found liable for copyright infringement. This is especially true if the kinds of works being copied are available only through paid subscription or are subject to statutory licensing through the Copyright Clearance Center (the "CCC"; for more information see <http://www.copyright.com>). In *Texaco*, publishers sued Texaco for copyright infringement. The Second Circuit held that Texaco's photocopying of various scientific and academic journals available via CCC license and by subscription was not fair use because the copying was widespread, systematic, and archival in nature, and because publishers lost licensing and subscription revenue as a result of Texaco's photocopying practices.

(n10)Note 6. One California court has found that a well drafted technology use policy can effectively defeat an employee's claim to privacy *vis-a-vis* personal information stored on company computer equipment. In *TBG Insurance Servs. Corp. v. Superior Court*, 96 Cal. App. 4th 443, 446, 117 Cal. Rptr. 2d 155 (Cal. App. 2d Dist. 2002) , a former executive was issued a company computer for work at home. The former executive had signed a policy limiting his use of the computer to business purposes only, as well as acknowledging that the equipment was subject to monitoring by authorized company personnel and that communications transmitted by the computer were not private. The court held that such a policy was sufficient to defeat the former executive's claim that he had a reasonable expectation of privacy. *But see Haynes v. Office of the AG*, 298 F. Supp. 2d 1154, 1162 (D. Kan. 2003) (finding that a governmental employee's statement that employees had no expectation of privacy in using the employer's computer system was significant but failed to overcome evidence that several of the employer's practices would reasonably lead an employee to such expectation, such as allowing employees to use work computers for private communications).

(n11)Note 7. See § 2.23 of this Guide ("Company Property; Proprietary, Confidential, And Personal Information"), Note 1. Unlike in the United States-where, if employers give employees clear notice that they will monitor Technology Resources, employees generally will have no reasonable expectation of privacy and employers can then monitor employees' e-mails-outside of the United States it is not as clear-cut. For example, in the European Union, employees do have a legitimate expectation of a certain degree of privacy in the workplace; however, this must be balanced with other legitimate rights and interests of the employer. Companies with employees or facilities located outside of the United States are strongly encouraged to seek legal advice concerning applicable privacy laws in those jurisdictions.

(n12)Note 8. The federal Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act of 1986, generally prohibits the unauthorized access to and disclosure of electronic and wire communications in storage, such as e-mail and voicemail messages. See 18 U.S.C. § 2701. However, access is permitted if (1) one of the parties to a communication consents to the access; or (2) the entity providing the communication service consents to access. Employers have relied on the latter exception when accessing the stored electronic and wire communications of their employees without the employee's consent. See, e.g., *Bohach v. City of Reno*, 932 F. Supp. 1232, 1236 (D. Nev. 1996) (employer acted lawfully where it accessed messages stored in its computerized paging system because it constituted a service provided under the statute); *but see Konop v. Haw. Airlines, Inc.*, 302 F.3d 868 (9th Cir. 2001) , *cert. denied*, 537 U.S. 1193 (2003) (reversing District Court's grant of summary judgment in favor of defendant employer on plaintiff employee's claims that employer's unauthorized access of password-protected Web site created by employee, on which employee posted bulletins critical of employer, constituted violations of the Railway Labor Act and the Stored Communications Act). However, employers seeking access to employee e-mail and voicemail messages are best assured of avoiding liability under the federal law by obtaining advance consent to such access from their employees. In contrast to federal law, the applicability of California privacy laws to an employer's right to access stored electronic and wire communications is less clear. The California Invasion of Privacy Act (*Penal Code § 630 et seq.* ) prohibits, under certain circumstances, wiretapping of communications and eavesdropping on or recording confidential communications, without the consent of both parties to the communication. Unlike federal law, however, the Act does not appear to apply literally to stored communications.

For further discussion of the state wiretapping and eavesdropping statutes, see *Wilcox, California Employment Law*, § 50.19 (Matthew Bender).

Although federal and state privacy laws may not bar an employer's access to stored employee communications, employers who access such communications must be prepared to defend against any common law claims of invasion of privacy by employees or outside callers. To do so effectively, employers should take steps to diminish the employee's (and, in the case of voicemail, the outside caller's) expectation of privacy in such communications. Notice to employees that their communications are accessible by the employer is one such step. In addition to providing such notice through an employee handbook, employers may wish to have their employees sign a statement that they understand their communications may, from time to time, be accessed by the employer. (Callers could be alerted to the nonconfidential nature of voicemail through the outgoing message they hear when the telephone is answered.) Further, employers should only access employee electronic mail or voicemail for limited purposes and time. Such access should occur only for business-related purposes, such as when an employee is unavailable and the information is needed, or in order to determine if employees are using Company property for some illegal or unauthorized purpose. Moreover, employers should check messages to determine if they are business or personal and should refrain from monitoring personal messages beyond the point that their nature is determined. See also § 2.32 of this Guide ("Inspections On Company Premises," Notes 1, 7).

(n13)Note 9. As noted above, federal and state privacy statutes prohibit, under certain circumstances, an employer's unauthorized interception of or eavesdropping on wire, electronic, and oral communications. Under federal law, however, employers may intercept such communications if they obtain the consent of one of the parties to the communication, or if the interception is conducted in the ordinary course of business. See 18 U.S.C. § 2510(5)(a). A number of federal courts have considered the application of this latter exception to employer monitoring of employee telephone conversations and have upheld such monitoring when done for training purposes, to provide quality control over customer servicing, to prevent use of phones by employees during work hours for personal purposes, and where the employer suspected employees of leaking confidential information to business competitors. Unlike federal law, California state law contains no "ordinary course of business" exception and requires the consent of both parties to the communication before interception or monitoring may occur. Thus, the scope of an employer's right to intercept or to eavesdrop upon communications on its telephone lines and computer networks in California is severely curtailed.

(n26)Note 10. By stating the Company's right to inspect and monitor all files and messages on its Technology Resources, this guideline is intended to reduce an employee's expectation of privacy in such messages. However, employers should be aware that a reasonable expectation of privacy might still arise from informal policies or practices communicated to employees. See *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892 (9th Cir. 2008) (the Ninth Circuit agreed with the district court's holding that employer's informal policy and supervisor's communications that text messages on an employer-provided mobile network would not be audited if employees paid overages rendered plaintiff employee's expectation of privacy in those messages reasonable, even though employees had signed a "Computer Usage, Internet and E-mail Policy" that specifically disclaimed an expectation of privacy in the mobile network). Accordingly, employers should be careful to stay "on message" where surveillance of employee communications is concerned, and avoid having managers and supervisors communicate any statements that could give rise to a reasonable expectation of privacy.

(n27)Note 11. Employers should inform employees that passwords do not create any right to privacy *vis-a-vis* the employer. See § 2.32 of this Guide ("Inspections On Company Premises," Note 8).

(n28)Note 12. Employee use of Technology Resources to post content onto blogs, social networking Web sites, or other Internet Web sites or publications raises a number of important legal concerns, including those related to protection of Confidential Information, privacy, and defamation. For further discussion of these issues see § 2.32 of this Guide ("Blogging Policy").

(n29)Note 13. Employers may want to consider using screen savers, keyboard locking mechanisms, and periodic

password expiration to enhance protection of Confidential Information.



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California Employer's Guide to Employee Handbooks and Personnel Policy Manuals

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DIVISION 2 EMPLOYEE HANDBOOKS AND PERSONNEL POLICY MANUALS

Part A. RECOMMENDED GUIDELINES

*1-2 CA Guide to Employee Handbooks § 2.17*

## **§ 2.17 BLOGGING POLICY**

### **[1] Model Guideline**

#### **BLOGGING POLICY**

The Company encourages employees to post freely and exchange opinions and ideas on interactive websites in a way that is constructive and follows all Company policies and codes of conduct. Accordingly, the following policy is intended to set forth the terms of the Company's policy on employee use of blogs and other interactive websites. This policy covers employees creating, posting, commenting, or uploading to any Internet website, including the Company-sponsored blog on the intranet, as well as any non-Company external site, such as media sites, chat rooms, bulletin boards, newsgroups, discussion groups, non-Company email groups, personal websites, video sharing sites, picture sharing sites, dating sites, and social networking sites (e.g. MySpace, Facebook, Twitter, etc.), whether or not such sites are set to private. Failure to follow the Company's Blogging Policy may lead to disciplinary measures, up to and including immediate termination of employment.

#### **I. Company-Sponsored Blog**

The Company sponsors an internal Company blog on the Company intranet ("Company Blog") on which it encourages its employees to post their opinions and ideas freely. However, each employee is responsible for using the Company Blog in a way that is constructive, protects the Company's proprietary and confidential information, and is respectful of other employees and the Company's products and services.

#### **A. Authorization**

Access to the Company Blog is within the sole discretion of the Company. Employees have no free speech right to post content on the Company Blog, and anonymous posting on the Company Blog is prohibited. [The Company's policies regarding Company access to Technological Resources and monitoring of online services, as described in the

Company's Technology Use and Security guideline in this Manual, apply with equal force to the Company Blog.] **[See Note n1]** Posting on the Company Blog is a privilege that may be revoked when abused, and the Company retains the absolute right to delete or modify any content it deems inappropriate in its sole discretion. Further, the Company has the right to require any employee involved in posting inappropriate content to stop posting immediately.

While the Company reserves the right to remove inaccurate, offensive, or inappropriate content from the Company Blog, it is not obligated to do so, and assumes no liability for failing to take such action. The Company encourages each participating employee to monitor the Company Blog by correcting inaccurate information and by reporting any offensive or inappropriate content immediately to \_\_\_\_\_ [e.g. the Company's Human Resources Department]. [Employees are only permitted to read or post on the Company Blog during work time.] The Company does not expect or require employees to work on work-related tasks (including the Company Blog) during meal periods or after scheduled working times. Any and all use of the Company Blog shall be made in compliance with Company's "Hours of Work, Overtime, And Pay Day policy." See *Section 2.05*.

## **B. Use**

The Company Blog is confidential and proprietary and meant for internal use only. Disclosing this information outside of the Company could violate the Company's policies regarding the nondisclosure of proprietary, confidential and personal information. The Company Blog is intended to focus on topics related to the Company's business and its employees in general, and may not be used for discussion of non-work-related issues. **[See Note n2]** [However, employees should not use the Company Blog as a means of notifying the Company of compliance matters or concerns, but should instead [e.g. follow the process outlined in the Company's "Open Door Policy" in this Manual or report such concerns to the employee's supervisor, manager, and/or the Human Resources Department]].

Moreover, each employee blogs/posts at his or her own risk and is personally and legally responsible for what he or she posts, including compliance with all applicable laws, Company policies, and Company codes of conduct. The Company will not be liable for any statements employees make when blogging. It therefore is critical for employees to use their common sense and best judgment when posting comments on the Blog.

## **C. Improper Use**

### **1. Prohibition Against Harassing, Discriminatory and Defamatory Use**

The Company recognizes that blogging is generally informal. Yet employees are cautioned not to allow informality to lapse into rash postings, careless behavior or improper comments; they are expected to blog with respect. Employees may not engage in any postings that may harm or tarnish the image, reputation and/or goodwill of the Company or any of its employees or clients. While postings may be critical of the Company's policies or decisions, they should always be respectful and constructive and refrain from delving into personal attacks. **[See Note n3]** Employees are expected to abide by the Company's policies against discrimination, harassment, and retaliation when blogging. Employees are prohibited from making any discriminatory, harassing, disparaging, libelous, defamatory, obscene, indecent, or threatening comments (e.g., sexually explicit or racial messages, jokes, or cartoons) when blogging, or otherwise engaging in any conduct prohibited by the Company. **[See Note n4]** Employees are expected to exercise restraint in terms of exaggeration, colorful language, guesswork, legal conclusions and derogatory remarks or characterizations.

### **2. Prohibition Against Disclosing Proprietary and Confidential Information**

The Company's policies regarding the nondisclosure of proprietary, confidential and personal information apply to online blogging or postings. As such, employees must not post information on the Company Blog that in any way discloses confidential or proprietary information of the Company, its employees, or any other third party that has disclosed information to the Company. The posting of copyrighted materials on the Company Blog also is not allowed. In addition, employees are prohibited from sharing any confidential information they learn by accessing the Company Blog with anyone outside of the Company unless they have been given express written permission to do so by the Company. Further, employees may not use any confidential information they learn by accessing the Company Blog for their own benefit or for the benefit of any person or entity other than the Company.

[Please be aware that using material nonpublic information learned on the Company Blog to trade securities or disclosing such information to third parties who trade securities could subject employees to liability for insider trading.] **[See Note n5]**

### 3. Other Prohibitions

Employees may not use the Blog to promote or solicit participation in any activity that is unrelated to their work at the Company. [See the Company's guideline on Solicitation, Distribution, and Bulletin Boards in this Manual.] **[See Note n6]** Employees also may not use the Blog for any illegal purpose, violation of any Company policy, in a manner contrary to the best interests of the Company, or for personal or pecuniary gain.

Any inappropriate bloggings and/or postings that violate these guidelines should be reported to Company management immediately. Any questions or concerns about blogging, the Company Blog, or the Blogging Policy should be directed to [e.g. to the employee's supervisor, manager, and/or the Human Resources Department]. **[See Note n7]**

## II. Non-Company Blogs

Employees are free to create or participate in non-Company social media sites ("non-Company blog") and other forms of online publishing and discussion, provided that such participation does not violate any Company policies, is not detrimental to the Company's best interests and does not interfere with an employee's regular work duties. **[See Note n8]** [The Company's policies regarding Company access to Technological Resources and monitoring of online services, as described in the Company's Technology Use and Security guideline in this Manual, apply with equal force to employee access and use of non-Company blogs.] **[See Note n1]** [Employees may not engage in blogging during work time. If an employee's job is being adversely affected by time spent blogging, the employee may be subject to discipline, including immediate termination.]

Employees blog/post at their own risk and are personally and legally responsible for their postings and online comments. The Company will not assume any liability or risk for an employee's blogging or posting online. The following are illustrative of the types of relevant laws implicated by blogging, but are not intended to be comprehensive: privacy, libel, defamation, harassment, copyright, data theft, disclosure of material non-public information, and disclosure of confidential or trade secret information. [Further, employees who travel internationally, should be careful to avoid making online comments that are openly critical or hostile of the countries to which they plan future travel (including the countries' governments, ruling parties, officials, and religious values), as some governments have criminal penalties for such online statements, including imprisonment.] **[See Note n9]**

When posting in a non-Company blog or online forum, if the blog in any way identifies the Company or discusses the Company or its business, an employee must identify himself or herself as a Company employee, speak in the first person, and make it clear that what is being said is representative of the employee's personal views and opinions and does not necessarily reflect the views and opinions of the Company. **[See Note n10]** [At a minimum, an employee's

personal blog or posting should include the following standard disclaimer language, "I am an employee of the Company. The views expressed are mine alone and do not necessarily reflect the positions, strategies, or opinions of the Company." [See Note n2] In no way may employees represent or suggest that their opinions or positions are endorsed by the Company or any of its managers or employees. In addition, employees should not re-publish postings or statements of other Company employees without making the same disclaimer that the views expressed are of an employee of the Company and do not reflect the positions, strategies or opinions of the Company.

Managers and executives should exercise particular care when posting online to ensure their published personal thoughts are not misunderstood to be expressions of official Company positions. [Managers also should safely assume their direct reports will read their postings, and fully understand that non-Company blogs are not appropriate forums for communicating Company policy to Company employees.]

Employees must always be in compliance with the Company's policies regarding non-disclosure of proprietary, confidential and personal information, especially on non-Company blogs. Accordingly, employees are prohibited from revealing, or making any reference to, any proprietary or confidential information, trade secrets, or other information covered by such policy. Even vague or disguised references to such information could violate the Company policies and applicable laws. Employees also must respect copyright and fair use laws when posting [and, as a best practice, always credit and/or link to someone else's work when quoting or relying upon it]. Additionally, never identify a Company client, partner, vendor, supplier or affiliate by name, and never discuss the confidential information of a Company client, partner, vendor, supplier or affiliate online.

[All employees also should understand that posting false or misleading information about the Company may subject both the employee and Company to liability for violation of securities laws. Employees are prohibited from disclosing material, nonpublic information about the Company. Information is material if it would change a reasonable person's perception of the value of a company's stock. Again, even vague or disguised references to nonpublic information about the Company may violate such laws (such as statements that any aspect of the Company is "strong," hints regarding the timing of a product release, a forward-looking statement about the Company, speculation about Company business deals, mergers, acquisitions, relationships, partnerships, etc.). Employees may only disclose operational or financial information if such information has already been released publicly in a press release, public filing or other published materials. The Company reserves the right to ask employees to temporarily limit their personal online commentary or blogging to topics unrelated to the Company if it believes that is necessary to ensure compliance with securities regulations or other laws.] [See Note n5]

Employees are prohibited from using Company logos, trademarks or other intellectual property or adding a link to the Company's website without the Company's written permission. The Company monitors the use of its name, copyrights, trademarks, website, and other information on the Internet. Employees likewise may not post any content that is harassing, discriminatory, defamatory, threatening, disparaging, libelous or otherwise illegal or injurious. [See Note n11] [If an employee posts about a competitor, the employee must ensure what is said is factually accurate and may not openly advertise or tout for the competitor to the potential detriment of the Company.]. Moreover, non-Company blogs must never be used for internal business-related communications between fellow employees.

[Non-Company blog postings may generate media interest or coverage. If a member of the media contacts an employee about a Company-related posting or online comment published by the employee, or requests Company information of any kind, contact [e.g. Marketing Department, Human Resources, Company management]].

Failure to adhere to Company policies regarding blogging and online postings will be considered grounds for discipline, including immediate termination. Such violations can also lead to serious legal ramifications for offending individuals, as they can be held personally liable for any post that is defamatory, proprietary, discriminatory, harassing, obscene or which violates any other law.

Any inappropriate bloggings and/or postings that violate these guidelines should be reported to Company management immediately. [See Note n7 ]

## [2] Drafting Checklist

### RECOMMENDED PROVISIONS

1. A statement describing a Company's sole, discretionary control over employee access to the Company Blog;
2. A statement that failure to abide by the Company's blogging guidelines may lead to disciplinary measures, up to and including immediate termination of employment;
3. A statement that the Company Blog is for internal use only and is meant to focus on business-related topics;
4. A statement that employees post at their own risk, are personally responsible for what they post, and the Company is not liable for any statements made by blogging employees;
5. A statement that employees are expected to blog with respect;
6. A statement of policy against posting anything on the Company blog that is harassing, discriminatory, defamatory, or disparaging about the Company, or its employees;
7. A statement cautioning employees about engaging in certain types of risky behavior, such as exaggeration, colorful language, guesswork, obscenity, and the like;
8. A statement of policy regarding the posting of copyrighted material and nondisclosure of trade secrets and/or confidential, proprietary, or personal information of the Company or third parties when blogging or participating in online discussions;
9. A statement of policy regarding nondisclosure and use of confidential information learned from accessing a Company Blog;
10. A statement against use of a Company Blog to promote or solicit participation in non-work-related activities, or for any illegal purpose, violation of Company policy, in a manner contrary to the Company's best interests, or for personal or pecuniary gain [**But see Note n2**];
11. A cross-reference to the Company's "Hours of Work, Overtime, And Pay Day" Policy for use of a Company Blog.
12. A statement regarding where to report violations of the Company's blogging guidelines;
13. A statement of policy regarding employee freedom to create and participate in non-Company blogs and online publishing and discussion, so long as it is in a professional manner, does not otherwise violate Company policy, is not detrimental to the Company's best interests, and does not interfere with an employee's regular work duties;
14. A statement that managers and executives should take special care when posting to ensure their published personal thoughts are not misinterpreted to be expressions of official Company positions;

15. A statement of policy regarding the nondisclosure of trade secrets and proprietary, confidential, or personal information when participating in non-Company blogs, including a stated prohibition of identifying a Company client or affiliate by name without permission;
16. A statement requiring employees to respect and adhere to copyright and fair use laws when posting;
17. A statement against the use of Company logos or trademarks without the Company's written permission;
18. A statement of policy against posting personal online content that is harassing, discriminatory, defamatory or otherwise illegal or injurious, and a statement encouraging employees to ensure all personal comments about a competitor are factually accurate;
19. A statement prohibiting employees from using non-Company blogs for internal business-related communications.

### **OPTIONAL PROVISIONS**

1. A cross reference to the employer's guideline on Company access to Technological Resources and monitoring of online services;
2. Depending on whether an employer is a publicly-traded company, statements regarding the risk of liability for insider trading and violation of securities laws based on use of information learned from the Company blog or publishing misleading information online, and a statement reserving the Company's right to ask employees to confine their blogging to non-Company-related topics if necessary to comply with applicable securities laws;
3. A cross reference to the employer's guideline on Solicitation, Distribution, and Bulletin Boards;
4. A statement of policy that employee blogs or postings must be accompanied by a clear disclaimer that says, at a minimum, language to the following effect; "The views expressed are mine alone and do not necessarily reflect the position, strategies, or opinions of the Company";
5. A statement that blogging best practices include crediting and/or linking to someone else's work when quoting or relying upon it;
6. A statement that managers should safely assume their direct reports will read their postings on non-Company blogs, and an admonition that non-Company blogs are not appropriate forums for communicating Company policy to Company employees;
7. A statement of policy and protocol regarding when blogging or online postings generate media interest.
8. A warning about the international implications of political blogging.

### **[3] Notes**

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Labor & Employment Law Employment Relationships At-Will Employment General Overview Labor & Employment Law Employment Relationships At-Will Employment Exceptions Implied Contracts Labor & Employment Law Wrongful Termination Breach of Contract Employer Handbooks

#### FOOTNOTES:

(n1)Note 1. See § 2.16 of this Guide (Technology Use and Security).

(n2)Note 2. Blogging policies must be careful to avoid any argument that they infringe on the employees' opportunity to engage in concerted activities and constitute an unfair labor practice under Section 8(a)(1) of the National Labor Relations Act. 29 U.S.C. § 2000e-2(a)(1) (2009). All blogging policies should be reviewed by counsel. Permitting employees to use the employer's electronic mail or communications system (including company-sponsored blogs) for nonbusiness-related communications can potentially lead to an obligation to permit employees to use that system to discuss and distribute materials related to unions and union organizing. The key is where and how an employer draws a line between those nonbusiness-related activities it permits and those it prohibits. An employer lawfully may bar employees' nonwork-related use of its e-mail system, provided it does not discriminate against unionizing, collective bargaining, or other protected concerted activity permitted under Section 7 of the National Labor Relations Act ("NLRA"). See *Guard Publ'g Co., 2007 NLRB LEXIS 499*, at \*20, 351 N.L.R.B. No. 70 (Dec. 16, 2007) (holding employees do not have a statutory right to use an employer's e-mail system to engage in Section 7 activities). The standard for determining whether an employer is discriminating "along Section 7 lines" has been narrowed. See *id.* at \*35-\*38. The focus no longer is on whether an employer permits *some* nonbusiness-related e-mail communications, but prohibits *others* because they are union-related. Rather, the test now is whether an employer has drawn a line between permitted and prohibited activities *on Section 7 grounds*. See *id.* at \*35-\*38. This means that an employer may not allow employees to e-mail or solicit for one union but not another or permit solicitation by antiunion employees but not by prounion employees. Nonetheless, an employer is free to draw a line between, for example, charitable solicitations and non-charitable solicitations, between solicitations of a personal nature and solicitations for the commercial sale of a product, and/or between business-related use and nonbusiness-related use. See *id.* at \*38. Employers, therefore, should craft their policies relating to electronic communications carefully to describe what communications are and are not prohibited. Additionally, employers contemplating disciplining employees for conduct in violation of such policies should confirm that the alleged conduct does, in fact, violate the policies and that other employees engaged in sending similar nonunion communications (e.g., solicitations for non-charitable organizations) have been treated similarly.

(n3)Note 3. Employers should be mindful of derogatory postings that could constitute protected concerted activity under the National Labor Relations Act or analogous statutes. See, e.g., *Konop v. Hawaiian Airlines, Inc. (9th Cir. 2002) 302 F.3d 868* (holding pilot's postings that were critical of the incumbent pilots union and referred to Hawaiian Airlines' president as an incompetent "Nazi" were not so intolerable or egregious to cause pilot to lose protection under federal labor laws).

(n4)Note 4. An employer may be subject to liability based on an employee's blogging activities. In *Blakey v. Continental Airlines (2000) 164 N.J. 38, 751 A.2d 538*, a female pilot asserted allegations of defamation, sexual harassment, and hostile work environment, among others, stemming from derogatory postings made about her on a pilots' online bulletin board operated by a third-party Internet service provider. The New Jersey Supreme Court held that Continental Airlines has a duty to take effective measures to stop co-employee harassment when it knows or has reason to know that such harassment is part of a pattern of harassment that is taking place in the workplace *and in settings that are related to the workplace*--such as an online site Continental pilots are required to access in order to do their job. See *Blakey v. Continental Airlines (2000) 164 N.J. 38, 44, 751 A.2d 538, 553*; see also § 2.13 of this Guide (Policy Against Harassment), Note 3. The Court remanded the case for a determination of whether the online bulletin board was sufficiently integrated with the workplace to require Continental Airlines to respond to offensive postings. Presumably, an employer-operated blog would satisfy this test. The significance of the *Blakely* decision, however, is its illustration

that employer liability may reach beyond employer-sponsored blogs. *See also Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal. App. 4th 790 (holding that employer was immune from liability as an interactive computer service provider under the Communications Decency Act where a former employee transmitted cyberthreats to third parties over the employer's computers without the employer's knowledge and that the plaintiffs had failed to establish employer liability under theories of ratification, respondeat superior, or negligent supervision).

(n9)Note 5. U.S. securities laws, including the Securities Act of 1933 and Securities Exchange Act of 1934, broadly prohibit fraudulent activities of any kind in connection with the offer, purchase, or sale of securities. Posting materially misleading information risks violation of securities laws. Moreover, insider trading is illegal when a person trades a security while in possession of material nonpublic information in violation of a duty to withhold the information or refrain from trading. Publicly-traded companies also may wish to reserve the right to ask employees to refrain from blogging about Company-related topics to comply with "quiet periods" imposed in connection with certain corporate activities, such as filing a registration statement.

(n10)Note 6. *See* § 2.28 of this Guide (Policy on Solicitation, Distribution, and Bulletin Boards), Note 5 (regarding company bulletin boards). *See also* Note 1 to this policy.

(n11)Note 7. *See* § 2.13 of this Guide (Policy Against Harassment), Note 7 (employers must advise employees as to procedures for making complaints of harassment or harassing conduct).

(n12)Note 8. California employers are reminded that state law prohibits them from forbidding or preventing employee participation in politics, controlling employee political activities or affiliations, or attempting to coerce or influence employees to adopt or refrain from adopting a course of political action. *See Cal. Lab. Code §§ 1101, 1102*. Under California law, employers also may not discipline an employee for engaging in lawful off-duty conduct. *See Cal. Lab. Code §§ 96(k), 98.6*.

(n13)Note 9. International companies may consider warning their employees who travel internationally that some countries, including Iran, have launched crackdowns on bloggers and Internet users deemed to be hostile to authorities or religious values, with penalties including imprisonment.

(n26)Note 10. The Supreme Court has held that anonymous speech is entitled to *First Amendment* protection, and in some circumstances, bloggers may be entitled to protection for journalists under the *First Amendment* and California's reporter shield law. *See, e.g., Cal. Civ. Proc. Code § 425.16* (California's reporter shield law); *Talley v. California*, 362 U.S. 60 (1959) (anonymous speech is protected by the *First Amendment*); *Apple Computer, Inc. v. Doe I*, Case No. 1-04-CV-032173, 2005 WL 578641, (Cal. Super. Ct. March 11, 2005) (denying bloggers' request for protective order against employer's subpoena for documents disclosing the identities of employees who provided its trade secret information to bloggers because even if the bloggers were journalists, an argument the court expressly did not consider, they would not be protected by California's reporter shield law because knowingly disclosing Apple's trade secrets was "in furtherance of an illegal act" to which the law did not apply).

(n27)Note 11. Employers must take care not to blur improper or injurious conduct with protected concerted activity. In *Konop v. Hawaiian Airlines*, a pilot for Hawaiian Airlines created and maintained a personal, password-protected website where he posted bulletins critical of his employer, its officers, and the incumbent union. *See Konop v. Haw. Airlines, Inc.* (9th Cir. 2002) 302 F.3d 868, cert. denied, 537 U.S. 1193 (2003). Through his secure website, Konop encouraged Hawaiian Airlines employees to consider alternative union representation. After surreptitiously accessing the website and reading Konop's bloggings, Hawaiian Airlines placed Konop on medical suspension. Konop filed suit alleging, among other things, retaliation in violation of the Railway Labor Act, a statute comparable to the NLRA. The Ninth Circuit denied Hawaiian Airlines' summary judgment motion, explaining there was no dispute that Konop's website constituted protected union organizing activity and ruling his allegedly defamatory postings were "rhetorical hyperbole" and opinion rather than deliberately false statements of fact. *See Id. at 882-883*.



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DIVISION 2 EMPLOYEE HANDBOOKS AND PERSONNEL POLICY MANUALS

Part A. RECOMMENDED GUIDELINES

*1-2 CA Guide to Employee Handbooks § 2.18*

## § 2.18 MOBILE DEVICE POLICY

### [1] Model Guideline

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#### MOBILE DEVICE POLICY

The Company prohibits the use of all handheld mobile devices including telephone, data, personal organizer, or other devices for work purposes while operating a motor vehicle or for personal purposes while operating a motor vehicle during work hours or on Company business. [See Note n1] Moreover, all use of company-issued mobile devices, or personally purchased mobile devices used for work-related purposes, must be made in accordance with Company policy [including the Technology Use And Security policy, and Section XII thereof relating to "Remote Access To Technology Resources"].

Employees may use hands-free mobile devices while driving when safe to do so. Special care should be taken in situations where there is heavy traffic, inclement weather, or the employee is driving in an unfamiliar area. Employees must adhere to all federal, state, and local rules and regulations regarding the use of mobile devices while driving.

Under no circumstances are employees allowed to use text devices to type or review text messages for work purposes while operating a motor vehicle or for personal purposes while operating a motor vehicle during work hours or on Company business. [See Note n2]

### [2] Drafting Checklist

#### RECOMMENDED PROVISIONS

1. Statement that no employee may use a handheld cellular phone for work purposes while driving or for personal purposes while driving during work hours or on Company business.

2. Cross-reference to "Technology Use And Security" policy.

### OPTIONAL PROVISIONS

1. Statement prohibiting employees from using text devices to type or review text messages for work purposes while driving or for personal purposes while driving during work hours or on Company business.

### [3] Notes

### Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law  
Employment Relationships  
At-Will Employment  
General Overview  
Labor & Employment Law  
Employment Relationships  
At-Will Employment  
Exceptions  
Implied Contracts  
Labor & Employment Law  
Wrongful Termination  
Breach of Contract  
Employer Handbooks

### FOOTNOTES:

(n1)Note 1. *Cal. Veh. Code § 23123* prohibits the use of mobile phones in a moving vehicle unless the driver is using a hands-free device. Commercial drivers (i.e., motor truck drivers with a commercial class A or class B license) are exempt from this law until July 1, 2011. Employers should require their employees to abide by this law to help prevent vicarious liability in the event a worker acting within the course and scope of employment is involved in an auto collision caused by the worker's negligence (such as cellular phone distraction).

(n2)Note 2. The Wireless Communication Device Law (effective January 1, 2009) makes it an infraction to write, send, or read text-based communication on an electronic wireless communications device, such as a cell phone, while driving a motor vehicle. *Cal. Veh. Code § 23123.5*. Thus, employers should adopt policies prohibiting "texting" while driving.



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DIVISION 2 EMPLOYEE HANDBOOKS AND PERSONNEL POLICY MANUALS

Part A. RECOMMENDED GUIDELINES

*1-2 CA Guide to Employee Handbooks § 2.19*

## § 2.19 ACKNOWLEDGMENT OF RECEIPT OF HANDBOOK

### [1] Model Guideline

---

#### ACKNOWLEDGMENT

PLEASE READ THE EMPLOYEE HANDBOOK AND FILL OUT AND RETURN THIS PORTION TO THE PERSONNEL DEPARTMENT [WITHIN ONE WEEK OF EMPLOYMENT].

Employee Name: \_\_\_\_\_

I acknowledge that I have received a copy of the Company's Employee Handbook. I understand that I am responsible for reading the Handbook and for knowing and complying with the policies set forth in the Handbook during my employment with the Company, [including the dispute resolution/arbitration provision set forth on page \_\_\_\_]. **[See Notes n1,n2]**

I further understand, however, that the guidelines contained in the Handbook are guidelines only and are not intended to create any contractual rights or obligations, express or implied, [and shall not be construed to create any type of right to a "fair procedure" prior to termination or other disciplinary action]. **[See Note n3]** I also understand that, except for the Company's at-will employment policy, the Company may amend, interpret, modify, or withdraw any of the provisions of the Handbook at any time in its sole discretion, with or without notice. **[See Note n4]** Furthermore, I understand that, because the Company cannot anticipate every issue that may arise during my employment, if I have any questions regarding any of the Company's guidelines or procedures, I should consult the Company's \_\_\_\_\_ [*specify, e.g., Human Resources Department*].

I understand and agree that my relationship with the Company is "at-will," which means that my employment is for no definite period and may be terminated by me or by the Company at any time and for any reason, with or without cause or advance notice. **[See Note n5]** I also understand that the Company may demote or discipline me or otherwise alter

the terms of my employment at any time at its sole discretion, with or without cause or advance notice. **[See Note n6]**

I understand and agree that the terms of this Acknowledgment may not be modified or superseded except by a written agreement signed by me and \_\_\_\_\_ [*specify authorized company official, e.g., the President of the Company*], that no other employee or representative of the Company has the authority to enter into any such agreement, and that any agreement to employ me for any specified period of time or that is otherwise inconsistent with the terms of this Acknowledgment will be unenforceable unless in writing and signed by me and \_\_\_\_\_ [*specify authorized company official, e.g., the President of the Company*]. **[See Note n5]** I further understand and agree that if the terms of this Acknowledgment are inconsistent with any guideline or practice of the Company now or in the future, the terms of this Acknowledgment shall control.

Finally, I understand and agree that this Acknowledgment contains a full and complete statement of the agreements and understandings that it recites, that no one has made any promises or commitments to me contrary to the foregoing, and that this Acknowledgment supersedes all previous agreements, whether written or oral, express or implied, relating to the subjects covered in this Acknowledgment. **[See Note n5]**

I have carefully read this Acknowledgement of Receipt.

Date: \_\_\_\_\_

Signed: \_\_\_\_\_

## **[2] Drafting Checklist**

### **RECOMMENDED PROVISIONS**

1. A statement in which the employee acknowledges receiving and reading the employee handbook **[See Note n1]**;
2. A provision by which the employee acknowledges that no contractual or other legal obligations are intended or created by the employee handbook;
3. A reservation of the employer's right to modify the policies, benefits, and practices contained in the employee handbook without prior notice;
4. Inclusion of an at-will statement consistent with the language contained in *Lab. Code § 2922* **[See Note n5]**;
5. A statement that the Company may demote or discipline the employee, or alter the terms of employment, at any time at its discretion **[See Note n6]**;
6. A statement setting forth an exclusive mechanism for written modification of the terms of the Acknowledgment **[See Note n5]**; and
7. A merger clause stating that the Acknowledgment contains a full and complete statement of the agreements that it recites, and supersedes all previous agreements relating to the subject of the Acknowledgment **[See Note n5]**.

### **OPTIONAL PROVISIONS**

1. A requirement that the employee read the handbook and return the Acknowledgment within a

specified period;

2. A statement that nothing in the employee handbook should be construed as creating any right to a "fair procedure" [See Note n3]; and

3. A statement that employee has read dispute resolution arbitration provision [See Note n2].

### [3] Notes

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law  
 Employment Relationships  
 At-Will Employment  
 General Overview  
 Labor & Employment Law  
 Employment Relationships  
 At-Will Employment  
 Exceptions  
 Implied Contracts  
 Labor & Employment Law  
 Wrongful Termination  
 Breach of Contract  
 Employer Handbooks

#### FOOTNOTES:

(n1)Note 1. See generally *Wilcox, California Employment Law*, § 62.03[1][a]-[c] (Matthew Bender).

(n2)Note 2. If the employer includes a dispute resolution or arbitration provision in its employee handbook, then incorporating a specific reference to those provisions in the Acknowledgment of Receipt can help promote the provisions' enforceability, particularly if the Handbook is lengthy. Compare *Asmus v. Pac. Bell* (2000) 23 Cal. 4th 1, 15, 96 Cal. Rptr. 2d 179, 999 P.2d 71 (noting employees may accept employer's policies, after receiving notice of such policies, by continuing their employment) and *Craig v. Brown & Root, Inc.* (2000) 84 Cal. App. 4th 416, 419, 422, 100 Cal. Rptr. 2d 818 (ruling arbitration agreement existed where employee received employer's cover memorandum expressly notifying employee of dispute resolution policy along with a brochure discussing such policy) with *Romo v. Y-3 Holdings, Inc.* (2001) 87 Cal. App. 4th 1153, 1159-60, 105 Cal. Rptr. 2d 208 (holding that arbitration agreement contained in employee handbook was not enforceable, despite fact that employee signed acknowledgment stating that she agreed to be bound by benefits, policies, rules, and procedures contained within remaining sections of handbook, as there was no reference to arbitration or arbitration agreement in portion of handbook signed by employee, and language of arbitration section suggested that it was intended as complete stand alone agreement).

(n3)Note 3. The California Supreme Court has held that employees employed pursuant to an implied contract not to be terminated except for good cause are entitled to a "fair procedure" prior to being discharged. See *Cotran v. Rollins Hudig Hall Int'l, Inc.* (1998) 17 Cal. 4th 93, 107-08, 69 Cal. Rptr. 2d 900, 948 P.2d 412. Frequently, terminated employees base their implied contract claims on the language of discipline and termination policies contained in employee handbooks. After *Cotran*, terminated employees are more likely to claim that their employers did not provide the "fair procedure" required by *Cotran*. The bracketed language expressly provides that the employee handbook does not guarantee a fair procedure and, coupled with the at-will language of the acknowledgment, should provide added protection to employers against such claims. As with at-will provisions in general, however, employers must carefully consider whether to incorporate such language in the Acknowledgment because it may cause a negative reaction from the workforce and be used against the employer in the event of a union-organizing drive.

(n4)Note 4. This provision is intended to protect against claims that the employer should have followed prior policies or guidelines that the employer contends are no longer in effect. To ensure that this provision is effective, however, employers should provide reasonable notice to employees that the old policies or guidelines have been superseded. See *Asmus v. Pac. Bell* (2000) 23 Cal. 4th 1, 18, 96 Cal. Rptr. 2d 179, 999 P.2d 71 (requiring employer to provide reasonable notice to employees that it was eliminating employment security policy); *Chapin v. Fairchild Camera and Instrument Corp.* (1973) 31 Cal. App. 3d 192, 194 n.2, 196-97, 107 Cal. Rptr. 111 (employer not permitted to argue that policy on which employees brought suit had been modified since modification had never been

communicated to employees); see generally *Wilcox, California Employment Law*, § 62.03[1][a]-[c] (Matthew Bender). Generally, such notice may be accomplished by providing employees with a copy of the handbook containing the change. If the employer has a prior personnel policy manual that the employer intends to continue to use, the text of this guideline should be modified accordingly.

(n9)Note 5. See *Lenk v. Total-Western, Inc.* (2001) 89 Cal. App. 4th 959, 969, 108 Cal. Rptr. 2d 34 (holding that at-will language in a signed employment application plus the employee's written acknowledgement of receipt and reading of a personnel manual with at-will language precluded a claim for breach of contract to terminate only for good cause); *Haggard v. Kimberly Quality Care, Inc.* (1995) 39 Cal. App. 4th 508, 518, 46 Cal. Rptr. 2d 16 (finding against employee on claim for breach of implied contract because employee signed agreement containing at-will provision with integration clause stating that there were "no express or implied agreements contrary" to the at-will provision and that the agreement "supersedes all previous agreements, whether written or oral, express or implied, relating to [the] subject matter" of the agreement and that prohibited anyone, other than the president of the company, from entering into any agreement contrary to the at-will provision).

(n10)Note 6. See *Scott v. Pac. Gas & Elec. Co.* (1995) 11 Cal. 4th 454, 46 Cal. Rptr. 2d 427, 904 P.2d 834 (recognizing a cause of action for wrongful demotion).



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DIVISION 2 EMPLOYEE HANDBOOKS AND PERSONNEL POLICY MANUALS

Part B. OPTIONAL GUIDELINES

*1-2 CA Guide to Employee Handbooks § 2.20*

## § 2.20 EMPLOYEE CLASSIFICATIONS

### [1] Model Guideline

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#### EMPLOYEE CLASSIFICATIONS

##### [A. Probationary Employees

The term "probationary employees" is sometimes used in this Handbook/Manual to refer to those employees who are within their introductory period, i.e., the first \_\_\_\_\_(*specify, e.g., 90*) days of employment with the Company. At the Company's discretion, the introductory period may be extended for an additional period.] **[See Note n1]**

##### B. Regular Full-Time Employees

An employee who successfully completes the introductory period (including any extension), and is regularly scheduled to work 40 hours per week for a period of indefinite duration, is referred to as a regular full-time employee.

##### C. Regular Part-Time Employees

An employee who successfully completes the introductory period (including any extension), and is regularly scheduled to work less than 40 hours per week for a period of indefinite duration, is referred to as a regular part-time employee. **[See Note n2]**

##### D. Temporary Employees

Temporary employees are persons hired to work on special assignment with the understanding that such work will be completed within a specified period of time, usually not to exceed \_\_\_\_\_ [*specify, e.g., three months*]. [See Note 3] Temporary employees do not become regular employees as a result of the passage of time.

#### [E. Seasonal Employees

Seasonal employees are employees who are hired to work for \_\_\_\_\_ (*specify applicable season(s)*).

#### [F. Casual Employees

Casual employees are employees who are hired on a sporadic basis to work for a few hours or days at a time.]

#### [G. On-Call Employees

On-call employees are employees who are hired for the purpose of providing relief on short notice in the event of an unexpected absence by another employee.]

#### H. Exempt/Nonexempt Employees

Exempt employees, by definition, are exempt from earning overtime compensation. [See Note n4] Nonexempt employees are employees who are eligible to be paid for overtime work in accordance with the provisions of applicable wage and hour laws. [See Note n5] Overtime pay requirements are set forth in the section of this Handbook/Manual entitled "Hours of Work, Overtime, and Pay Day."

#### I. Salaried Employees

Salaried employees are employees who are paid a fixed amount on a periodic basis and not by the hour.

#### J. Hourly Employees

Hourly employees are employees whose wages are paid by the hour. Wages fluctuate according to the number of hours worked.

#### [K. Commissioned Employees

Commissioned employees are employees whose pay depends on commissions earned in accordance with their commission agreement with the Company.]

#### L. Change in Employment Status

The Company may change the employment classification of any employee at any time based on the nature of the

employment assignment.

## [2] Drafting Checklist

### RECOMMENDED PROVISIONS

1. Definitions of employees according to number of hours worked, length of employment, method of payment, and eligibility for overtime [See Notes n1,n2,n3]; and
2. A reservation of the right to change the classification of employees.

### OPTIONAL PROVISIONS

1. Inclusion of other categories of employees (e.g., seasonal, casual, on-call, commissioned).

## [3] Notes

### FOOTNOTES:

(n1)Note 1. Some employers may prefer not to designate employees in their introductory period as "probationary employees" because of the possible implication that employees who have completed the period gain greater job-security rights. However, the implication, which may be countered by an explicit at-will statement, is inherent in having an introductory period, and not in the particular terminology used. See § 2.04[3] of this Guide Note 1 (Introductory Period Guideline).

(n2)Note 2. Certain "part-time" employees are not counted when determining whether a sufficient number of employees are being laid off or terminated to trigger advance notice requirements under the federal Worker Adjustment and Retraining Notification Act (WARN), 29 U.S.C. § 2101 *et seq.* In general, employees who worked less than an average of 20 hours per week or less than 6 months during the preceding 12 months are deemed part-time employees under WARN. Once a WARN obligation is triggered, however, both part-time and full-time employees are entitled to the required 60-day notice. California's WARN Act contains similar notification requirements, although it does not exempt part-time employees from the calculation of the total number of employees laid off, relocated, or terminated. See *Lab. Code §§ 1400 et seq.* For a discussion of WARN, see *Wilcox, California Employment Law, § 60.03[3][s]* (Matthew Bender).

(n3)Note 3. Certain "temporary employees" may not be entitled to advance notice of plant closing or mass layoff under either the federal or California WARN Act. To fall within this exception, the temporary employees must have been hired with the understanding that their employment would last only for the duration of a temporary project or facility, and the employees must be terminated at the completion of the temporary project or closure of the temporary facility. See 29 U.S.C. § 2103(1); 20 C.F.R. § 639.5(c); *Lab. Code § 1400(g)(2)*.

(n4)Note 4. Under federal law, "executive," "administrative," "professional," "outside sales," and certain "computer" employees are exempt from the requirement to pay overtime. See 29 U.S.C. § 213(a)(1)-(17) (FLSA); 29 C.F.R. Part 541. California law also provides similar, though not identical, exemptions for "executive," "administrative," "professional," "outside sales," and certain "computer" employees. See *Lab. Code §§ 515, 515.5, 1171 et seq.*; Industrial Welfare Commission Wage Order Nos. 1-2001 through 13-2001 and 14-2001 through 17-2001. For discussion of the exemption for these employees under federal and state law, see *Wilcox, California Employment Law, §§ 2.04[1][a]*. [b][i][vi], and 2[b][c]. For a general discussion of other exemptions from overtime requirements under federal and state law, see *Wilcox, California Employment Law, §§ 2.04, 3.03* (Matthew Bender).

(n9)Note 5. Under federal law, payment of overtime compensation is governed by the Fair Labor Standards Act

(FLSA), 29 U.S.C. § 201 *et seq.*, and regulations of the Wage and Hour Division of the Department of Labor, contained in Title 29, Code of Federal Regulations. Under California law, overtime is governed by *Labor Code Section 500 et seq.*, and by Wage Orders issued by the Industrial Welfare Commission (IWC). See Wage Order Nos. 1-2001 through 17-2001. For a sample overtime guideline, see § 2.05 of this Guide. For a discussion of the general scope and coverage of wage and hour laws, see Wilcox, California Employment Law, Ch. 1 (Matthew Bender). For discussion of overtime compensation requirements and exemptions from those requirements, see Wilcox, California Employment Law, Ch. 3 (Matthew Bender).



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DIVISION 2 EMPLOYEE HANDBOOKS AND PERSONNEL POLICY MANUALS

Part B. OPTIONAL GUIDELINES

*1-2 CA Guide to Employee Handbooks § 2.21*

## § 2.21 PERFORMANCE AND PAY REVIEW

### [I] Model Guideline

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#### PERFORMANCE AND PAY REVIEW

##### I. Performance Reviews

The Company will attempt to conduct periodic performance reviews for employees. Hourly and salaried non-exempt employees generally receive performance evaluations once every \_\_\_\_\_ [*specify, e.g., six months*]. Exempt employees generally receive performance evaluations \_\_\_\_\_ [*specify, e.g., annually*] [**See Note n1**]

The purpose of the review is to evaluate the employee's current level of performance, to examine the progress made since the last review, and to establish goals for the employee's next review. [**See Note n2**] [During their performance reviews, employees are encouraged to discuss any issues raised, as well as any opportunities for advancement or career development within the Company.]

[After receiving their performance evaluations, employees will be required to sign the evaluation acknowledging that they have received the evaluation and are aware of its contents. A copy of the performance evaluation will then be placed in the employee's personnel file.] [**See Note n3**]

##### II. Wage Adjustments

Satisfactory performance reviews will not necessarily result in wage increases. Likewise, unsatisfactory performance reviews typically will not result in wage decreases. Rather, wage adjustments may be made at any time in the sole

discretion of the Company and depend on a number of factors, including performance.]

## [2] Drafting Checklist

### RECOMMENDED PROVISIONS

1. The periods covered by the evaluations [See Note n1];
2. The application of different evaluation periods to different classifications of employees [See Note n1]; and
3. A statement of the purpose of reviews [See Note n2].

### OPTIONAL PROVISIONS

1. A statement of how wage adjustments are related to performance reviews;
2. A description of the performance rating system; and
3. A summary of the performance review procedure.

## [3] Notes

### Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law  
Employee Privacy  
Disclosure of Employee Information  
Personnel Files  
Labor & Employment Law  
Wrongful Termination  
General Overview  
Labor & Employment Law  
Wrongful Termination  
Breach of Contract  
Employer Handbooks  
Labor & Employment Law  
Wrongful Termination  
Breach of Contract  
For Cause Standard  
Labor & Employment Law  
Wrongful Termination  
Breach of Contract  
Implied Contracts  
Labor & Employment Law  
Wrongful Termination  
Defenses  
Employee Misconduct

### FOOTNOTES:

(n1)Note 1. This language assumes that exempt employees up to the highest level will receive performance evaluations annually. If an employer's top executives are not reviewed by this process, they should specifically be exempted from this provision. For additional discussion of performance evaluations, see *Wilcox, California Employment Law*, § 62.03[3] (Matthew Bender).

(n2)Note 2. Supervisors should use performance evaluations to monitor the employee's goals and as a starting point for the next appraisal. When preparing the performance review, employers should avoid reporting inaccurate or incomplete information regarding an employee's unsatisfactory performance. Otherwise, the performance review may be used against an employer in later litigation by an employee claiming wrongful termination. For example, it may be difficult to convince a jury that an employee's discharge was for good cause if there is no documentation of poor performance and the employee's performance reviews indicate satisfactory or better performance. See, e.g., *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 663, 254 Cal. Rptr. 211, 765 P.2d 373 ("steady series of salary increases, promotions, bonuses, awards and superior performance evaluations" may be sufficient to create an implied-in-fact contract that an employee may only be terminated for cause). Employers can limit potential liability for wrongful discharge claims by regularly preparing well documented and accurate reviews. See, e.g., *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 1258-59, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 (employee's claim for constructive wrongful discharge in retaliation for reporting allegedly illegal activities failed because employee's

performance evaluations, which were regularly prepared, showed that evaluations did not become negative until four or five years after employee reported allegedly illegal activities). For discussion of performance evaluations, see *Wilcox, California Employment Law, § 62.03[3]* (Matthew Bender).

(n3)Note 3. *Labor Code Section 432* requires employers, on request, to give employees a copy of any instrument they sign relating to obtaining or holding employment. Moreover, *Labor Code Section 1198.5* requires employers to make available to employees, on reasonable request, their personnel files for inspection. If the personnel records are not kept, or made available to the employee, at the place where the employee reports to work, the employer must "[p]ermit the employee to inspect the personnel records at the location where the employer stores the personnel records, with no loss of compensation to the employee." *Lab. Code § 1198.5(c)(3)*. For further discussion of employees' access rights to employment documents, see *Wilcox, California Employment Law, §§ 51.01-51.06* (Matthew Bender).



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DIVISION 2 EMPLOYEE HANDBOOKS AND PERSONNEL POLICY MANUALS

Part B. OPTIONAL GUIDELINES

*1-2 CA Guide to Employee Handbooks § 2.22*

## § 2.22 PERSONNEL RECORDS

### [1] Model Guideline

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#### PERSONNEL RECORDS

##### A. Personnel Files

The information in an employee's personnel file is permanent and confidential, and must be kept up to date. **[See Note ]** Employees should inform the Personnel Manager immediately whenever there are changes in personal data such as address, telephone number, marital status, number of dependents, and person(s) to notify in case of emergency. **[Employees are also responsible for maintaining a current group life insurance beneficiary designation.]**

Employees have the right to inspect their personnel files at reasonable times and on reasonable notice. **[See Note n2]** In addition, employees have the right to request copies of all employment-related documents that they have signed. **[See Note n3]** An employee may inspect only his or her own personnel file [and only in the presence of the Personnel Manager]. **[See Note n4]**

Personnel files are the property of the Company and may not be removed from the Company's premises without written authorization from the Personnel Manager.

##### B. Payroll Records

Employees [and former employees] also have the right to inspect and copy certain Company payroll records regarding their compensation, and deductions from their compensation, upon reasonable request to the Company. **[See Note n5]** Employees wishing to review or copy payroll records should notify the \_\_\_\_\_ [specify, e.g., Personnel

Department].

## [2] Drafting Checklist

### RECOMMENDED PROVISIONS

1. A requirement that information be kept current;
2. A provision regarding employee inspection and copying [See Notes n2,n3];
3. A prohibition against an employee inspecting another employee's personnel file [See Note n4]; and
4. A statement that personnel files are the property of the Company; and
5. A statement that employees (and former employees) have the right to inspect and copy company payroll records regarding their payroll and deductions. [See Note n5]

### OPTIONAL PROVISIONS

1. A provision pertaining to the designation of a group life insurance beneficiary, if applicable; and
2. A requirement that inspection of personnel files be made in the presence of the Personnel Manager or some other designated official. [See Note n4]

## [3] Notes

### Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law  
 Discrimination  
 Disability Discrimination  
 Employment Practices  
 Examinations & Inquiries  
 Labor & Employment Law  
 Employee Privacy  
 Disclosure of Employee Information  
 Personnel Files  
 Labor & Employment Law  
 Employment Relationships  
 Employment Contracts  
 Conditions & Terms  
 Duration of Employment  
 General Overview

### FOOTNOTES:

(n1)Note 1. Certain employee information should be kept separately from personnel files. For example, the Americans with Disabilities Act of 1990 (ADA) requires that information regarding an employee's medical condition or medical history, which is obtained in a medical examination conducted on the employer's behalf, be kept in a separate medical file and be treated as a confidential medical record. See *42 U.S.C. § 12112(d)(3)(B)*. Employers that maintain computerized employee records may be required to immediately notify an employee if the security of the employee's information is breached or potentially breached. Specifically, in the employment context, this applies when there is a breach or potential breach of security in an unencrypted computer system containing employees' personal information (including employees' names and any one of the following: social security number, driver's license number, California Identification Number, account number, credit/debit card number in combination with any required security or access code, any password that would provide access to an employee's financial account, medical information or health insurance information). See *Civ. Code § 1798.29*.

(n2)Note 2. California employers are required at reasonable intervals and reasonable times to permit employees to inspect the personnel records maintained by the employer relating to the employee's performance or to any grievance concerning the employee. See *Lab. Code § 1198.5(a)*. This requirement does not, however, apply to "letters of

reference," "[r]ecords relating to the investigation of a possible criminal offense," or "[r]atings, reports, or records" that were obtained prior to the time the employee commenced employment, prepared by "identifiable examination committee members," or obtained by the employer "in connection with a promotional examination." *Lab. Code § 1198.5(d)* . Employers are required to (1) keep a copy of the employee's personnel records at the place where the employee reports to work; (2) make the employee's personnel records available at the place where the employee reports to work within a reasonable time after the employee's request to review the personnel records; or (3) permit the employee to inspect the personnel records at the location where the records are stored, with no loss of compensation to the employee. See *Lab. Code § 1198.5(c)* . Unless the employer requires the employee to inspect the records at a place other than where the employee reports to work, employers are not required to make personnel records available when the employee is actually required to perform work for the employer. For further discussion of employees' access rights to employment documents, see *Wilcox, California Employment Law, §§ 51.01-51.06* (Matthew Bender).

(n3)Note 3. Upon request, employees are entitled to a copy of any employment documents that they are required to sign. See *Lab. Code § 432* .

(n4)Note 4. In the absence of formal discovery initiated in the course of litigation, employees have no right to inspect the personnel files of any other employee. When an employee inspects his or her own personnel file, the inspection need not be in private. See Section 7 of the I.W.C. wage orders. Rather, employers may require that employees inspect their personnel file in the presence of a designated company official who will ensure that documents are not altered or removed. See D.L.S.E. Policy & Procedure Memo. No. 76-2 (Jan. 15, 1976); but see *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal. 4th 557, 59 Cal. Rptr. 2d 186, 927 P.2d 296 (voiding all "written interpretive policies" of the D.L.S.E. for failure to adopt such policies in compliance with the Administrative Procedure Act; such written interpretive policies include, for example, portions of the D.L.S.E. Operations & Procedures Manual and portions of the D.L.S.E. Interpretive Bulletins), *cert. denied* (1997) 520 U.S. 1248, 117 S. Ct. 1862, 137 L. Ed. 2d 1062 . For a general discussion of the weight to be accorded D.L.S.E. interpretations of statutory law, see *Wilcox, California Employment Law, § 1.05[3][c]* (Matthew Bender). For a general discussion of D.L.S.E. policies regarding inspection of employment files, see *Wilcox, California Employment Law, § 51.02* (Matthew Bender).

(n9)Note 5. Employers are required to furnish to all current employees specific information regarding payroll and deductions either semimonthly or at the time of each payment of wages. See *Lab. Code § 226(a)* . Furthermore, employers must permit all current and former employees to inspect and copy these records, which pertain to the requesting employee, upon reasonable written or oral request. See *Lab. Code § 226(b)* . Employers should comply with any such request "as soon as practicable," but in no event later than 21 calendar days from the date of the request. *Lab. Code § 226(c)* . For further discussion of employees' rights to inspect and copy records regarding wage deductions, see *Wilcox, California Employment Law, § 51.06* (Matthew Bender).



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DIVISION 2 EMPLOYEE HANDBOOKS AND PERSONNEL POLICY MANUALS

Part B. OPTIONAL GUIDELINES

*1-2 CA Guide to Employee Handbooks § 2.23*

## § 2.23 DRESS AND GROOMING STANDARDS

### [1] Model Guideline

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#### DRESS AND GROOMING STANDARDS

The Company considers the presentation of the Company image to its customers, suppliers, and the public at large to be extremely important. Since the Company's product includes service, and excellent service can only be provided through its employees, the Company seeks not only good performance and conduct from its employees, but also expects them to observe high standards in their personal presentation. Accordingly, while the Company has no formal dress code, it is expected that all employees dress in a manner consistent with good hygiene, safety, and good taste. Employees whose jobs require them to come in contact with customers, suppliers, or the public are expected to wear apparel the Company considers appropriate for dealing with the public. [See Note n1]

### [2] Drafting Checklist \_\_\_\_\_

#### RECOMMENDED PROVISIONS

1. Employer expectations [See Note n1]; and
2. Provisions pertaining to employees who have public or client contact.

#### OPTIONAL PROVISIONS

1. Inclusion of more specific requirements, such as provisions relating to jewelry, cosmetics, hair length, facial hair, clothing, shoes, and uniforms [See Note n1].

### [3] Notes

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Labor & Employment Law Discrimination General Overview Labor & Employment  
Law Discrimination Accommodation Labor & Employment Law Discrimination Actionable Discrimination Labor &  
Employment Law Discrimination Gender & Sex Discrimination Coverage & Definitions Personal Appearance

**FOOTNOTES:**

(n1)Note 1. While not every company needs this policy, some organizations that emphasize marketing, sales, and interaction with customers and the general public believe that it is important that employees maintain a professional appearance. Because policies and practices concerning dress and grooming rules have frequently been the focus of discrimination claims, this guideline is provided with the caution that it be used only if truly necessary. In 2003, the California Legislature enacted a provision requiring employers to allow transgendered employees to appear and dress according to the employee's actual or perceived sex. See *Gov. Code § 12949*. This provision, however, does not limit an employer's ability to otherwise require compliance with reasonable workplace appearance, grooming, and dress standards.

In 1994, the California Legislature amended the FEHA to make it unlawful for an employer to refuse to permit an employee to wear pants on account of the sex of the employee. See *Gov. Code § 12947.5*. Even prior to the enactment of this legislation, several courts had concluded that an employer's requirement that female employees wear sexually provocative uniforms, which subjected those employees to verbal and physical harassment from the public, violates Title VII. See *Priest v. Rotary (N.D. Cal. 1986) 634 F. Supp. 571, 581*; *E.E.O.C. v. Sage Rlty. Corp. (S.D.N.Y. 1981) 507 F. Supp. 599, 607-08*. Many federal courts, however, have concluded that grooming policies that prohibit men, but not women, from wearing long hair do not violate Title VII. See, e.g., *Baker v. California Land Title Co. (9th Cir. 1974) 507 F.2d 895, 898*, cert. denied, 422 U.S. 1046, 95 S. Ct. 2664, 45 L.Ed.2d 699 (1975); *Harper v. Blockbuster Entertainment Corp. (11th Cir.) 139 F.3d 1385, 1387*, cert. denied, 525 U.S. 1000, 119 S. Ct. 509, 142 L. Ed. 2d 422 (1998). In *Jespersen v. Harrah's Operation Company (9th Cir. 2006) 444 F.3d 1104*, the Ninth Circuit concluded that an employer's grooming policy that required women to wear makeup at all times was not discriminatory because the grooming policy applied to and imposed an equal burden to both male and female bartenders, and reaffirmed that grooming standards that appropriately differentiate between the genders are not facially discriminatory under Title VII so long as the policy does not create an "unequal burden" for one gender.

Certain grooming policies have been challenged as infringing on African-American employees' expression of racial pride or cultural identification. See, e.g., *Brown v. D.C. Transit System, Inc. (D.C. Cir. 1975) 523 F.2d 725, 726, 173 U.S. App. D.C. 130* (upholding employer's policy), cert. denied (1975) 423 U.S. 862, 96 S. Ct. 121, 46 L. Ed. 2d 91. "No beard" policies have been challenged on the ground that they discriminate against a segment of the African-American male population with a medical sensitivity to shaving. See, e.g., *Langston-Bradley v. Pizzaco, Inc. (8th Cir. 1993) 7 F.3d 795, 799* (food services employer must recognize a narrow medical exception to its no-beard policy for those African-American males who cannot shave because they suffer from pseudofolliculitis barbae ("PFB")); *Fitzpatrick v. City of Atlanta (11th Cir. 1993) 2 F.3d 1112* (upholding fire department no-beard regulation against claims brought by firefighters with PFB). Employers may also be required to reasonably accommodate specific dress or grooming practices that result from an employee's religious beliefs and practices. See, e.g., *Bhatia v. Chevron U.S.A., Inc. (9th Cir. 1984) 734 F.2d 1382, 1383* ("no beard" rule challenged as applied to Sikhs; employer reasonably attempted to accommodate employee's religious beliefs).

For discussion of limitations on the scope of permissible dress and grooming rules under equal employment laws, see *Wilcox, California Employment Law, § 41.54* (Matthew Bender). For a discussion of accommodation of religious beliefs and practices, see *Wilcox, California Employment Law, § 41.52[2][d]* (Matthew Bender).



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DIVISION 2 EMPLOYEE HANDBOOKS AND PERSONNEL POLICY MANUALS  
Part B. OPTIONAL GUIDELINES

*1-2 CA Guide to Employee Handbooks § 2.24*

## § 2.24 SMOKING

### [1] Model Guideline

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#### SMOKING

The Company prohibits smoking in the workplace [except in designated smoking rooms]. [See Note n1]

### [2] Drafting Checklist \_\_\_\_\_

#### RECOMMENDED PROVISIONS

1. A complete ban against smoking on the premises, or a restriction of smoking to designated smoking rooms [See Note n1].

### [3] Notes

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Antitrust & Trade Law Consumer Protection Tobacco Products State Regulation Governments Agriculture & Food Smoking Bans Labor & Employment Law Discrimination Accommodation Labor & Employment Law Occupational Safety & Health Civil Liability Labor & Employment Law Occupational Safety & Health Compliance & Defenses Labor & Employment Law Occupational Safety & Health Duties & Rights

#### FOOTNOTES:

(n1) Note 1. California law generally prohibits smoking in all enclosed places of employment. See *Lab. Code § 6404.5*

. With limited exceptions for hotels, tobacco shops, bars, taverns, gaming clubs, warehouse facilities, medical research or treatment sites, theatrical production sites, home daycare centers, and motortruck cabs, smoking may be permitted only in designated smoking rooms that meet certain OSHA or EPA standards and that are located in non-work areas. Air from the designated smoking rooms must be exhausted directly outside, and there must be sufficient nonsmoking breakrooms to accommodate nonsmokers. See *Lab. Code* § 6404.5(d)(1)-(13) . Somewhat less stringent standards apply to employers with five or fewer employees. See *Lab. Code* § 6404.5(d)(14) . Employers who knowingly and intentionally violate the Labor Code's prohibitions against smoking in the workplace may be subject to monetary penalties. See *Lab. Code* § 6404.5(b) , (j). For further discussion of prohibitions against smoking in the workplace, see *Wilcox, California Employment Law*, § 21.81A (Matthew Bender).

In order to comply with the Labor Code's prohibitions against smoking in the workplace, employers who regularly permit non-employees to enter the workplace must post a sign at the building entrance stating either "No smoking" or "Smoking is prohibited except in designated areas," depending on which policy is applicable. See *Lab. Code* § 6404.5(c)(1)(A) , (B). In addition, Proposition 65 requires California employers to warn employees about the danger of environmental or "sidestream" smoke in the workplace. See generally *Health & Safety Code* § 25249.6 . The warning should appear on a sign in the workplace "posted in a conspicuous place and under conditions that make it likely to be read and understood by employees and other individuals prior to the exposure for which the warning is given." *22 Cal. Code Reg.* § 12601(c)(1)(B) . Thus, it is recommended that employers post signs containing the smoking warning at the entrance to the facility permitting smoking and immediately outside any specifically designated smoking room. The suggested content of the warning posted at the entrance to the facility is as follows: "This facility permits smoking [in designated areas]. Tobacco smoke is known to the State of California to cause cancer." See *22 Cal. Code Reg.* § 12601(c)(3)(A) . The suggested content of the warning posted immediately outside any designated smoking room is as follows: "WARNING: Employees are permitted to smoke in this room. Tobacco smoke is known to the State of California to cause cancer." See *Id.*

Also, a condition or an allergy that makes an employee unusually sensitive to tobacco smoke is a physical disability that is protected by state discrimination law. See *County of Fresno v. Fair Employment & Housing Comm'n* (1991) *226 Cal. App. 3d* 1541, 1548-50, *277 Cal. Rptr.* 557 . However, if an employer complies with California's smoking law, there is a strong argument that in most instances it has done what is necessary to reasonably accommodate such smoke-sensitive employees. For a general discussion of disability discrimination and accommodating employees with disabilities, see *Wilcox, California Employment Law*, §§ 41.32 and 41.51 (Matthew Bender).



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DIVISION 2 EMPLOYEE HANDBOOKS AND PERSONNEL POLICY MANUALS

Part B. OPTIONAL GUIDELINES

*1-2 CA Guide to Employee Handbooks § 2.25*

## § 2.25 EMPLOYMENT OF RELATIVES

### [1] Model Guideline

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#### EMPLOYMENT OF RELATIVES

Relatives of present employees may be hired by the Company only if (1) the individuals concerned will not work in a direct supervisory relationship with one another, and (2) the employment will not pose difficulties for supervision, security, safety, or morale. "Relatives" are defined as spouses, domestic partners, children, sisters, brothers, mothers, or fathers, [and persons related by marriage]. [See Note n1] Present employees who marry or become domestic partners [or who become related by marriage] will be permitted to continue employment with the Company only if they do not work in a direct supervisory relationship with one another, or otherwise pose difficulties for supervision, security, safety, or morale. [See Note n2] If employees who marry [or who become related by marriage] do work in a direct supervisory relationship with one another, the Company will attempt to reassign one of the employees to another position for which he or she is qualified, if such a position is available. [See Note n3] If no such position is available, then one of the employees will be required to leave the Company. The decision as to which employee leaves will be left solely to the employees. [See Note n4] In the event that no alternative position is available and neither employee voluntarily leaves the Company, the employee with lesser seniority will be terminated. [See Note n5]

### [2] Drafting Checklist \_\_\_\_\_

#### RECOMMENDED PROVISIONS

1. A prohibition against relatives working in a supervisory relationship or in other situations that would pose problems with respect to conflicts of interest, supervision, safety, security, or morale [See Note n2];
2. A definition of "relatives" [See Note n1];

3. A provision dealing with employees who marry, form domestic partnerships, or otherwise become related after the employment relationship is established;
4. A provision for reassignment, if feasible [See Note n3]; and
5. A statement that any decision as to which employee will remain with the employer will be left to the employees involved [See Note n4].

#### OPTIONAL PROVISIONS

1. Expansion of the definition to include in-laws; and
2. A statement that the Company will terminate the employee with lesser seniority if neither employee voluntarily leaves the Company [See Note n5].

#### [3] Notes

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law General Overview Labor & Employment Law Discrimination General Overview Labor & Employment Law Discrimination Gender & Sex Discrimination Coverage & Definitions General Overview

#### FOOTNOTES:

(n1)Note 1. Employers who are considering adoption of an anti-nepotism rule may wish to expand the definition of "relatives" to include persons related by marriage.

(n2)Note 2. California law prohibits employers from discriminating against applicants or employees on the basis of their marital status. See *Gov. Code § 12940(a)*. An employer may, however, reasonably regulate, "for reasons of supervision, safety, security, or morale, the working of spouses in the same department, division, or facility, consistent with the rules and regulations adopted by the [Fair Employment and Housing] [C]ommission." *Gov. Code § 12940(a)(3)(A)*. The regulations provide that an employment decision shall not be based on whether an individual has a spouse presently employed by the employer except that, for business reasons of supervision, safety, security, or morale, an employer (1) may refuse to place one spouse under the direct supervision of the other spouse; and (2) may refuse to place both spouses in the same department, division, or facility if the work involves potential conflicts of interest or other hazards greater for married couples than for other persons. See *2 Cal. Code Reg. § 7292.5(a)*. Employer decisions may not be based on mere generalizations or possibilities, but must be based on a case-by-case careful assessment of the actual work setting, including the degree of risk and the significance of the potential harm. See, e.g., *DFEH v. Insurance America Sales Agency* (1988) FEHC Dec. No. 88-07. For a discussion of the law regarding rules restricting marriage between employees, see *Wilcox, California Employment Law*, §§ 41.36[2][b], 41.42[2][1], 41.65, 41.110 (Matthew Bender). Employers also should be aware that the regulations prohibit pre-employment inquiries about marital status generally, and permit such inquiries about the employment of spouses only for the purpose of determining whether any of the business reasons noted above might preclude employment. See *2 Cal. Code Reg. § 7292.4*; see also discussion in *Wilcox, California Employment Law*, § 41.44[2][d] (Matthew Bender). In addition, both the Fair Employment and Housing Act and Title VII prohibit employment discrimination on the basis of sex, race, color, religion, or national origin. See *Gov. Code § 12940*; *42 U.S.C. § 2000e-2*. Thus, entirely apart from marital status discrimination, anti-nepotism rules that are neutral on their face but that have an adverse impact on members of a protected class are subject to challenge. See, e.g., *Thomas v. Metroflight, Inc.* (10th Cir. 1987) 814 F.2d 1506, 1509 (anti-nepotism rule allegedly had adverse impact on female employees). Nevertheless, anti-nepotism rules designed to avoid the employment of family members in the circumstances described in this guideline have been upheld in the

absence of demonstrable adverse impact. See, e.g., *Montgomery v. Carr* (6th Cir. 1996) 101 F.3d 1117, 1126, 1130-31 ; *Parsons v. County of Del Norte* (9th Cir. 1984) 728 F.2d 1234, 1236-38 , cert. denied, (1984), 469 U.S. 846 , 105 S. Ct. 158 , 83 L. Ed. 2d 95 ; *Harper v. Trans World Airlines, Inc.* (8th Cir. 1975) 525 F.2d 409, 410-12 . For a discussion of equal employment law relating to nepotism generally, see *Wilcox, California Employment Law*, §§ 41.43[3] , 41.64 (Matthew Bender).

(n3)Note 3. Under FEHC regulations on marital status discrimination, employers are required to make "reasonable efforts" to assign job duties so as to minimize problems of supervision, safety, security, or morale in the event that co-employees marry. See 2 *Cal. Code Reg.* § 7292.5(b) . Except for these regulations, however, employers are under no affirmative duty to attempt to accommodate employees who are related to one another.

(n4)Note 4. If an employer can demonstrate the existence of one or more of the business reasons cited in Note 2, above, and if reasonable accommodation is not possible, then the employer may lawfully require that one of the employees leave the Company. By leaving the decision solely to the employees, the employer reduces the risk of a successful legal challenge based on either marital status or sex discrimination. See generally *Thomas v. Metroflight, Inc.* (10th Cir. 1987) 814 F.2d 1506, 1510-11 ; see also discussion in *Wilcox, California Employment Law*, § 41.65 (Matthew Bender).

(n9)Note 5. Denoting seniority as the "tie-breaker" in the event neither employee voluntarily resigns is less likely to be perceived as discriminatory than making the decision based on other factors, such as which employee earns the higher salary. See, e.g., *Parks v. City of Warner Robins* (11th Cir. 1995) 43 F.3d 609 (upholding as constitutional an anti-nepotism policy that provided that, if an appropriate transfer could not be arranged, the less senior employee would be terminated); *George v. Farmers Electric Cooperative, Inc.* (5th Cir. 1983) 715 F.2d 175, 178 (intimating that seniority may be a proper basis for choosing which employee to discharge).



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DIVISION 2 EMPLOYEE HANDBOOKS AND PERSONNEL POLICY MANUALS

Part B. OPTIONAL GUIDELINES

*1-2 CA Guide to Employee Handbooks § 2.26***§ 2.26 SAFETY PROGRAM****[1] Model Guideline**


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**SAFETY PROGRAM**

The Company is committed to providing and maintaining a healthy and safe work environment for all employees. **[See Note n1]** Accordingly, the Company has instituted an Injury and Illness Prevention Program designed to protect the health and safety of all personnel. **[See Note n2]** Every employee will receive a copy of the Company's General Safety Rules and will receive health and safety training as part of the Injury and Illness Prevention Program. A complete copy of the Injury and Illness Prevention Program is kept by \_\_\_\_\_ *[specify, e.g., the Personnel Manager or the Safety Coordinator]* and is available for your review.

You are required to know and comply with the Company's General Safety Rules and to follow safe and healthy work practices at all times. [You may be subject to discipline for engaging in any unsafe or unhealthy work practice or for violating established safety rules.] **[See Note n3]** You also are required to report immediately to your supervisor any potential health or safety hazards, and all injuries or accidents. **[See Note n4]** First aid supplies are located at *[specify location(s)]*. The location of the nearest doctor and/or medical facility is posted at *[specify locations]*.

**[2] Drafting Checklist** \_\_\_\_\_**RECOMMENDED PROVISIONS**

1. A statement of the employer's commitment to safety;
2. A statement regarding the existence of the employer's injury and illness prevention program **[See Note n12]**;

3. A statement regarding the safety rules and health and safety training components of the employer's injury and illness prevention program;
4. A statement regarding the availability of the injury and illness prevention program for employee review;
5. A requirement that employees know and observe the health and safety rules of the injury and illness prevention program [See Note n3];
6. A requirement that employees report health and safety hazards, as well as accidents and injuries, to their supervisors [See Note n4]; and
7. The location of the nearest medical assistance.

### OPTIONAL PROVISIONS

1. Provisions relating to equipment safety; and
2. A statement that employees may be disciplined for unsafe and unhealthy work practices and for violating established safety rules [See Note n3].

### [3] Notes

### Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment LawGeneral OverviewLabor & Employment LawOccupational Safety & HealthAdministrative ProceedingsRulemakingLabor & Employment LawOccupational Safety & HealthCompliance & DefensesLabor & Employment LawOccupational Safety & HealthCriminal PenaltiesLabor & Employment LawOccupational Safety & HealthDuties & Rights

### FOOTNOTES:

(n1)Note 1. Every employer in California is required to furnish employment and a place of employment that is safe and healthful for employees. *Lab. Code § 6400* .

(n2)Note 2. Every employer in California is required to implement an effective injury and illness prevention program ("IIPP"). See *Lab. Code § 6401.7*; 8 Cal. Code Reg. § 3203; see also *Sully-Miller Co. v. California OSHA (2006) 138 Cal. App. 4th 684, 699* (requiring primary employer of leased employees to comply with *Labor Code Section 6401.7* requirements). The employer's IIPP must be in writing, and must include each of six major elements identified in the law: (1) identification of the individual responsible for implementing the program; (2) a system for identifying and evaluating workplace hazards, including periodic inspections, and investigating occupational injuries and illnesses; (3) a system for correcting unsafe or unhealthy conditions and work practices in a timely manner; (4) workplace health and safety training programs for employees; (5) a system for communicating with employees on health and safety matters; and (6) a system for ensuring employee compliance with safe and healthy work practices. See *Lab. Code § 6401.7*; 8 Cal. Code Reg. § 3203.

The California Division of Occupational Safety and Health ("DOSH") instructs its compliance personnel to evaluate the effectiveness of an employer's IIPP Program in the course of every inspection and document the results of the evaluation. DOSH will not consider an employer in compliance if any one of the elements is not established, implemented and maintained. Employers DOSH cites for a serious violation that do not have an operative IIPP shall not

receive a penalty adjustment for Good Faith or History. See Cal/OSHA Policy & Procedures Manual Enforcement of 8 CCR Section 3203; Injury and Illness Prevention Program.

Moreover, the California Division of Occupational Safety and Health ("DOSH") considers risks of workplace violence to be a workplace safety issue, which must be addressed in an employee's injury prevention program. *Franklin v. Monadnock Co.* (2007) 151 Cal.App.4th 252, 259. DOSH has issued "Guidelines for Workplace Security" that address the escalating problem of violence in the workplace. Pursuant to these Guidelines, employers may develop a workplace security component to their IPPs. The scope of the workplace security component will vary depending on the type of employment establishment and the risks associated with such employment. These issues are addressed in detail in the Guidelines. See Cal/OSHA Guidelines for Workplace Security (March 30, 1995), which can be located on the DOSH website at [www.dir.state.ca.gov/dosh/dosh\\_publications/worksecurity.html](http://www.dir.state.ca.gov/dosh/dosh_publications/worksecurity.html). DOSH has also developed a model IIPP for workplace security. See Injury and Illness Prevention Model Program for Workplace Security (Revised August 1995), which can be located at [www.dir.state.ca.gov/dosh/dosh\\_publications/iipsecurity.html](http://www.dir.state.ca.gov/dosh/dosh_publications/iipsecurity.html).

DOSH has developed a model IIPP for use by "non-high-hazard" employers. See *Lab. Code § 6401.7(j)*. The model program must be distributed to such employers on request. See Injury and Illness Prevention Model Program for Non-High Hazard Employers CS-1B (Revised August 1995), which can be located at [http://www.dir.ca.gov/dosh/dosh\\_publications/iipnonhigh.html](http://www.dir.ca.gov/dosh/dosh_publications/iipnonhigh.html). Employers who prepare and post such a model program in good faith may not be assessed a civil penalty for a first violation of the injury and illness prevention plan requirements. Nonetheless, an employer's IIPP should be reviewed by experienced legal counsel to ensure that it satisfies all legal requirements for such programs.

This Guideline is not an IIPP and is not intended to substitute for one. Employers who currently do not have a written IIPP should consult with legal counsel, their workers' compensation insurance carrier, an industrial hygienist, or the Consultation Service of the DOSH for assistance in developing and implementing an IIPP that is appropriate for the employer's facility.

For further discussion regarding implementing and maintaining IPPs, see *Wilcox, California Employment Law*, § 21.12 (Matthew Bender).

(n3)Note 3. In order to ensure employee compliance with an IIPP, employers are expressly permitted to discipline employees who engage in unsafe or unhealthy work practices. See *Lab. Code § 6401.7(a)(6)*. Furthermore, failure to discipline employees for violating employer safety rules may serve as evidence of the inadequacy of the employer's safety program. See, e.g., *Steiny & Co., Inc. (Sept. 11, 1991) Cal. OSHAB Docket No. 90-R4D1-944* (employer could not prove it had a well-devised safety program when it presented insufficient evidence of its policy of sanctioning employees who violated the program). Appropriate records regarding the steps an employer has taken to implement and maintain its IIPP, including inspection and training records, must be maintained for one year. See *Lab. Code § 6401.7(d)*; 8 *Cal. Code Reg. § 3203(b)(1), (2)*.

(n4)Note 4. California employers are required to file with the Division of Labor Statistics and Research or with the employer's workers' compensation insurer a report of every occupational injury or illness that results in lost time beyond the date of the injury or illness, or that requires medical treatment beyond first aid. See *Lab. Code § 6409.1(a)*; see also *Lab. Code § 6409(b)* ("occupational illness" defined). Employers also are required by federal and state law to maintain records of occupational injuries and illnesses. See 29 U.S.C. § 657(c); 8 *Cal. Code Reg. § 14300.1*. If an employee suffers a "serious injury or illness" (i.e., one that requires hospitalization for more than 24 hours other than for purposes of observation, or that results in any loss of a member of the body, or that involves any serious degree of permanent disfigurement) or death, the employer must file an immediate report (either by telephone or telegraph) to DOSH. See *Lab. Code § 6409.1(b)*; 8 *Cal. Code Reg. § 342*; see also *Lab. Code § 6302(h)* ("serious injury or illness" defined). In addition, corporate employers or their individual managers must immediately notify the DOSH in writing, and also must immediately warn all affected employees in writing, whenever the employer or manager has actual knowledge that a

serious concealed danger in the workplace poses an imminent risk of great bodily harm or death to the employees. See *Penal Code § 387(a)(2)(A)-(B)*. In the absence of such an imminent risk, the employer or manager must give the required written notice within 15 days of receiving actual knowledge of a serious concealed danger. See *Penal Code § 387(a)(2)(B)*. Unless notification is otherwise required, the hazardous condition may, alternatively, be corrected in lieu of notification if the corrective action is taken within the specified time periods (i.e., immediately in cases of imminent risk or within 15 days in other cases). See *Penal Code § 387(a)*. Corporate employers or their individual managers may be subject to criminal penalties, including imprisonment, for failure to give the required notice or failure to take corrective measures within the specified time limits. See *Penal Code § 387(a)*. For further discussion of *Penal Code § 387*, see *Wilcox, California Employment Law, § 21.67* (Matthew Bender).



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DIVISION 2 EMPLOYEE HANDBOOKS AND PERSONNEL POLICY MANUALS

Part B. OPTIONAL GUIDELINES

*1-2 CA Guide to Employee Handbooks § 2.27*

## § 2.27 EMPLOYEE BENEFITS

### [1] Model Guideline

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#### EMPLOYEE BENEFITS

The Company provides benefits for its regular full-time employees, as described in general terms below. The terms on which benefits are made available to employees are set forth in the governing plan documents. In the event of a conflict between the following descriptions and the terms of the plan documents, the plan documents will control. This handbook is not a plan document and does not create any enforceable rights with respect to benefits [or otherwise]. The Company reserves the right to eliminate or modify any of its benefits at any time without prior notice. **[See Note n1]**

#### I. Insurance Benefits

##### A. Workers' Compensation Insurance

The Company carries workers' compensation insurance coverage as required by law to protect employees who are injured on the job. This insurance provides coverage for certain medical, surgical, and hospital treatment in addition to payment for a portion of any lost earnings that result from work-related injuries. **[See Note n2]** Compensation payments generally begin on the first day of an employee's hospitalization or after the third day following the injury if an employee is not hospitalized. The cost of this coverage is paid completely by the Company.

*[Set forth other insurance benefits provided, as applicable]*

##### B. Medical and Dental Insurance

All employees classified by the Company as regular full-time employees and their dependents are eligible to participate in the Company's health and dental insurance plan starting \_\_\_\_\_ [*specify, e.g., the first day of the month following 90 days of full-time employment*]. [The Company pays the premiums for this coverage.] [The premium cost for eligible employees will be provided to you separately. You also may contact Personnel Department to obtain the current premium schedule. Dependent coverage is available to eligible employees at an additional cost. Premiums generally can be paid on a pre-tax basis. **[See Note n3]** [The term "dependent" includes your registered domestic partner, if any. Please be aware that there are special rules that apply to domestic partner coverage. For example, you may not be able to pay for it on a pre-tax basis and additional income may be imputed to you if you elect it.] **[See Note n4]**

#### C. Life Insurance

All employees classified by the Company as regular full-time employees are eligible for group life insurance \_\_\_\_\_ [*specify, e.g., on the first day of the month following 90 days of full-time employment*]. Group life insurance is based on an amount equal to \_\_\_\_\_ [*specify, e.g., the employee's annual salary, up to a maximum of \_\_\_\_\_*]. [The premiums are paid by the Company.] [If you elect such coverage, you must pay for it. The premium cost will be provided to you separately. You also can contact Personnel Department to obtain the current premium schedule.] You may be taxed on the value of this coverage under IRS rules. **[See Note n5]**

#### D. Accidental Death and Dismemberment

All employees classified by the Company as regular full-time employees become eligible for accidental death and dismemberment insurance \_\_\_\_\_ [*specify, e.g., on the first day of the month following 90 days of full-time employment*]. Accidental death and dismemberment insurance is based on an amount equal to \_\_\_\_\_ [*specify, e.g., the employee's annual salary*], up to a maximum of \_\_\_\_\_. The premium cost will be provided to you separately. You also can contact Personnel Department to obtain the current premium schedule.] [The premiums for this coverage are paid by the Company.]

#### E. Premium Payments for Employees on Leave

The Company will pay the employer's portion of premiums for continuation of Company-sponsored group health plan benefits during the first \_\_\_\_\_ [*specify, e.g., 90*] days of any authorized leave. Thereafter, the employee must reimburse the Company for such premium costs if the employee wishes to remain covered under the group plans. The employee always will be responsible for paying the employee's portion of the premiums. If an employee is on an approved FMLA leave, the Company will permit the employee to continue coverage under Company-sponsored group health plans by paying only the amount charged to similarly-situated active employees. If an employee does not return to work at the expiration of an FMLA leave, regardless of whether he or she continued coverage during the FMLA leave, he or she normally will be eligible to elect COBRA continuation coverage with respect to Company-sponsored group health plans, with the COBRA qualifying event normally being the expiration of the leave. **[See Note n6]**

The Company will pay the premiums for continuation of group insurance benefits during the first \_\_\_\_\_ [*specify, e.g., 90*] days of any authorized leave. Thereafter, the employee must reimburse the Company for such premium costs if the employee wishes to remain covered under the group plans.

#### F. Conversion/Post-Employment Insurance Options

Pursuant to the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), and the California Continuation of Benefits Replacement Act (Cal-COBRA) eligible employees and their dependents may be entitled to continue insurance coverage after employment with the Company ceases or certain other qualifying events occur. **[See Note n7]** COBRA information is provided separately. In addition, you also can contact the Personnel Department to obtain COBRA information.

#### G. Insurance Coverage Information

Eligibility requirements and further information concerning insurance coverage are fully explained in the applicable plan documents, summary plan descriptions, and any applicable summaries of material modification, available from the Personnel Department.

### II. Retirement Program

The Company maintains a [specify type of retirement plan; e.g., 401(k) plan] that is generally available to all employees who have completed \_\_\_\_\_[specify eligibility requirements: e.g., 1 year of service and attainment of age 21]. After an employee has satisfied the retirement plan's eligibility requirements, he or she must complete an enrollment form in order to commence participation. Contributions to the retirement plan can be made by employees on [a pre-tax [and/or] post-tax basis]. The Company also may make discretionary contributions, which may be increased, decreased, or eliminated. Currently, the Company matches employee contributions at the rate of [specify rate], up to [specify maximum]. All contributions to the retirement plan are subject to limitations imposed by the Internal Revenue Code.

For information about the retirement plan, employees should refer to the official plan document, the summary plan description, and any applicable summaries of material modification, available from the Personnel Department. **[See Note n8]**

### III. Other Benefits

In addition to insurance and retirement benefits, the Company also provides or makes available the following benefits to eligible employees:

*[specify additional benefits and general terms, as applicable, such as the following]*

- (1) Cafeteria Plan;
- (2) Educational Assistance;
- (3) Credit Union Membership;
- (4) Stock Purchase Plan and/or Stock Option Plan; and
- (5) Employee Discounts.

Additional information on these benefits can be obtained from the Personnel Department.

### [3] Notes

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsUnilateral ContractsEmployee Benefit PlansInsurance LawIndustry RegulationFederal RegulationsEmployee Retirement Income Security Act (ERISA)General OverviewLabor & Employment LawDisability & Unemployment InsuranceDisability BenefitsProofGeneral OverviewLabor & Employment LawWrongful TerminationBreach of ContractEmployer HandbooksPensions & Benefits LawEmployee Benefit PlansGeneral OverviewPensions & Benefits LawEmployee Retirement Income Security Act (ERISA)General OverviewTax LawFederal Income Tax ComputationCompensation & Welfare BenefitsCafeteria Plans (IRC sec. 125)Tax LawFederal Income Tax ComputationRetirement PlansContributions (IRC secs. 401-404A, 406-408A, 410-420)

#### FOOTNOTES:

(n1)Note 1. Under California law, to the extent not preempted by ERISA, an employer's policy can become an enforceable unilateral contract where the employer promises a specific benefit and the employees rely on that promise, either by continuing to work or by acting or foregoing action in some other way. *Asmus v. Pacific Bell* (2000) 23 Cal. 4th 1, 10. In such a situation, the employer must give advance notice before making substantive changes to the benefits policy. Accordingly, counsel should be consulted before making substantive changes to benefits.

(n2)Note 2. The California Labor Code requires employers to provide compensation, without regard to negligence, for any injury or death of an employee "arising out of and in the course of the employment," if specified conditions are met. See *Lab. Code § 3600(a)*; see also *Lab. Code § 3700* (describing the ways employers secure payment of workers' compensation). For discussion of the scope of coverage of California workers' compensation requirements, see Wilcox, California Employment Law, Ch. 20 (Matthew Bender). Employers that fail to do so will not be protected by workers' compensation exclusivity and can be sued for tort damages. See *Cal. Lab. Code §§ 3600, 3602*.

(n3)Note 3. See Internal Revenue Code ("IRC") section 125.

(n4)Note 4. The value of health insurance coverage provided for an employee's registered domestic partner may be excluded from the employee's gross income only if the registered domestic partner also qualifies as the employee's dependent under *IRC section 152(a)*. Otherwise, the value of the employer-provided coverage (calculated as the excess of the fair market value of the coverage over the employee's own contributions) is taxed as income to the employee. See *Treas. Reg 1.106-1*, Priv. Ltr. Ruls. 9034048, 9717018, 200108010. Certain states, such as California, however, do not require that the value of domestic partner coverage generally be included in the employee's gross income.

(n9)Note 5. Pursuant to *IRC section 79(a)*, the first \$50,000 of employer-provided group term life insurance (plus the amount, if any, paid by the employee toward the purchase of the insurance), is excluded from the gross income of the employee for the taxable year. The cost of group term life insurance on the life of an employee provided during any period is determined on the basis of uniform premiums (computed on the basis of five year age brackets) prescribed by regulations of the Secretary of the Treasury. *IRC § 79(c)*. Group term life insurance is defined as coverage that (1) provides a general death benefit that is excludable from gross income under *IRC section 101(a)*; (2) is provided to a group of employees; (3) is provided under a policy carried directly or indirectly by the employer; and (4) computes the amount of insurance provided to each employee under a formula that precludes individual selection, which must be based on factors such as age, years of service, compensation, or position. *Treas. Reg. § 1.79-1(a)*. Life insurance coverage is "carried directly or indirectly" by an employer if (1) the employer pays any part of the cost of the life insurance directly or through another person; or (2) the employer or two or more employers arrange for payment of the cost of the life insurance by their employees and charge at least one employee less than the cost of his or her insurance, and at least one other employee more than the cost of his or her insurance. *Treas. Reg § 1.79-0 (a), (b)*.

(n10)Note 6. See *Treas. Reg. § 54.4980B-10* (questions and answers addressing how the taking of leave under FMLA affects the COBRA continuation coverage requirements.)

(n11)Note 7. The Consolidated Omnibus Budget Reconciliation Act of 1985, as amended ("COBRA") is the result of congressional concern that employer-provided health insurance was too valuable to be lost when employment was terminated or other events triggered a loss of coverage. Congress perceived that the American worker and his or her family needed to have available, for at least a limited time, continued coverage at group rather than individual rates. COBRA, therefore, permits eligible employees and/or their spouses and dependents to elect to receive coverage under the employer's group health plan for a limited period after an event that would, pursuant to the plan, cause the loss of such coverage for a specified reason (*e.g.*, layoff, termination due to disability, divorce, etc.) in exchange for the payment of a specified periodic premium. Employers with 20 or more employees are subject to COBRA. The above model guideline focuses on the provisions of COBRA that require the continuation of employee health coverage.

The California Continuation Benefits Replacement Act (Cal-COBRA) provides continuation benefits for employees who work for small employers (those with 2 to 19 employees). See *Health & Safety C. § 1366.21 et seq.* Cal-COBRA requires health care providers and health plans to offer up to 36 months of continuation coverage to employees and dependents eligible for either COBRA or Cal-COBRA; See *Health & Safety Code §§ 1366.21 et seq. ; § 1366.27 Ins. Code § 10128.50 et seq.* Employees and dependents who are eligible for less than 36 months of COBRA benefits will be given the opportunity to continue coverage under Cal-COBRA once their COBRA benefits have expired. This requirement does not appear to be applicable to group health plans that are self-funded; state regulation of self-funded welfare benefit plans is generally preempted by ERISA. See *ERISA Section 514(a)* ; see also *29 U.S.C. 1001 et seq.*

Under prior law, California employers subject to COBRA or Cal-COBRA who provided a group health plan that was issued, amended, delivered, or renewed in California on or after January 1, 1999, were required to offer extended COBRA continuation coverage to each employee (and spouse) who worked at least 5 years and attained age 60 on the date of his or her termination of employment with the employer. This coverage option was repealed, effective January 1, 2005, for any individual who did not satisfy the eligibility requirements as of that date. See *Health & Safety Code § 1373.621(j)* ; *Insurance Code § 10116.5(j)* .

In addition to offering extended COBRA coverage to former employees and their spouses, California law requires employers providing health benefits under a group insurance policy to offer such persons the right to convert their coverage to individual policies. See *Health & Safety Code § 1373(g)*, *§ 1373.6*. The former employer is required to provide notice of the conversion option in accordance with *California Labor Code Section 2800.2* .

(n12)Note 8. This section of the model guideline contemplates a "401(k)" defined contribution plan, and must be modified if the retirement plan sponsored by the employer is a different type of qualified plan (*e.g.*, a defined benefit

pension plan, a money purchase pension plan). The Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*, and the Internal Revenue Code, 26 U.S.C. § 1 *et seq.*, govern most employee pension benefit and welfare benefit plans. Subchapter D of the Internal Revenue Code sets forth the numerous tax requirements applicable to qualified employee pension benefit plans and welfare benefit plans and is implemented through regulations and rulings promulgated by the Internal Revenue Service. Title I of ERISA (Reporting and Disclosure Requirements; Minimum Participation, Vesting and Benefit Accrual Requirements; Plan Administration, Fiduciary Responsibility Standards and Enforcement) is implemented through regulations promulgated by the Employee Benefits Security Administration (formerly known as the Pension and Welfare Benefit Administration) of the Department of Labor. For example, in general, ERISA requires that a plan administrator distribute a summary plan description to each employee within 90 days after he or she becomes a participant in the plan (or, in the case of a beneficiary, within 90 days after he or she first receives benefits under the plan). See 29 U.S.C. § 1024(b). The regulations implementing this rule impose complex content and presentation requirements on the plan administrator. Furthermore, the courts have held that if the terms of a summary of the plan describe the plan in terms that are more favorable than the plan document itself, and the participant relies on such description to his or her detriment, the participant may be entitled to the more favorable benefits described in the summary, rather than the less favorable benefits contained in the plan document. See, e.g., *Bergt v. Retirement Plan for Pilots of Mark-Air* (9th Cir. 2002) 293 F.3d 1139, 1145; *Palmisano v. Allina Health Sys.* (8th Cir. 1999) 190 F.3d 881, 887-88; *McKnight v. Southern Life and Health Ins. Co.* (11th Cir. 1985) 758 F.2d 1566, 1571; *Blau v. Del Monte Corp.* (9th Cir. 1984) 748 F.2d 1348, *cert. denied*, (1985) 474 U.S. 865, 106 S. Ct. 183, 88 L. Ed. 2d 152; *Morse v. Stanley* (2d Cir. 1984) 732 F.2d 1139; *Gors v. Venoy Palmer Mkt., Inc.* (E.D. Mich. 1984) 578 F. Supp. 365; *Hillis v. Waukesha Title Co.* (E.D. Wis. 1983) 576 F. Supp. 1103; compare *Andersen v. Chrysler Corp.* (7th Cir. 1996) 99 F.3d 846, 859 (holding that language in summary plan description controls only if participant shows that the language of the summary plan description was more favorable than the plan document itself and the employee detrimentally relied on such language). Thus, caution should be exercised in drafting to ensure that there are no inconsistencies between the governing plan documents and a summary plan description, whether the summary is incorporated into the employee handbook or appears in a separate document.



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DIVISION 2 EMPLOYEE HANDBOOKS AND PERSONNEL POLICY MANUALS

Part B. OPTIONAL GUIDELINES

*1-2 CA Guide to Employee Handbooks § 2.28*

## § 2.28 SOLICITATION, DISTRIBUTION, AND BULLETIN BOARDS

### [1] Model Guideline

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#### SOLICIATION, DISTRIBUTION, AND BULLETIN BOARDS

Employees may engage in solicitation on Company premises only during their nonworking time. Nonworking time means time during meals or breaks and before or after work. **[See Note n1]**

Employees may distribute or circulate non-Company written materials only during nonworking time and only in nonwork areas. If an employee is not certain whether an area is a work or nonwork area, he or she should consult his or her immediate supervisor for clarification. **[See Note n2]**

Solicitation or distribution in any way connected with the sale of any goods or services for profit is strictly prohibited anywhere on Company property at any time. Similarly, solicitation or distribution of literature for any purpose by non-employees is strictly prohibited on Company property at any time. **[See Note n3]** [The sole exception to the Company's no-solicitation rule applies to the Company's annual participation in \_\_\_\_\_ (*specify designated charity participation.*)] **[See Note n4]**

Employees are prohibited from using the Company's e-mail system at any time to solicit or to distribute or circulate non-Company materials, or to engage in solicitation or distribution in any way connected with the sale of any goods or services for profit. [The sole exception to the Company's no-solicitation rule applies to the Company's annual participation in \_\_\_\_\_ (*specify designated charity participation.*)] **[See Note n1]**

[The Company has bulletin boards located throughout the facility for the purpose of communicating with employees. Postings on these boards are limited to Company-related material including statutory and legal notices, safety and disciplinary rules, Company policies, memos of general interest relating to the Company, local operating rules, and other Company items. All postings require the prior approval of the Division Manager or the Personnel representative.

No postings will be premitted for any other purpose.] [See Note n5]

## [2] Drafting Checklist

### RECOMMENDED PROVISIONS

1. A statement of the rule prohibiting solicitation by employees [See Note n1];
2. A statement of the rule prohibiting distribution by employees [See Note n2];
3. A statement of the rule prohibiting solicitation and distribution by non-employees [See Note n3];
4. An explanation of what "working time" means, if that term is used in the no-solicitation rule [See Notes n1,n2];
5. A statement that the use of the Company's e-mail system for solicitation or distribution of non-Company materials is prohibited at all times. [See Note n1]

### OPTIONAL PROVISIONS

1. A statement designating a particular charitable organization as the sole exception to the no-solicitation rule [See Note n4]; and
2. A statement that company bulletin boards are only for company business [See Note n5];

## [3] Notes

### Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law  
 Employment Relationships  
 General Overview  
 Labor & Employment Law  
 Wrongful Termination  
 Breach of Contract  
 Employer Handbooks

### FOOTNOTES:

(n1)Note 1. This guideline is designed, among other things, to prohibit union solicitation. Any rule attempting to do so must comply with certain requirements of the National Labor Relations Board (N.L.R.B.), the federal agency that enforces the National Labor Relations Act ( 29 U.S.C. § 151 et seq. ). A rule prohibiting union solicitation is permissible if it applies generally (i.e., if it does not single out union solicitation), and if it prohibits solicitation only during "working time." Working time, as used by the N.L.R.B., means time when the employee is supposed to be working. It does not include breaks or lunch periods, nor does it include time before an employee is supposed to be working or afterward. An employer may not lawfully prohibit solicitation during such nonworking time, even if the employer follows a rule that evenhandedly prohibits all other solicitation during such time. A rule meeting the above requirements is only presumptively valid, meaning that if the rule is applied discriminatorily against unions but not against other solicitation (e.g., for football pools, girl scout cookies, Avon products, etc.), the employer commits an unfair labor practice. See *Atlantic Forest Products, Inc. (1987) 282 N.L.R.B. 855* ; see also, *St. Margaret Mercy Healthcare Ctrs v. NLRB, 519 F. 3d 373 (7th Cir. 2008)* (employer unlawfully enforced a no-solicitation rule by disciplining a nurse for engaging in union solicitation at the nurses' station when it routinely allowed non-union solicitation in the same spot.) An employer may prohibit employees from using the Company's e-mail system to facilitate union-related solicitations. See *Guard Publ'g Co. ("Register-Guard") (2007) 351 N.L.R.B.1110*. A rule prohibiting the use of the company's e-mail system for union-related solicitation is lawful so long as unions are not

singled out for disparate treatment. In other words, an employer may not permit e-mail solicitations for one union but not another or permit antiunion communications and prohibit pronoun communications. On the other hand, an employer may distinguish between charitable and non-charitable solicitations, whereby solicitations for the union and solicitations for the sale of products would be prohibited equally, but solicitations for the United Way would be permitted. Note: The D.C. Circuit recently attacked the Board's decision in *Register-Guard, Guard Publ'g Co. v. N.L.R.B.* (2009) 571 F.3d 53 (D.C. Cir. 2009). Additionally, It is widely expected that the Obama Board will overrule *Register-Guard*. If so, the recommended provision would need to be revised.

(n2)Note 2. The N.L.R.B. rules draw a distinction between solicitation, which generally means oral solicitation, and distribution, which refers to handing out printed material. (Passing out union authorization cards, however, is deemed by the N.L.R.B. to be solicitation. See *Stoddard-Quirk Mfg. Co.* (1962) 138 N.L.R.B. 615, 620 n.6 ). An employer is required to permit employee distribution of union material only in nonwork areas during nonworking time. Conversely, an employer lawfully may prohibit such distribution in work areas at all times. See *Atlantic Forest Products, Inc.* (1987) 282 N.L.R.B. 855 ; but see *Foundation Coal West, Inc.* (2008) 352 NLRB No. 22 (employer may not prohibit distribution in a workplace hallway that is a "mixed-use" area in which extensive nonwork activities occur).

(n3)Note 3. An employer lawfully may prohibit both solicitation and distribution by non-employees (e.g., union organizers) on company premises at all times, unless there is no other reasonable way for the union to communicate with employees. This exception "does not apply wherever nontrespassory access to employees may be cumbersome or less-than-ideally effective," but only where the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them. See, e.g., *Lechmere, Inc. v. N.L.R.B.* (1992) 502 U.S. 527, 539, 112 S. Ct. 841, 117 L. Ed. 2d 79 (citing *NLRB v. Babcock & Wilcox Co.* (1956) 351 U.S. 105, 113, 76 S. Ct. 679 ); see *N.L.R.B. v. Town & Country Electric, Inc.* (1995) 516 U.S. 85, 89-93, 116 S. Ct. 450, 133 L. Ed. 2d 371 (upholding *Lechmere* but also holding that the definition of "employee" for the purposes of hire and retention is broad enough to cover applicants and employees paid by a union to help organize an employer). Again, however, this rule must be enforced uniformly and not just against unions. Note, however that some, jurisdictions, such as California, allow broad access to private property that is open to the public (e.g., shopping malls) for expressive activities which would include union activity.

(n4)Note 4. No-solicitation rules will not be deemed invalid merely because they specify a particular charity as the sole exception to the restrictions on solicitation. See *South Nassau Communities Hosp.* (1985) 274 N.L.R.B. 1181 . However, the level and nature of solicitations under such an exception can be the basis for finding that the employer applied its rule in a disparate manner. See *United States Indus., Hammary Mfg. Corp., Div. of U.S. Indus., Inc.* (1982) 265 N.L.R.B. 57 . Because of the potential for a claim of disparate treatment, a company considering adopting a charitable exception to the no-solicitation rule is advised to first seek legal counsel.

(n9)Note 5. The board has traditionally held that, if an employer permits employees to post personal or other non-company material on company bulletin boards, then the employer must permit employees to post material in support of unions as well. See *New Process Co.* (1988) 290 N.L.R.B. 704 , enforced, 872 F.2d 413 (3d Cir. 1989) . The NLRB's decision in *Register-Guard*, supra , however, would allow an employer to permit purely personal postings while consistently prohibiting the posting of solicitations of a "commercial" nature, including union solicitations, but the D.C. Circuit has said that such a policy violates employees' Section 7 rights. *Guard Publ'g Co. v. N.L.R.B.* (2009) 571 F.3d 53 (D.C. Cir. 2009). The recommended provision presupposes use of the bulletin board for official Company business only.



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DIVISION 2 EMPLOYEE HANDBOOKS AND PERSONNEL POLICY MANUALS  
Part B. OPTIONAL GUIDELINES

*1-2 CA Guide to Employee Handbooks § 2.29*

## § 2.29 NON-FRATERNIZATION

### [1] Model Guideline

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#### NON-FRATERNIZATION

In order to promote the efficient operation of the Company's business and to avoid misunderstandings; complaints of favoritism; other problems of supervision, security and morale; and possible claims of sexual harassment, managers and supervisors are forbidden from dating or pursuing romantic or sexual relationships with employees whom they supervise, directly or indirectly. [See Note n1] Employees who violate this guideline will be subject to discipline, up to and including termination of employment. [See Note n2]

### [2] Drafting Checklist \_\_\_\_\_

#### RECOMMENDED PROVISIONS

1. A statement of reasons for adoption of a non-fraternization guideline [See Note n1];
2. A statement of conduct that is prohibited; and
3. A statement informing employees of the consequences of a violation of the guideline [See Note n2].

### [3] Notes

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law Discrimination Gender & Sex Discrimination Enforcement Labor & Employment Law Discrimination Harassment General Overview Labor & Employment Law Discrimination Harassment Sexual Harassment General Overview

#### FOOTNOTES:

(n1)Note 1. Employers may adopt and enforce non-fraternization rules designed to accomplish the purposes discussed in this guideline. See, e.g., *Crosier v. United Parcel Service, Inc.* (1983) 150 Cal. App. 3d 1132, 1140, 198 Cal. Rptr. 361 (upholding discharge of employee for violation of non-fraternization rule) overruled on other grounds, *Foley v. Interactive Data Corp.* (1998) 47 Cal. 3d 654, 688-700, 254 Cal. Rptr. 211, 765 P.2d 373 ; see also *Wilcox, California Employment Law*, § 60.09[5][b] (Matthew Bender). On the one hand, good reasons exist for adoption of such rules, including the affirmative duty imposed on California employers to take "all steps necessary to prevent sexual harassment from occurring." 29 C.F.R. § 1604.11(f) (EEOC guidelines on sex discrimination, which encourage employers to take affirmative steps to prevent harassment); see also *Gov. Code § 12940(k)* (employer must "take all reasonable steps necessary to prevent discrimination and harassment from occurring"). See *Miller v. Dept. of Corr.* (2005) 36 Cal. 4th 446 (prison guard's sexual harassment claim was properly stated against prison warden, who was involved in multiple romantic relationships with other subordinates).

However, employers are not required to adopt non-fraternization rules, and sound reasons also support choosing not to do so. First, because such rules seek to regulate employee behavior away from the workplace, some employers may regard them as overly intrusive in the personal lives of employees. Second, it is difficult to monitor compliance with non-fraternization rules. Third, difficult questions of interpretation may arise, requiring the employer to determine, for example, whether certain conduct is "romantic" or merely "social."

Employers should weigh carefully these competing considerations before deciding whether to adopt a non-fraternization rule, and should consult legal counsel before doing so. Whatever the decision, a separate policy dealing specifically with sexual harassment is strongly recommended. For a model guideline prohibiting harassment generally, see § 2.13 above. For a discussion of sexual harassment generally, see *Wilcox, California Employment Law*, § 41.81 (Matthew Bender).

(n2)Note 2. If a non-fraternization rule is adopted, employees should be informed of the rule and of the consequences for violations.



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DIVISION 2 EMPLOYEE HANDBOOKS AND PERSONNEL POLICY MANUALS

Part B. OPTIONAL GUIDELINES

*1-2 CA Guide to Employee Handbooks § 2.30*

## § 2.30 CONFLICTS OF INTEREST

### [1] Model Guideline

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#### CONFLICTS OF INTEREST

Employees are expected to devote their best efforts and attention to the full-time performance of their jobs. Moreover, employees are expected to use good judgment, to adhere to high ethical standards, and to avoid situations that create an actual or potential conflict between their personal interests and the interests of the Company. A conflict of interest exists when the employee's loyalties or actions are divided between the Company's interests and those of another, such as a competitor, supplier, or customer. Both the fact and the appearance of a conflict of interest should be avoided. Employees unsure as to whether a certain transaction, activity, or relationship constitutes a conflict of interest should discuss it with their immediate supervisor or the Personnel Manager for clarification. Any exceptions to this guideline must be approved in writing by \_\_\_\_\_ [*specify official authorized to make exceptions, e.g., the Company's President*].

While it is not feasible to describe all possible conflicts of interest that could develop, some of the more common conflicts that employees should avoid include the following: **[See Note n1]**

- (1) Accepting personal gifts or entertainment from competitors, customers, suppliers, or potential suppliers;
- (2) Working for a competitor, supplier, or customer;
- (3) Engaging in self-employment in competition with the Company;
- (4) Using proprietary or confidential Company information for personal gain or to the Company's detriment;

- (5) Having a direct or indirect financial interest in or relationship with a competitor, customer, or supplier, [except that ownership of less than \_\_\_\_\_ (*specify, e.g., one percent (1%)*) of the publicly traded stock of a corporation will not be considered a conflict];
- (6) Using Company property or labor for personal use;
- (7) Acquiring any interest in property or assets of any kind for the purpose of selling or leasing it to the Company; [or]
- (8) Committing the Company to give its financial or other support to any outside activity or organization; [or]
- (9) Developing a personal relationship with a subordinate employee of the Company or with an employee of a competitor, supplier, or customer that might interfere with the exercise of impartial judgment in decisions affecting the Company or any employees of the Company]. **[See Notes n1,n2]**

If an employee or someone with whom an employee has a close relationship (e.g., a family member or close companion) has a financial or employment relationship with a competitor, customer, supplier, or potential supplier, the employee must disclose this fact in writing to the Personnel Department. [Employees should be aware that if they enter into a personal relationship with a subordinate employee or with an employee of a competitor, supplier, or customer, a conflict of interest may exist, which requires full disclosure to the Company.] **[See Notes n2, n3]**

Part-time employees may engage in outside employment, provided that they disclose such employment and get written approval from their immediate supervisor. **[See Notes n1,n4]**

Failure to adhere to this guideline, including failure to disclose any conflicts or to seek an exception, may result in discipline, up to and including termination of employment. **[See Note n1]**

## **[2] Drafting Checklist \_\_\_\_\_**

### **RECOMMENDED PROVISIONS**

1. A statement that the company expects employees to use good judgment, adhere to ethical standards, and avoid conflicts of interest;
2. A definition of conflict of interest **[See Note n1]**;
3. A provision dealing with the appearance as well as the fact of a conflict;
4. A provision referring employees to their supervisor or to the Personnel Manager in case of questions;
5. A provision requiring written approval from a specified officer of the employer for any exception to the guideline;
6. A list of specific types of conflicts or transactions that are to be avoided **[See Note n1]**;
7. A provision requiring written disclosure of conflicts to the personnel department **[See Note n4]**;
8. A provision alerting employees that personal relationships with employees of the company or

employees of competitors may result in a conflict situation [See Notes n2,n3];

9. A provision permitting part-time employees to engage in outside employment; and

10. A statement providing for the discipline of employees who fail to comply with the policy.

### OPTIONAL PROVISIONS

1. A prohibition against developing personal relationships with subordinate employees that might affect decisions concerning employees [See Note n2].

### [3] Notes

#### Legal Topics:

For related research and practice materials, see the following legal topics:  
Labor & Employment Law General Overview

#### FOOTNOTES:

(n1)Note 1. This guideline, as drafted, includes a number of specific types of conflicts that might arise in the workplace. Before deciding whether to adopt each of the specific conflicts listed--or others--employers should consider the nature of their business and their workforce. Moreover, the employer must consider whether the conduct occurs during nonworking hours away from the employer's premises. California law prohibits an employer from taking adverse action against an employee or applicant for employment who engages in "lawful conduct occurring during nonworking hours away from the employer's premises." *Lab. Code §§ 96(k)*, 98.6. Hence, when drafting a policy relating to conflicts of interests, or before disciplining employees for violating such policy, the employer must carefully consider (1) the nature of the conduct, and whether it actually creates a conflict of interest; (2) whether the employee's conduct occurred after working hours; and (3) whether the employee's conduct occurred away from the employer's premises. For discussion of various legal doctrines protecting employers against conflicts of interest or competition by employees, see generally *Wilcox, California Employment Law, Ch. 70* (Matthew Bender).

(n2)Note 2. The guideline, as drafted, treats the prohibition against developing personal relationships with subordinate employees as optional. If an employer adopts a separate non-fraternization rule, it is not necessary to list it as a specific prohibition in the conflict of interest guideline as well. If no such rule is adopted, however, consideration should be given to inclusion of this optional provision. See § 2.26 of this Guide and accompanying notes.

(n3)Note 3. The requirement in this guideline that employees disclose relationships with a competitor, supplier, or customer serves two purposes. First, it alerts the employer to a possible conflict of interest. Second, it alerts the employer to a potential claim of harassment under *Government Code section 12940(j)(1)* or *Civil Code section 51.9*. For a discussion of professional relationship sexual harassment, see § 2.13[3] of this Guide, Notes 2, 4, and 5.

(n4)Note 4. Employees may be asked at the time of hire to certify that they do not know of any facts that constitute a conflict of interest, and to disclose any conflict subsequently arising.



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DIVISION 2 EMPLOYEE HANDBOOKS AND PERSONNEL POLICY MANUALS

Part B. OPTIONAL GUIDELINES

*1-2 CA Guide to Employee Handbooks § 2.31*

## § 2.31 PROOF OF RIGHT TO WORK

### [1] Model Guideline

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#### PROOF OF RIGHT TO WORK

Under federal law, all new hires must produce original documentation establishing their identity and right to work in the United States, and complete INS Form I-9, swearing that they have a right to work in the United States. **[See Note n1]** New hires may establish their identity and right to work in the United States by (1) providing documentation that establishes both their identity and employment authorization ("List A" documents) or (2) providing documentation that separately establishes their identity ("List B" documents) *and* their employment authorization ("List C" documents). **[See Note n2]** All documents must be unexpired. Documentation must be produced within three business days of hire, or on the first day of any employment that is less than three business days. **[See Note n3]** [Required documentation must be presented to the \_\_\_\_\_ (*specify, e.g., Personnel Department*), which will be responsible for processing the documents.]

Any one of the following documents may be used to establish both identity and employment authorization ("List A" documents): **[See Note n4]**

- (1) United States passport;
- (2) Permanent Resident Card (Form I-551); Alien Registration Receipt Card (I-551);
- (3) Foreign passport that contains a temporary I-551 stamp or temporary I-551 printed notation on a machine-readable immigrant visa;
- (4) An Employment Authorization Document that contains a photograph (Form I-766);

(5) In the case of a nonimmigrant alien authorized to work for a specific employer incident to status, a foreign passport with (Form I-94 or Form I-94A) bearing the same name as the passport and containing an endorsement of the alien's nonimmigrant status, as long as the period of endorsement has not yet expired and the proposed employment is not in conflict with any restrictions or limitations identified on the form; or

(6) Passport from the Federated States of Micronesia or Republic of the Marshall Islands with Form I-94A indicating non-immigrant admission under the Compact of Free Association between the U.S. FSM or RMI.

If an applicant cannot produce one of the documents listed above, two documents are required: one to prove identity and another to prove employment authorization. **[See Note n5]**

The following documents are acceptable as proof of identity, but not employment authorization ("List B" documents): **[See Note n6]**

(1) A driver's license or I.D. card issued by a state or outlying possession of the United States, provided it contains a photograph or identifying information such as name, date of birth, gender, height, eye color, and address;

(2) I.D. card issued by federal, state, or local government agencies or entities provided it contains a photograph or identifying information such as name, date of birth, gender, height, eye color, and address;

(3) School I.D. card with photograph;

(4) Voter's registration card;

(5) U.S. military card or draft record;

(6) Military dependant's ID card;

(7) Merchant Mariner Card issued by the United States Coast Guard;

(8) Native American tribal document;

(9) Canadian driver's license; or

(10) Individuals under the age of 18 who are unable to produce any of the identification documents listed in (1)-(9) may present a: a) school record or report card, b) daycare or nursery school record, or c) clinic doctor or hospital record only.

The following documents are acceptable to establish employment authorization, but not identity ("List C" documents): **[See Note n7]**

(1) A social security card, other than one that specifies on the face that the issuance of the card does not authorize employment in the U.S.;

(2) A Certification of Birth Abroad issued by the Department of State (Form FS-545);

(3) A Certification of Report of Birth issued by the Department of State (Form DS-1350);

- (4) An original or certified copy of a birth certificate issued by a state, county, municipal authority, or outlying territory of the United States, and bearing an official seal;
- (5) A Native American tribal document;
- (6) A United States Citizen Identification Card (INS Form I-197);
- (7) An Identification card for use of resident citizen in the United States (INS Form I-179); or
- (8) An employment authorization document issued by the Department of Homeland Security.

Authorization documents will be copied and placed with the employee's Form I-9 in a special file separate from the employee's Personnel File. **[See Note n8]** [These documents will be retained at least three years after the date of hire or one year after an employee's employment terminates, whichever is later.] **[See Note n9]**

## **[2] Drafting Checklist \_\_\_\_\_**

### **RECOMMENDED PROVISIONS**

1. A statement of the requirement that new hires must produce documentation of right to work in the United States **[See Notes n1,n2]**;
2. A list of documents that may be used to establish both identity and employment eligibility **[See Note n4]**;
3. A list of documents that may be used to establish identity only **[See Notes n5,n6]**;
4. A list of documents that may be used to establish employment eligibility only **[See Notes n5,n7]**; and
5. A statement that work authorization documents will be kept separate from personnel files **[See Note n8]**.

### **OPTIONAL PROVISIONS**

1. A statement of which department (e.g., the employment department or the personnel department) will be responsible for processing the required documentation; and
2. A statement of the length of time a Form I-9 will be retained by the employer **[See Note n9]**.

## **[3] Notes**

### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Immigration Law Duties & Rights of Aliens Employment Labor & Employment Law Discrimination National Origin Discrimination General Overview Labor & Employment Law Discrimination National Origin Discrimination Employment Practices General Overview Labor & Employment Law Employee Privacy Disclosure of Employee Information Personnel Files Labor & Employment Law Wrongful Termination Breach of Contract Employer Handbooks

**FOOTNOTES:**

(n1)Note 1. The Immigration Reform and Control Act of 1986 prohibits employers from knowingly hiring or continuing to employ aliens who are not authorized to work in the United States. On February 13, 1996, President Clinton signed an Executive Order barring federal contracts for one year to employers who knowingly hire illegal aliens. See Exec. Order No. 12989, *61 Fed. Reg. 6091 (1996)*. As of September 8, 2009, all federal contractors are subject to regulations mandating the use of E-Verify, an online system of work authorization verification. See Federal Acquisition Regulation 2007-013, *73 Fed. Reg. 677074* (Nov. 14, 2008). Employers are also required to verify that all newly hired employees have necessary work authorization documents. See *8 U.S.C. § 1324a(a), (b)*. Implementing administrative regulations have been promulgated by the Immigration and Naturalization Service (INS) and by legacy INS agencies such as U.S. Citizenship and Immigration Services (USCIS). See generally *8 C.F.R., pt. 274a*.

With regard to former employees who are rehired, employers need not re-verify documents or complete new Form I-9 if (1) the employer determines that the Form I-9 relates to the individual and that individual is still eligible to work and (2) the individual is hired within three years after the date of the initial execution of the Form I-9. See *8 C.F.R. § 274a.2(c)(1)(i)*. The employer must, however, update the Form I-9 to reflect the date of rehire. An employer who obtains labor by contract with a third party (e.g., through a temporary employment agency) need not verify documentation nor complete Form I-9, but employers may not use the services of any such employee known not to be authorized to work. See *8 C.F.R. §§ 274a.1(g), 274a.5*.

(n2)Note 2. See *8 C.F.R. § 274a.2(b)(1)(v)*. In addition, under specified circumstances, a new hire who cannot produce one of the listed documents may produce a "receipt" in lieu of the listed document. See *8 C.F.R. § 274a.2(b)(1)(vi)*.

(n3)Note 3. See *8 C.F.R. § 274a.2(b)(1)(ii), (iii)*. Employers should take care to avoid discrimination claims in the context of complying with the employment eligibility verification requirements. For example, in order to avoid national origin discrimination claims by unsuccessful job applicants, employers should not request employment verification documents prior to making a job offer.

(n4)Note 4. See *8 C.F.R. § 274a.2(b)(1)(v)(A)*. As of April 3, 2009, all employers must use the revised I-9 that was issued 2009. USCIS issued two revised forms, and both are acceptable. The appropriate I-9 forms are identifiable by the marking of "2/2/09" or "8/7/09" on the lower right hand corner of the form. Only these versions may be used; all other versions of the I-9 forms are void.

(n9)Note 5. See *8 C.F.R. § 274a.2(b)(1)(v)*.

(n10)Note 6. See *8 C.F.R. § 274a.2(b)(1)(v)(B)*.

(n11)Note 7. See *8 C.F.R. § 274a.2(b)(1)(v)(C)*.

(n12)Note 8. See *8 C.F.R. § 274a.2(b)(3)*. Documentation and I-9 forms should be kept separate from personnel files for two reasons: (1) to provide easy access in the event USCIS inspectors request to examine I-9 forms; and (2) to prevent persons making personnel decisions regarding hire, promotion, demotion, termination, and other matters from having access to inappropriate information about national origin or citizenship status when examining the personnel file. See *8 U.S.C. § 1324b(a)*; *42 U.S.C. § 2000e-2*; *Gov. Code § 12940(a)* (prohibiting discrimination on basis of national origin). For further discussion of prohibitions against national origin discrimination and the relationship to lawful citizenship and employment eligibility requirements, see *Wilcox, California Employment Law, §§ 40.31[2A], 60.03[3][j]* (Matthew Bender).

(n13)Note 9. Completed Form I-9 must be retained at least three years after the date of hire or one year after the date an employee's employment terminates, whichever is later. See *8 C.F.R. § 274a.2(b)(2)(i)(A)*.



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DIVISION 2 EMPLOYEE HANDBOOKS AND PERSONNEL POLICY MANUALS

Part B. OPTIONAL GUIDELINES

*1-2 CA Guide to Employee Handbooks § 2.32*

## § 2.32 INSPECTIONS ON COMPANY PREMISES

### [1] Model Guideline

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#### INSPECTIONS AND SEARCHES ON COMPANY PREMISES

##### I. Purpose of the Guideline

The Company believes that maintaining a workplace that is free of drugs, alcohol, and other harmful materials is vital to the health and safety of its employees and to the success of the Company's business. The Company also intends to protect against the unauthorized [use and] removal of Company property. In addition, the Company intends to assure its access at all times to Company premises and Company property, equipment, information, records, documents, and files. [See Note n1] Accordingly, the Company has established this Guideline concerning inspections and searches on Company premises. This Guideline applies to all employees of the Company. [See Note n2]

##### II. Definitions [See Note n3]

For purposes of this Guideline:

(1) "Prohibited materials" [See Note n4] means firearms or other weapons; explosives and/or hazardous materials or articles; illegal drugs or other controlled substances [as defined in the Company's Drug-Free Workplace Guideline] [See Note n5]; drug-related paraphernalia; the unauthorized use or consumption of alcoholic beverages on Company property; or Company property and/or proprietary and confidential information belonging to a third party that an employee is not authorized to have in his or her possession. [See Note n6]

(2) "Company property" includes all documents, records, software, electronic codes, data, and files relating to the Company's business; and all equipment, hardware, and other property of any kind, whether owned, leased, rented, or used by the Company.

(3) "Company premises" includes all premises and locations owned or leased by the Company or under the control of the Company, including parking lots, lockers, and storage areas.

(4) "Reasonable suspicion" includes a suspicion that is based on specific personal observations such as an employee's manner, disposition, muscular movement, appearance, behavior, speech or breath odor; information provided to management by an employee, by law enforcement officials, by a security service, or by other persons believed to be reliable; or a suspicion that is based on other surrounding circumstances.

(5) "Possession" means that an employee has the substance or Company property on his or her person or otherwise under his or her control.

### III. Inspections and Searches

#### A. Access to Company Property

1. In order to assure access at all times to Company property, and because employees properly in possession of Company property or information related to Company business may not always be available to produce the property or information when needed in the ordinary course of the Company's business, the Company reserves the right to conduct a routine inspection or search at any time for Company property on Company premises. [In addition, the Company reserves the right to access at all times information and communications stored in Company computer files(,) (and) on Company disk-drives, (and in employee voicemail boxes and electronic-mail systems).]

2. Routine searches or inspections for Company property may include an employee's office, desk, file cabinet, closet, computer files, [voice mail,] [electronic mail,] or similar places where employees may store Company property or company-related information, whether or not the places are locked [or protected by access codes and/or passwords]. **[See Note n7]**

3. Because even a routine search for Company property might result in the discovery of an employee's personal possessions, all employees are encouraged to refrain from bringing into the workplace any item of personal property that they do not wish to reveal to the Company. **[See Note n8]**

#### B. Inspections and Searches for Prohibited Materials

1. Inspections or searches for prohibited materials in or on Company premises also will be conducted whenever the Company has reasonable suspicion to believe that a particular employee [or group of employees] may be in possession of materials in violation of this Guideline. **[See Note n9]**

2. Inspections or searches for prohibited materials may be conducted by an independent security service or by Company personnel. **[See Note n10]**

[3. Inspections or searches for prohibited materials may be conducted on a \_\_\_\_\_ [regular *or* random] basis at locations where employees enter or exit Company premises, without regard to whether there is reasonable

suspicion that any employee may be in possession of prohibited materials in violation of this Guideline.] **[See Note n11]**

[4. Inspections or searches for prohibited materials may be conducted from time to time even when there is no immediate reason to suspect the presence of the materials. In such cases, the Company \_\_\_\_\_[*may or will*] announce the inspection in advance, *except* for inspections or searches conducted at locations where employees enter or exit Company premises.] **[See Note n12]**

[5. Inspections or searches for prohibited materials may include an employee's office, desk, file cabinet, closet, computer, or similar places where employees may place personal possessions or information, whether or not the places are locked [or password protected]. **[See Note n7]** [Inspections or searches for prohibited materials also may include an employee's locker, or an employee's pockets, purse, briefcase, lunch box, or other item of personal property that is being worn or carried by the employee while on Company premises.] **[See Note n13]**

[6. In cases involving an inspection or search of an employee's pockets, purse, briefcase, or other item of personal property that is being worn or carried by the employee, the employee will be requested to conduct a self-search (i.e., by turning out or emptying pockets, purses, etc.) in the presence of an observer who will be a person of the same gender.] **[See Note n14]**

[7. Employees who refuse to cooperate during an inspection or search will not be forcibly detained or searched. **[See Note n15]** They will be informed, however, that the Company will base any disciplinary decision on the information that is available, including their refusal to consent to the search as well as the information that gave rise to a reasonable suspicion that the employees were in possession of prohibited materials, if applicable, and that their failure or refusal to cooperate could deprive the Company of information that may clear them of suspicion. **[See Note n16]** In addition, the Company reserves the right to take appropriate action to prevent the unauthorized removal from Company premises of Company property.] **[See Note n17]**

#### **IV. Approvals for Inspections**

1. In instances in which the inspection or search is conducted because there is reasonable suspicion that a particular employee or group of employees may be in possession of prohibited materials in violation of this Guideline or may be using Company property in an unauthorized manner, and in instances in which an item of the employee's personal property will be searched, the inspection or search will be approved in advance by \_\_\_\_\_[*specify first level of approval required, e.g., the highest ranking member of management in the Division who is available at the time the inspection or search is to be conducted*] and by \_\_\_\_\_[*specify second level of approval, if desired, e.g., the Personnel Manager*] [or his or her (or their) designated alternate(s) in the event of unavailability]. **[See Notes n18,n19]**

[2. All inspections or searches that are conducted as part of the Company's program of periodic (and unannounced) **[See Note n10]** inspections will be approved in advance by \_\_\_\_\_[*specify, e.g., the Personnel Manager*], who will inform the \_\_\_\_\_(*specify, e.g., Division Manager*) of the impending inspection prior to its occurrence.] **[See Note n20]**

#### **V. Disciplinary Action**

Employees who are found to be in possession of prohibited materials in violation of this Guideline and/or in violation of \_\_\_\_\_[*include reference to other applicable guidelines, e.g., the Company Property; Proprietary and Confidential Information Guideline, the Technology Use and Privacy Guideline, and the Drug-Free Workplace*

Guideline] [See Note n5], or employees who are found to have used Company property in an unauthorized manner, will be subject to discipline, up to and including discharge, regardless of the Company's reason for conducting the search or inspection. [See Note n21]

## **VI. Confidentiality**

Managers and supervisors will make their best effort to restrict communications concerning a violation or possible violation of this Guideline to persons who have an important work-related reason to know. [See Note n22]

### **[2] Drafting Checklist \_\_\_\_\_**

#### **RECOMMENDED PROVISIONS**

1. A statement setting forth the employer's reasons for adopting the policy [See Note n1];
2. A statement informing employees that this guideline applies to all employees [See Note n2];
3. A definition of "prohibited materials" and other terms used in the guideline [See Notes n3,n4,n6];
4. A statement informing employees of the employer's intent to conduct routine searches for the employer's property when employees properly in possession of the property are not available, including notice that any search or inspection conducted pursuant to this guideline may include an employee's office, desk, file cabinet, and similar places where employees may place personal possessions [See Note n7];
5. A statement informing employees that the employer may access computer files, disk drives, and employee voice mail boxes [See § 2.23A of this Guide (Technology Use and Privacy policy)];
6. A statement encouraging employees to refrain from bringing into the workplace any personal items that they do not wish to reveal [See Note n8];
7. Notice to employees that inspections or searches will be conducted whenever the employer has reasonable suspicion to believe that an employee may be in possession of prohibited materials in violation of this guideline [See Note n9];
8. Reservation of the employer's right to retain an independent security service to conduct a search [See Note n10];
9. Notice to employees that they will not be forcibly detained or searched [See Notes n14,n15];
10. Notice to employees that their failure to cooperate during a search or inspection will be taken into consideration in determining appropriate disciplinary action [See Note n16];
11. Reservation of the employer's right to take appropriate action to prevent the unauthorized removal of the employer's property [See Note n17];
12. A description of the circumstances under which advance management approval is required for a search or inspection [See Notes n18,n19];

13. Notice to employees that possession of prohibited materials in violation of this guideline will subject them to disciplinary action [See Note n21]; and

14. A statement cautioning managers and supervisors to restrict communications concerning a violation of the guideline [See Note n22].

#### OPTIONAL PROVISIONS

1. A cross reference to the employer's Drug-Free Workplace Guideline (if the employer has such a guideline) [See Note n5];

2. Notice to employees of the employer's intent to conduct inspections at designated locations [See Note n11];

3. Notice to employees that inspections and searches for prohibited materials may be conducted in the absence of reasonable suspicion [See Notes n12,n20];

4. Notice to employees that inspections and searches may include an employee's locker or vehicle or an employee's pockets, purse, briefcase, lunch box, or other item of personal property [See Note n13];

5. Notice to employees that the employer may engage in electronic, mechanical, aural, or other monitoring of employee [See Note n23];

6. A statement informing employees that in cases involving a search or inspection of an employee's purse, pockets, briefcase, or similar item of personal property, the employee will be requested to conduct a self-search [See Note n14];

7. A statement informing employees of the procedures that will be followed in the event prohibited materials are found in their possession [See Note n10];

8. An explanation of procedures if more than one level of advance approval is required for inspections for prohibited materials [See Note n20]; and

9. A statement informing employees that the employer may submit prohibited materials for testing if they are believed to be illegal drugs.

#### [3] Notes

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Corporations Governing Documents & Procedures Records & Inspection Rights General Overview Labor & Employment Law Employee Privacy General Overview Labor & Employment Law Employee Privacy Invasion of Privacy Labor & Employment Law Employee Privacy Privacy Act General Overview Labor & Employment Law Workplace Violence

#### FOOTNOTES:

(n1) Note 1. The principal legal interest that is implicated by a private employer's program for conducting workplace inspections and searches is the individual employee's right of privacy under *Cal. Const., art. I, § 1*. The constitutional provision has been held applicable to private as well as governmental employers, and creates a private right of action.

See *Hill v. National Collegiate Athletic Ass'n* (1994) 7 Cal. 4th 1, 16-20, 26 Cal. Rptr. 2d 834, 865 P.2d 633 ; *White v. Davis* (1975) 13 Cal. 3d 757, 775, 762, 120 Cal. Rptr. 94, 533 P.2d 222 . Although no case has yet construed the California constitutional right of privacy in the context of a private employer's program of searches, it appears that the California Supreme Court's analysis in the *Hill* case will apply to determine whether a workplace search amounts to an invasion of privacy. Using the standards enunciated in *Hill*, the employee would have to establish (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by the employer constituting a serious invasion of privacy. Even if an employee establishes these three elements, the employer may still defend its search and inspection program by showing that countervailing interests justify its conduct. See *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal. 4th 1, 39-40, 26 Cal. Rptr. 2d 834, 865 P.2d 633 . Thus, an employee's right of privacy is not absolute. Rather, the employee's right of privacy must be based on a reasonable expectation of privacy, which, in turn, must be balanced against the employer's interest in conducting the search or inspection. A similar analysis, based on reasonableness, has been applied to governmental employers subject to the requirements of the *Fourth* and *Fourteenth Amendments to the U.S. Constitution* . See, e.g., *O'Connor v. Ortega* (1987) 480 U.S. 709, 723-29, 107 S. Ct. 1492, 94 L. Ed. 2d 714 .

Thus, one significant factor in determining whether an employer's policy is defensible is the extent to which employees have a reasonable expectation of privacy in the places to be searched. Assuming valid work-related reasons for conducting searches, employers can diminish the expectation of privacy by making certain that all employees are on notice of the employer's policy concerning workplace searches and inspections. If each employee is given a copy of the employer's policy before any search or inspection is conducted, the employer will have a strong argument that employees could not have a reasonable expectation of privacy in the places to be searched. See, e.g., *Sec. & Law Enforcement Employees, Dist. Council 82 v. Carey* (2d Cir. 1984) 737 F.2d 187 (noting that employees have a diminished expectation of privacy when they are on notice that they are subject to searches while on employer's premises); *United States v. Ziegler* (9th Cir. 2007) 474 F.3d 1184, 1192 (finding that employee did not have a reasonable expectation of privacy in the information on his computer and records of his Internet usage where the employer routinely monitored employee Internet traffic, and where all "employees were apprised of the company's monitoring efforts through training and an employment manual, and they were told that the computers were company-owned and not to be used for activities of a personal nature"), *cert. denied*, 128 S. Ct. 879 (2008); *TBG Ins. Servs. Corp. v. Superior Court*, 96 Cal. App. 4th 443, 452-53, 117 Cal. Rptr. 2d 155 (2002) (company's advance notice to employee, in the form of a computer monitoring/use policy statement, coupled with employee's written consent to the policy statement, defeated employee's state constitution privacy claim). The employer's argument can be further strengthened by also posting a copy of the policy in locations where other notices to employees are regularly posted. Another element of a defensible policy is a legitimate business purpose for conducting searches in the workplace. This guideline, as drafted, identifies three reasons an employer may have for conducting inspections or searches in the workplace: (1) to prevent the presence of drugs, alcohol, and other specified materials in the workplace; (2) to safeguard the employer's property; and (3) to assure the employer's right to retrieve its property in the event an employee entrusted with the property is not available. If an employer has other business reasons for conducting workplace searches, those reasons should be included in the employer's policy.

In short, whether a given search is permissible likely will depend on a number of factors, including (1) the employer's purpose in conducting the search; (2) whether the employee has a reasonable expectation of privacy; (3) the level of suspicion the employer has that the search will yield what is sought; (4) whether the search was narrowly tailored to its purpose; and (5) whether the employee has consented to the search. For discussion of privacy interests in the context of employer searches, see *Wilcox, California Employment Law*, §§ 50.30[1] , 50.31[1] , 50.41 (Matthew Bender).

(n2)Note 2. One factor that may influence a court in determining the permissibility of an employer's search is uniformity of application. See generally *Wilcox, California Employment Law*, § 50.41 (Matthew Bender). If an employer intends to apply its search policy only to certain employees (e.g., those working in certain locations), or to exempt application of its policy to certain groups of employees (e.g., executives), the employer should consult with legal counsel to determine whether the limitation or exemption will render the policy vulnerable to legal challenge.

(n3)Note 3. The section containing definitions is not essential, but is recommended. Definitions are useful to inform both management and employees about the employer's interpretation of its policy, to avoid inconsistent application, and to avoid disputes about whether certain conduct violates the policy. Employers are free to define the terms used in their policies in virtually any manner not inconsistent with law or common sense. The definitions included in this guideline are intended for general application and clarity in communication. Employers who decide to include definitions should consider whether different or additional definitions will better suit their particular business and workforce.

(n4)Note 4. Even if a section containing definitions is not included, the employer should put employees on notice of what it is the employer intends to search for, i.e., the items, materials, or substances that are prohibited in the workplace. As noted above, one element of a defensible program is a legitimate business purpose for conducting a search. In the absence of definitions, or some other appropriate form of notice, managers will be free to determine for themselves what "prohibited materials" should form the basis for a search, and employees will not have advance notice of whether the presence of certain materials will cause them to be in violation of the employer's guideline, and to be subject, therefore, to a search. Thus, failure to provide adequate notice as to what is prohibited could result in a determination that the employer's program is unreasonable. If the employer intends to prohibit the presence of items other than those listed in this guideline, as drafted, the items should be specifically included in the employer's policy.

(n9)Note 5. If an employer has adopted a Drug-Free Workplace Guideline, and if that guideline defines the term "illegal drugs or other controlled substances," reference should be made to that guideline. See § 2.33 of this Guide. Otherwise, the employer should include a definition of illegal drugs in this guideline.

(n10)Note 6. This guideline, as drafted, draws a distinction between investigative searches for "prohibited materials" and routine (i.e., non-investigative) searches for documents, records, files, and other items of the employer's or third party's property that are properly in an employee's possession or custody and that the employer may need to retrieve in the employee's absence. Accordingly, the definition of "prohibited materials" includes the unauthorized possession of the employer's property. Because many employers permit the use of alcoholic beverages in the workplace or during working time, including, for example, at social functions, lunch or dinner meetings, etc., this guideline, as drafted, limits "prohibited material" with respect to alcohol to that which is unauthorized. If an employer intends to prohibit the presence of alcohol completely, the definition should be modified accordingly, to prohibit "alcoholic beverages" without qualifiers.

(n11)Note 7. A legitimate purpose that all employers have for conducting workplace inspections or searches is the routine retrieval of an item of the employer's property that is needed in the ordinary conduct of the employer's business (e.g., a document or file) and that may be in the office, desk, or computer of an employee who is not available when the item is needed. Employers should be aware, however, that various areas to be searched involve different levels of "reasonable expectation" of privacy. For example, employees may have a reasonable expectation of privacy in an exclusive desk or office, but not in a shared desk or work area. Similarly, there will be a greater expectation of privacy in a locked desk or office than if those areas are unlocked. (With respect to employee lockers, see Note 13.) See *Wilcox, California Employment Law*, § 50.41 (Matthew Bender). Given the legitimate work-related reason for such routine searches and the diminished expectation of privacy resulting from advance notice, it is unlikely that an employee could assert a valid claim of invasion of privacy for a routine search. See *Schowengerdt v. General Dynamics Corp.* (9th Cir. 1987) 823 F.2d 1328, 1335 (employee has reasonable expectation of privacy in locked desk and credenza unless he was on advance notice that searches of these areas would occur for work-related purposes); cf. *O'Connor v. Ortega* (1987) 480 U.S. 709, 728, 107 S. Ct. 1492, 94 L. Ed. 2d 714. If the employer intends to include the optional bracketed provision for searches of locked areas, the employer should not only inform employees of the possibility for the searches, but should also retain keys and inform employees that keys have been retained. This will serve to facilitate the employer's search as well as to further diminish the employee's expectation of privacy. See also Note 13.

Finally, if the employer intends to search locked areas, the employer should consider obtaining written consent from

the employee at the time the desk, file cabinet, etc., is assigned to the employee. Although advance consent to a future search may not be upheld if the later search is itself unreasonable (see Notes 12, 15, and 19), an employer's offer to provide an employee with exclusive access to a given area (e.g., a desk that locks) only on the condition that the employee sign a written consent to a search of the area for legitimate business purposes is a reasonable (i.e., not unnecessarily intrusive) means of achieving the employer's objectives. However, if the employer seeks to obtain advance consent as a condition of employment, the consent may be viewed as coerced and therefore ineffective. See *Wilcox, California Employment Law, § 50.41* (Matthew Bender).

(n12)Note 8. By notifying employees that even routine searches might reveal their personal property and by specifically encouraging employees not to bring into the workplace any personal items which they do not wish to reveal, this provision is intended to further diminish an argument that employees have a reasonable expectation of privacy.

(n13)Note 9. Employers may wish to conduct "investigative" searches to determine whether an employee has violated the employer's policy against bringing certain materials into the workplace, as well as to determine whether a particular employee is in violation of some other rule, such as theft or misuse of company property, including electronic data. See *O'Connor v. Ortega* (1987) 480 U.S. 709, 728, 107 S. Ct. 1492, 94 L. Ed. 2d 714. This provision is intended to put employees on notice that such investigative searches will be conducted by the employer. Employers should be aware, however, that a search based upon individualized suspicion is easier to justify than one based on "group" suspicion or no suspicion at all.

(n26)Note 10. In some cases, employers may wish to engage an independent security service to conduct a search with specially trained personnel, e.g., when searching for the suspected presence of illegal drugs. To the extent that an employer searches for or collects prohibited material, such as illegal drugs, controlled substances, or firearms, the employer should have a standard procedure for handling such prohibited material. In addition to any other precautions the employer may choose to take, the employer should establish a method for collecting, securing, and marking the prohibited material, as well as a method for disposing of or returning it to the employee. For example, the employer may wish to place any prohibited material in a container and mark the container with the following: (1) the date on which the prohibited material was collected; (2) the names of the people present at the time of collection; (3) the circumstances of discovery and a general description of the contents placed in the container. Moreover, the employer may wish to provide the employee with a receipt for materials that were collected.

If the employer suspects that the collected material is or contains illegal drugs or other controlled substances, the employer should contact the Drug Enforcement Agency or other appropriate law enforcement authorities. If the prohibited material consists of firearms, explosives, or other hazardous materials, the employer should reserve the right to either dispose of the materials in whatever manner it deems appropriate or may return the materials to the employee at a later date.

Because the employer may be liable for invasion of privacy resulting from a search that is improperly conducted by an "agent" of the employer, a member of management should be present in all cases.

(n27)Note 11. If an employer is particularly vulnerable to pilferage by employees, is especially concerned about theft of trade secrets or highly confidential business information, or has experienced problems with the presence of certain items in the workplace, such as illegal drugs or alcohol, the employer should consider including in its guideline a provision for regular (or random) inspections at locations where employees enter or exit the employer's premises. This optional provision, as drafted, is intended to make clear to employees that such inspections will be conducted without regard to whether any employee is suspected of being in violation of the guideline. A similar policy of a governmental employer was upheld against a *Fourth Amendment* challenge as a reasonable means of achieving a legitimate objective. See *Chenkin v. Bellevue Hosp. Ctr.*, (S.D.N.Y. 1979) 479 F. Supp. 207, 215. If this provision is included, the employer should exercise caution in order to avoid any overly intrusive search. When practical, the employer also should consider including a provision for employees to "check" their personal packages if they wish to avoid an inspection. Also, such a

provision may be of marginal value if the employer does not have a practice of conducting such searches. See *McGann v. Northeast Illinois Reg. Commuter RR* (7th Cir. 1993) 8 F.3d 1174, 1183 (posted notice that employees' cars were subject to search on leaving company parking lot only "modestly" diminished expectation of privacy because cars were in fact never searched),

(n28)Note 12. In general, "investigative" searches not based on some reasonable level of suspicion may be viewed as overly intrusive of employee privacy interests when compared to the employer's business purposes for conducting the search. Thus, an employer may not be permitted to engage in an "unreasonable" search merely by putting employees on notice that the searches will be conducted. See *Wilcox, California Employment Law*, § 50.41 (Matthew Bender). Nevertheless, some employers may believe that they have a business justification for engaging in searches in the absence of reasonable suspicion, e.g., where the employer has had difficulty in the past in preventing on-the-job presence or use of illegal drugs among a group of employees who are engaged in unusually hazardous jobs. If this optional provision is included, the employer should decide whether its business purposes can be served by announcing in advance that an inspection will occur (which should have the effect of causing employees to remove any prohibited materials), or whether it is necessary to conduct the inspections without prior warning.

(n29)Note 13. As noted above, various areas to be searched involve varying levels of an expectation of privacy. In the context of a properly conducted employer search of the employer's own "property," such as a desk or office, where employees may incidentally place personal possessions, advance notice to employees should be sufficient to overcome any reasonable expectation of privacy, even if the employer intends to search locked areas. See § 2.16 of this Guide (Technology Use and Privacy Policy). An employee's expectation of privacy (i.e., freedom from search) is likely to be greater, however, in regard to items of personal property, particularly where the area to be searched is not one where it would be customary for the employee also to place property of the employer (e.g., the employee's purse or pockets) or is an area to which the employee is granted exclusive use primarily for the purpose of storing personal effects (e.g., lockers). Cf. *Tucker v. Superior Court* (1978) 84 Cal. App. 3d 43, 47, 148 Cal. Rptr. 167 (search by private employee at request of police). Nevertheless, advance notice to employees of the employer's intention to search such areas when the employer has reasonable suspicion that an employee is in possession of prohibited materials will serve to diminish the expectation of privacy. Although there is no case on this point under *Cal. Const., art. I, § 1*, by analogy to *Fourth Amendment* law, the advance notice, coupled with a properly conducted search, may insulate a private employer from valid claims of invasion of privacy. Cf. *O'Connor v. Ortega* (1987) 480 U.S. 709, 723-729, 107 S. Ct. 1492, 94 L. Ed. 2d 714; see *McGann v. Northeast Illinois Reg. Commuter RR* (7th Cir. 1993) 8 F.3d 1174, 1183 (if employer does not show any justification for search of employees' cars and has never before conducted such a search, posted notice that vehicles are subject to search upon leaving company parking lot does little to diminish expectation of privacy). This guideline, as drafted, treats the bracketed provisions as optional because many employers may not find it necessary to extend their searches to such areas and items. As in the case of desks or offices, if an employer intends to search employee lockers that are locked, the employer should put the employee on notice and retain a key. In addition, the employer should consider obtaining written consent from the employee, at the time the locker is assigned to the employee, to search the locker. Note that if the employer intends to conduct a search of an employee's office, desk, locker, or work area in the absence of the employee, it is important to guard against claims by the employee that some item of his or her personal property was improperly taken during a search. For these reasons, it is recommended that employers attempt to have more than one member of management present during any search when the employee is not present, except for routine non-investigative searches.

(n30)Note 14. If an employer elects to include the optional provision for searching an employee's person or personal property, the employer should also include this provision for self-searches by the employee. An employer who forcibly searches an employee's person or otherwise does so without the employee's consent may be liable for damages under one or more tort theories, such as assault, battery, false imprisonment, or intentional infliction of emotional distress. See *Wilcox, California Employment Law*, §§ 50.31, 63.01, 63.03 (Matthew Bender). Employees may carry any number of personal items in their pockets, purses, etc., which the employer has no legitimate interest in discovering and the discovery of which may be embarrassing or humiliating to the employee. Thus, while the routine "inspection" of

briefcases at locations where employees exit the employer's premises may be expected by employees (and should be if they are put on notice, as discussed in Note 8), employees are not likely to expect that they will be subject to "patting down" or to an order to empty the contents of their pockets or purses, particularly in the absence of some reason to suspect them of wrongdoing, or in front of other employees. In addition, if an employer obtains an employee's "consent" to a search of the employee's person under threat of discharge, the consent will probably not be considered voluntary. This provision is intended to maximize the effectiveness of an employer's search while minimizing both the possibility of legal liability to the employer and the intrusiveness of a search. See *Wilcox, California Employment Law*, §§ 50.31 , 50.41 (Matthew Bender).

(n31)Note 15. Even if an employer has a legitimate purpose for conducting a search, and even if the employee's expectation of privacy has been diminished by advance notice, the employer may face potential legal liability if the search is overbroad in scope or is conducted in an overly intrusive manner. Although an owner of property who has reasonable grounds to believe that another is stealing the property may be justified in detaining the suspect for a reasonable length of time to investigate the theft in a reasonable manner, the owner may be subject to liability for false imprisonment, for example, if the length of the detention is unreasonable or is accompanied by physical violence. See *Fermino v. Fedco, Inc.* (1994) 7 Cal. 4th 701, 723, 30 Cal. Rptr. 2d 18, 872 P.2d 559 ; *Moffatt v. Buffums' Inc.* (1937) 21 Cal. App. 2d 371, 374-75, 69 P.2d 424 ; see also *Wilcox, California Employment Law*, §§ 50.31[2] , 50.41 , 63.03 (Matthew Bender).

(n32)Note 16. Whether an employer may discipline an employee for refusing to cooperate with an inspection or search is a close legal question that depends on (1) whether the employee had a legitimate expectation of privacy, and (2) the intrusiveness of and justification for the search. Legal counsel should be consulted to review the circumstances of each particular case. This guideline is drafted to put employees on notice that their refusal to cooperate may result in disciplinary action, both because of the refusal itself and because the employer will then have to act on the basis of the information it has in the absence of the search. Discipline based on the refusal itself is more likely to be permissible if the employer has a reasonable suspicion to conduct the search than when the basis is lacking, such as in the case of a random search. Even if the employee "consents" to the search, the consent under threat of discipline is not likely to be deemed voluntary, so employers should be cautious in relying on consent alone to conduct searches. See *Wilcox, California Employment Law*, § 50.41 (Matthew Bender). If an employee does consent to a search, the search should be no more intrusive than necessary under the particular circumstances, and it should not include a search of the employee's person, unless the employee voluntarily conducts a self-search.

(n33)Note 17. It is recommended that employers reserve the right to take appropriate action to prevent unauthorized removal of the employer's property. What that appropriate action should be will depend on the particular circumstances, such as the degree of suspicion the employer has that the particular employee is engaged in theft and the extent of harm to the employer if the employee succeeds in removing the property. Certain employers (merchants, libraries, museums, and similar institutions) have a statutory right under *Penal Code* § 490.5(f) to detain a person and conduct a limited search for the purpose of retrieving items suspected of being stolen, but this right does not extend to searching the person's clothing. Presumably, employers not covered by *Penal Code* § 490.5(f) have a common-law privilege to protect their property. See generally *Collyer v. S.H. Kress & Co.* (1936) 5 Cal. 2d 175, 180-81, 54 P.2d 20 ; *Levy, Golden & Sacks, California Torts*, § 42.20 (Matthew Bender). In any event, however, employers should be cautious in the steps they take to prevent any unauthorized removal of their property.

(n34)Note 18. This guideline, as drafted, presumes that most employers will not want to impose a requirement of advance approval for routine searches for items needed in the ordinary conduct of the employer's business. Nevertheless, if advance approval is to be required in some cases, the policy should make clear whether there are cases when no such approval is required.

(n35)Note 19. As noted above, an employer may be subject to legal liability for a search that is legitimate in purpose but overbroad in scope or conducted in an improper manner or by improper means. See *Wilcox, California Employment Law*, § 50.41 (Matthew Bender). To help assure that searches are based on a sufficient degree of suspicion

at the outset, to guard against unnecessary intrusions, and to help assure that searches are properly limited in scope and conduct, this guideline, as drafted, imposes a requirement of advance approval for searches based on reasonable suspicion. The optional provision for a second level of approval is included for those employers who believe the approval may be needed.

(n36)Note 20. If the employer elects to include in its policy the optional provision for non-routine searches that are not based on reasonable suspicion (see Note 12), it is recommended that the employer build in a provision requiring advance approval by an official at a relatively high level within the organization.

(n100)Note 21. This guideline, as drafted, is intended to make clear to employees that possession of prohibited materials will subject them to discipline, up to and including discharge, regardless of whether the employee is found to be in possession of prohibited materials during a routine search or one that is based on reasonable suspicion.

(n101)Note 22. The employer is most likely to avoid liability for violation of an employee's legal interests if the employer (1) has a reasonable belief that the confiscated material is an illegal substance; (2) reports only factual information (i.e., does not accuse an employee); and (3) limits its report to appropriate law enforcement authorities. Employers should be aware, however, that any unfounded accusation of illegal activity by an employee, any "publication" of false or derogatory information about the employee, or any unnecessary disclosure of information concerning an employee's violation of the employer's policy, could potentially subject the employer to liability under one or more tort theories, such as defamation, infliction of emotional distress, or invasion of privacy. For discussion of the employer's obligation to treat the information confidentially, see Wilcox, California Employment Law, Chs. 50, 51 (Matthew Bender).

(n102)Note 23. California's Invasion of Privacy Act ( *Penal Code* § 632 ) requires the consent of *all* parties before phone conversations can be recorded. Employers should inform employees of the presence of any visual or auditory recording devices in workspaces where employees may reasonably and objectively expect privacy, and should gain the consent of employees before making any audio recording, including any video recording that includes an audio component. *Kearney v. Salomon Smith Barney, Inc.* (2006) 39 Cal. 4th 95 . Though *Penal Code* § 632 requires permission for any audio recording or eavesdropping, it does not require consent for video recordings without sound. Nonetheless, video recordings without sound may still be actionable under common law theories such as invasion of privacy. See *California Labor Code* § 435 (providing that "[n]o employer may cause an audio or video recording to be made of an employee in a restroom, locker room, or room designated by an employer for changing clothes, unless authorized by court order" for any purpose); *Trujillo v. City of Ontario* (C.D. Cal. 2006) 428 F. Supp. 2d 1094, 1103-1107 (in response to a complaint of theft, defendant police department secretly installed a video surveillance camera in the employee locker room; court recognized that video surveillance constitutes a particularly intrusive search and held the plaintiff officers had a reasonable expectation of privacy in not being covertly videotaped). However, the California Supreme Court is expected this year to address the question of whether two employees can state a cause of action for invasion of privacy when a hidden camera was placed in their private office, even when the evidence showed that no one ever watched the feed broadcast by the camera. *Hernandez v. Hillsides, Inc.* (2006) 142 Cal. App. 4th 1377, 48 Cal. Rptr. 3d 780 , review granted, (2007) 53 Cal. Rptr. 3d 801, 150 P.3d 692 . The trial court found that the plaintiff employees had no cause of action because there was no evidence they were ever viewed or recorded. The Court of Appeal reversed, finding that the plaintiff employees could state an invasion of privacy claim even if they had not actually been viewed or recorded. To view California Supreme Court briefs related to the *Hernandez* case that are available on *Lexis.com*, go to 2006 CA S. Ct. Briefs 47552 .



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California Employer's Guide to Employee Handbooks and Personnel Policy Manuals

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DIVISION 2 EMPLOYEE HANDBOOKS AND PERSONNEL POLICY MANUALS

Part B. OPTIONAL GUIDELINES

*1-2 CA Guide to Employee Handbooks § 2.33*

## § 2.33 DRUG-FREE WORKPLACE

### [1] Model Guideline

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#### DRUG-FREE WORKPLACE

##### I. Purpose of Guideline

It is the intent of the Company to maintain a workplace that is free of drugs and alcohol and to discourage drug and alcohol abuse by its employees. [See Note n1] Employees who are under the influence of a drug or alcohol on the job compromise the Company's interests and endanger their own health and safety and the health and safety of others. Substance abuse in the workplace can also cause a number of other work-related problems, including absenteeism and tardiness, substandard job performance, increased workloads for co-workers, behavior that disrupts other employees, and inferior quality in products or service. [See Note n2]

To further its interest in avoiding accidents, to promote and maintain safe and efficient working conditions for its employees, and to protect its business, property, equipment, and operations, the Company has established this Guideline concerning the use of alcohol and drugs. As a condition of continued employment with the Company, each employee must abide by this Guideline. [See Note n3]

##### II. Definitions [See Noten4 ]

For purposes of this Guideline:

(1) "Illegal drugs or other controlled substances" means *any* drug or substance that (a) is not legally obtainable; or (b) is legally obtainable but has not been legally obtained; or (c) has been legally obtained

but is being sold or distributed unlawfully.

(2) "Legal drug" means any drug, including any prescription drug or over-the-counter drug, that has been legally obtained and that is not unlawfully sold or distributed.

(3) "Abuse of any legal drug" means the use of any legal drug (a) for any purpose other than the purpose for which it was prescribed or manufactured; or (b) in a quantity, frequency, or manner that is contrary to the instructions or recommendations of the prescribing physician or manufacturer.

(4) "Reasonable suspicion" includes a suspicion that is based on specific personal observations such as an employee's manner, disposition, muscular movement, appearance, behavior, speech or breath odor; information provided to management by an employee, by law enforcement officials, by a security service, or by other persons believed to be reliable; or a suspicion that is based on other surrounding circumstances.

(5) "Possession" means that an employee has the substance on his or her person or otherwise under his or her control.

### **III. Prohibited Conduct**

#### **A. Scope**

The prohibitions of this section apply whenever the interests of the Company may be adversely affected, including any time an employee is:

- (1) On Company premises;
- (2) Conducting or performing Company business, regardless of location;
- (3) Operating or responsible for the operation, custody, or care of Company equipment or other property;  
or
- (4) Responsible for the safety of others in connection with, or while performing, Company-related business.

#### **B. Alcohol**

The following acts are prohibited and will subject an employee to discharge:

- (1) The unauthorized [**See Note n5**] use, possession, purchase, sale, manufacture, distribution, transportation, or dispensation of alcohol; or
- (2) Being under the influence of alcohol.

#### **C. Illegal Drugs**

The following acts are prohibited and will subject an employee to discharge:

- (1) The use, possession, purchase, sale, manufacture, distribution, transportation, or dispensation of any illegal drug or other controlled substance; or
- (2) Being under the influence of any illegal drug or other controlled substance.

#### D. Legal Drugs

The following acts are prohibited and will subject an employee to discharge:

- (1) The abuse of any legal drug **[See Note n6]**;
- (2) The purchase, sale, manufacture, distribution, transportation, dispensation, or possession of any legal prescription drug in a manner inconsistent with law **[See Note n7]**; or
- (3) Working while *impaired* by the use of a legal drug whenever such impairment might **[See Note n8]**:
  - (a) Endanger the safety of the employee or some other person;
  - (b) Pose a risk of significant damage to Company property or equipment; or
  - (c) Substantially interfere with the employee's job performance or the efficient operation of the Company's business or equipment.

### IV. Disciplinary Action

#### A. Discharge for Violation of Guideline

A first violation of this Guideline will result in *immediate discharge* **[See Note n9]** whenever the prohibited conduct:

- (1) Caused injury to the employee or any other person, or, in the sole opinion of management, endangered the safety of the employee or any other person;
- (2) Resulted in significant damage to Company property or equipment, or, in the sole opinion of management, posed a risk of significant damage;
- (3) Involved the sale or manufacture of illegal drugs or other controlled substances;
- (4) Involved the possession, distribution, or dispensation of illegal drugs or other controlled substances [or alcohol] [in a quantity greater than for personal use]; **[See Note n10]**
- (5) Involved an employee who had not completed the introductory period or was a casual, seasonal, or temporary employee **[See Note n11]** ; or
- (6) Involved the failure of an employee to report a criminal conviction, as required by Sections IV C and V C, below.

## B. Discretion Not to Discharge

In circumstances other than those described in Paragraph A, above, the Company, in the discretion of management, may choose not to discharge an employee for a first violation of this Guideline **[See Note n9]** if \_\_\_\_\_ [the employee satisfactorily participates in and completes an approved drug or alcohol abuse 'assistance' or rehabilitation program when recommended by the Company] **[See Note n12]** or the employee contacts the Employee Assistance Department within \_\_\_\_\_ (*specify, e.g., two*) working days after being referred there by management and follows the recommendations made by the Employee Assistance Department, including satisfactory participation in and completion of an approved drug or alcohol abuse, assistance, or rehabilitation program]. **[See Note n13]**

## C. Effect of Criminal Conviction

An employee who is convicted under a criminal drug statute for a violation occurring in the workplace or during any Company-related activity or event will be deemed to have violated this Guideline. **[See Note n14]**

## D. Written Warning

An employee who is not discharged for a first violation of this Guideline will receive a final written warning [and immediate suspension without pay for a period of \_\_\_\_\_ (*specify, e.g., 10*) calendar days]. **[See Note n9]**

## E. Effect of Second Violation

A second violation of this Guideline at any time will result in immediate discharge. **[See Note n9]**

## F. Effect of Discharge on Eligibility for Rehire

Employees who are discharged for a violation of this Guideline will not be eligible for rehire by the Company. **[See Note n15]**

## V. Drug-Free Awareness Program

### A. Employee Awareness

The Company has established a Drug-Free Awareness Program **[See Note n16]** that is designed to inform employees about the dangers of drug abuse in the workplace and to help ensure that employees are familiar with this Guideline and with the disciplinary actions that can result from a violation of this Guideline. From time to time, employees will be requested to attend one of the sessions of the Drug-Free Awareness Program. During each such session, employees will be given current information about [the Company's Employee Assistance Program and other] **[See Note n13]** available programs offering counseling and rehabilitation.

### B. Management Awareness

Managers and supervisors should be attentive to the performance and conduct of those who work with them and should not permit an employee to work in an impaired condition or to otherwise engage in conduct that violates this Guideline. When management has reasonable suspicion to believe that an employee or employees are working in violation of this Guideline, prompt action will be taken. **[See Note n17]** [If the employee occupies a designated safety-sensitive position, such action may include drug testing in accordance with the procedures outlined in this policy.] **[See Note n17]**

### C. Criminal Convictions

Employees must notify the Company of any conviction under a criminal drug statute for a violation occurring in the workplace or during any Company-related activity or event. Employees must notify the Company within five days after any such conviction. **[See Note n18]** When required by federal law, the Company will notify any federal agency with which it has a contract of any employee who has been convicted under a criminal drug statute for a violation occurring in the workplace. **[See Note n18]**

## VI. Use of Legal Drugs

The Company recognizes that employees may, from time to time, be prescribed legal drugs that, when taken as prescribed or according to the manufacturer's instructions, may result in impairment. Employees may not work while impaired by the use of legal drugs if the impairment might endanger the employee or someone else, pose a risk of significant damage to Company property, or substantially interfere with the employee's job performance. If an employee is so impaired by the appropriate use of legal drugs, he or she may not report to work. To accommodate the absence, the employee may use accrued sick leave, [personal leave,] or vacation time. **[See Note n19]** The employee may also contact \_\_\_\_\_ [*specify designated official, e.g., Personnel Manager*] to determine whether or not he or she qualifies for an unpaid leave of absence, such as family care or medical leave. [Nothing in this Guideline is intended to sanction the use of accrued sick leave [, personal leave,] or vacation time to accommodate absences due to the *abuse* of legal drugs.] **[See Note n4]** [Further, nothing in this Guideline is intended to diminish the Company's commitment to employ and reasonably accommodate qualified disabled individuals. The Company will reasonably accommodate qualified disabled employees who must take legal drugs because of their disability.] **[See Notes n6,n7,n19]**

## VII. Unregulated or Authorized Conduct

### A. Customary Use of Over-the-Counter Drugs

Nothing in this Guideline is intended to prohibit the customary and ordinary purchase, sale, use, possession, or dispensation of over-the-counter drugs, so long as that activity does not violate any law or result in an employee being impaired by the use of such drugs in violation of this Guideline. **[See Note n20]**

### B. Off-the-Job Conduct

[Unless an employee is in a designated safety-sensitive position,] [T]his Guideline is not intended to regulate off-the-job conduct, so long as the employee's off-the-job use of alcohol or drugs does not result in the employee being under the influence of or impaired by the use of alcohol or drugs in violation of this Guideline. **[See Note n20]** [If an employee is in a designated safety-sensitive position, he or she will be subject to drug testing as described in Section X of this Guideline.] **[See Notes n27,n28,n29,n30,n31,n32,n33,n34]**

### C. Authorized Use of Alcohol

The Company may provide alcohol for consumption at certain events, such as social functions. The consumption of alcohol at these events does not violate this Guideline. [See Note n21]

### VIII. Confidentiality

Disclosures made by employees to the \_\_\_\_\_ [specify authorized official, e.g., Personnel Manager] concerning their use of legal drugs will be treated confidentially and will not be revealed to managers or supervisors unless there is an important work-related reason to do so in order to determine whether it is advisable for the employee to continue working. [See Note n22] Disclosures made by employees to the \_\_\_\_\_ [specify authorized official, e.g., Personnel Manager] concerning their participation in any drug or alcohol rehabilitation program will be treated confidentially. [See Note n23]

### [IX. Counseling/Employee Assistance]

[EITHER]

[Employees who suspect they may have alcohol or drug problems, even in the early stages, are encouraged voluntarily to seek diagnosis and to follow through with the treatment as prescribed by qualified professionals. Employees who wish to voluntarily enter and participate in an approved alcohol or drug rehabilitation program are encouraged to contact \_\_\_\_\_ (specify authorized official, e.g., Personnel Manager), who will determine whether the Company can accommodate the employee by providing unpaid leave for the time necessary to complete participation in the program.] [See Note n24] [Employees should be aware that participation in a rehabilitation program will not necessarily shield them from disciplinary action for a violation of this Guideline, particularly if discipline is imposed for a violation occurring before the employee seeks assistance.] [See Note n25]

[OR]

[The Company maintains an Employee Assistance Program, administered by the \_\_\_\_\_ (specify authorized official, e.g., Employee Assistance Department), which provides help to employees who seek assistance for drug or alcohol abuse, as well as for other personal or emotional problems. Employees who suspect that they may have alcohol or drug problems, even in the early stages, are encouraged to voluntarily seek diagnosis and to follow through with the treatment as prescribed by qualified professionals.] [See Note n26] [Employees should be aware that participation in the Employee Assistance Program will not necessarily shield them from disciplinary action for a violation of this Guideline, particularly if discipline is imposed for a violation occurring before the employee seeks assistance.] [See Note n25]

### [X. Drug Testing] [See Note n27 ]

[A. Testing of Applicants for Designated Safety-Sensitive Positions]

[As part of the Company's employment screening process, any applicant (for \_\_\_\_\_ (*specify safety-sensitive positions*)), to whom an offer of employment is made must pass a test for controlled substances, under the procedures described below. **[See Notes n27,n28]** The offer of employment is conditioned on a negative test result. Applicants will be informed of the Company's drug testing policy in the employment application.]

[B. Testing of Employees in Designated Safety-Sensitive Positions]

**[1. Annual Testing]**

[Employees in the position(s) of \_\_\_\_\_ (*specify safety-sensitive position(s)*) will be required to submit to annual drug testing, under the procedures described below. **[See Notes n28,n29,n30]** The testing will be scheduled by the Human Resources Department and will occur in the employee's Company anniversary month.]

[If an employee refuses to cooperate with the administration of the drug test, the refusal will be handled in the same manner as a positive test result.]

**[2. Reasonable Suspicion Testing]**

[If an employee occupies a designated safety-sensitive position and his or her supervisor or manager has a reasonable suspicion that the employee is working in an impaired condition or otherwise engaging in conduct that violates this Guideline, the employee will be asked about any observed behavior and offered an opportunity to give a reasonable explanation. If the employee is unable to explain the behavior, he or she will be asked to take a drug test in accordance with the procedures outlined below.] **[See Note n29]**

[If the employee refuses to cooperate with the administration of the drug test, the refusal will be handled in the same manner as a positive test result.]

[C. Procedures for Drug Testing]

[The Company will refer the applicant or employee to an independent, National Institute on Drug Abuse (NIDA)-certified medical clinic or laboratory, which will administer the test. **[See Note 30n30]** The Company will pay the cost of the test and reasonable transportation costs to the testing facility. The employee will have the opportunity to alert the clinic or laboratory personnel to any prescription or non-prescription drugs that he or she has taken that may affect the outcome of the test. All drug testing will be performed by urinalysis. Initial screening will be done by EMIT II. Positive results will be confirmed by gas chromatography/mass spectrometry.] **[See Note n31]**

[The clinic or laboratory will inform the Company as to whether the applicant passed or failed the drug test. **[See Note 31n31]** If an employee fails the test, he or she will be considered to be in violation of this Guideline and will be subject to discipline accordingly.] **[See Notes n9,n10,n11]**

[D. Acknowledgment and Consent]

[Any employee subject to testing under this policy will be asked to sign a form acknowledging the procedures governing testing, and consenting to (1) the collection of a urine sample for the purpose of determining the presence of alcohol or drugs, and (2) the release to the Company of medical information regarding the test results. **[See Notes 33,**

**34n33,n34]** Refusal to sign the agreement and consent form, or to submit to the drug test, will result in the revocation of an applicant's job offer, or will subject an employee to discipline up to and including termination.]

[E. Confidentiality]

[All drug testing-records will be treated as confidential.] **[See Note n35]**

**[2] Drafting Checklist** \_\_\_\_\_

## **RECOMMENDED PROVISIONS**

### A. Purpose of Guideline

1. A statement setting forth the employer's reasons for adopting the policy and describing the drug-related and alcohol-related problems the employer is seeking to avoid **[See Notes n1,n2]**; and
2. A statement informing employees that compliance with this Guideline is a condition of continued employment **[See Note n3]**.

### B. Definitions

1. A section containing definitions of the key terms used in the Guideline **[See Note n4]**.

### C. Prohibited Conduct

1. Notice to employees of conduct that is prohibited and that constitutes a dischargeable offense **[See Notes n5,n6,n7,n8]**.

### D. Disciplinary Action

1. A description of the discipline that will be imposed by the employer and other consequences that may flow from a violation of the Guideline **[See Notes n9,n10,n11,n14,n15]**;
2. A statement that the employer may decide not to discharge an employee for a first violation of the Guideline under certain circumstances **[See Notes n12,n13]**;
3. A statement concerning the effect of an employee's criminal conviction for violations of drug statutes **[See Note n14]**;
4. A statement concerning written warnings given to employees not discharged for a first violation of the Guideline **[See Note n9]**; and
5. Statements concerning the effect of second violations and the effect of discharge on an employee's eligibility for rehire **[See Notes n9,n15]**.

### E. Drug-Free Awareness Program

1. A statement concerning the employer's drug-free awareness program **[See Note n17]**;
2. A statement urging managers and supervisors to monitor compliance with this guideline and to act

promptly when violations are suspected [**See Note n18**]; and

3. A statement that employees are required to inform their employer of any conviction under a criminal drug statute for a violation occurring in the workplace or during work-related activity, and that the employer will notify any federal agencies with which it has contracts of such a conviction, to the extent required by law [**See Note n19**].

#### F. Use of Legal Drugs

1. Notice to employees that working while impaired because of the use of a legal drug is not authorized [**See Note n6**];

2. Notice to employees that if they are prescribed legal drugs that result in their impairment, they must not report to work and may use accrued paid time off to account for their absence [**See Note n16**]; and

3. A statement informing employees that they may seek an unpaid leave to cover their absence caused by their appropriate use of legal drugs that results in their impairment and directing them to the appropriate official to determine whether or not they qualify for such a leave [**See Note n14**].

#### G. Authorized Conduct

1. A statement precluding application of the Guideline to the customary and ordinary use of over-the-counter drugs, and limiting application of the Guideline to on-the-job impairment or other violations [**See Note n20**]; and

2. A statement concerning the circumstances under which the possession or use of alcohol or certain drugs may be authorized by the employer [**See Note n21**].

#### H. Qualified Disabled Employees

1. An affirmation of the employer's commitment to employ and to provide reasonable accommodation to qualified disabled employees whose disability may require the use of prescribed drugs [**See Note n16**].

#### I. Confidentiality

1. A statement assuring employees that their voluntary disclosure of their use of drugs will be treated confidentially by the employer [**See Note n22**].

### OPTIONAL PROVISIONS

#### A. Disciplinary Action

1. A statement informing employees that participation in a rehabilitation program or, alternatively, in the employer's employee assistance program will, under certain circumstances, result in a lesser penalty than discharge for violation of this Guideline [**See Note n13**].

#### B. Counseling/Employee Assistance

1. A statement describing the employer's policy on reasonable accommodation to employees who wish to voluntarily participate in drug or alcohol rehabilitation programs or, alternatively, in the employer's employee assistance program, if the employer has such a program [**See Notes n24,n25,n26**].

### C. Drug Testing

1. A statement that applicants for safety-sensitive positions are required to take and pass a drug test as a condition of obtaining employment with the Company [**See Note n27**];
2. A statement that employees in safety-sensitive positions may regularly be required to take and pass a drug test [**See Notes n28,n29**];
3. A provision for "reasonable suspicion" testing of employees in safety-sensitive positions [**See Note n29**];
4. A statement that the drug test will be conducted by an independent, certified medical clinic or laboratory [**See Note n31**];
5. A statement that the employer will pay for the test;
6. A statement that the employer will receive only a pass or fail report from the medical clinic or laboratory [**See Note n32**];
7. A statement that employees who fail the drug test will be considered to have violated the Drug-Free Workplace Guideline;
8. A statement that employees who are subject to testing must sign an acknowledgment and consent form [**See Notes n33,n34**]; and
9. An assurance that all drug test records will be treated as confidential [**See Note n35**].

### [3] Notes

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment LawDiscriminationDisability DiscriminationCoverage & DefinitionsGeneral OverviewLabor & Employment LawDiscriminationDisability DiscriminationCoverage & DefinitionsDisabilitiesAlcohol & Drug AbuseLabor & Employment LawDiscriminationDisability DiscriminationDefenses & ExceptionsAlcohol & Drug UseLabor & Employment LawEmployee PrivacyAlcohol & Drug TestingLabor & Employment LawPreemployment PracticesLabor & Employment LawWrongful TerminationBreach of ContractEmployer Handbooks

#### FOOTNOTES:

(n1)Note 1. Employers who are covered by the federal Drug-Free Workplace Act of 1988 (DFWA), *41 U.S.C. § 701 et seq.*, which applies to all employers who receive federal grants or who receive contracts for the procurement of any property or services--other than "commercial items"--of a value greater than \$100,000, must agree to provide a drug-free workplace. *41 U.S.C. §§ 403(11), 701(a)(1), 702(a)*. Similarly, California has enacted the Drug-Free Workplace Act of 1990 (CDFWA), *Gov. Code § 8350 et seq.*, which applies to all persons or organizations "awarded a contract or a grant for the procurement of any property or services from any state agency." *Gov. Code § 8355*. Both the DFWA and the CDFWA require delivery and publication of a statement to employees, notifying them of drug-related conduct that is prohibited by the employer and specifying actions that can be taken against employees for engaging in the prohibited conduct. See *41 U.S.C. §§ 701(a)(1)(A), (C); 702(a)(1)(A), (C)*; see also *Gov. Code § 8355(a)(1), (3)*. The publication requirement can be met, for example, by posting this guideline where other notices are usually posted.

In addition to the publication requirement, both the DFWA and the CDFWA also require that a copy of the guideline (i.e., a statement) be given to each employee who is engaged in work on the government contract or grant. See *41 U.S.C. §§ 701(a)(1)(C), 702(a)(1)(C)*; see also *Gov. Code § 8355(a)(3)*.

The DFWA and the CDFWA do not apply to employees who are not directly involved in work on the government contract or grant. Because it may be difficult, as a practical matter, to monitor which of an employer's employees are covered by the DFWA or the CDFWA at any particular point in time, and because it is unlikely that many employers will want to apply their drug-free workplace policy only to those employees covered by the DFWA and the CDFWA, this guideline, as drafted, is intended to apply to all of an employer's employees. Although neither the DFWA nor the CDFWA addresses the issue of use or abuse of alcohol in the workplace, this guideline includes alcohol as well as drugs. Except for those employers who are covered by the DFWA or CDFWA, there is no requirement that employers adopt policies respecting drugs or alcohol in the workplace.

Employers who are considering the adoption of substance-abuse policies, including those who are required to comply with the provisions of the DFWA or CDFWA, must make a number of business policy decisions, including, for example, the level of discipline to be imposed for a violation of the policy. This guideline presumes that such decisions have been made, as reflected in the model. Employers should consider carefully whether to adopt this guideline as drafted, or to modify the guideline to suit their own needs and policy choices. Employers in the transportation industry also may be required to comply with Department of Transportation (DOT) regulations that mandate drug-testing for certain safety-sensitive positions. See *Procedures for Transportation Workplace Drug and Alcohol Testing Program*, DOT Rule, *49 C.F.R. Part 40*.

(n2)Note 2. The first paragraph of this guideline, although recommended, is not mandatory. There are, however, several reasons why inclusion of this paragraph should be helpful to employers. First, it is designed, in part, to educate employees about some of the work-related risks and problems associated with substance abuse, whether related to drugs or alcohol. To that end, it may constitute part of an employer's drug-awareness program. See Note 16. Second, it is intended to elaborate on the business justifications for adopting the guideline and for taking adverse action against employees who violate it. If the employer has actually experienced some of the problems the guideline is designed to prevent, specifically referring to the employer's past experience may help demonstrate that the employer's policy is intended to respond to actual workplace problems.

(n3)Note 3. The DFWA and CDFWA require that employees be informed that, as a condition of employment on the government contract or grant, they must abide by the terms of the employer's statement regarding prohibited drug-related activity. See *41 U.S.C. §§ 701(a)(1)(D)(i), 702(a)(1)(D)(i)*; see also *Gov. Code § 8355(a)(3)*. As noted above in Note 1, however, this guideline, as drafted, is intended to cover all of an employer's employees, not only those who may work on a contract or grant covered by the DFWA or the CDFWA. Employers should also be aware that this guideline, as drafted, prohibits certain conduct that may not be "unlawful" within the meaning of the DFWA or CDFWA. See Notes 6 and 8.

(n4)Note 4. Definitions are useful to inform both management and employees of the employer's interpretation of its policy. Additionally, definitions help to avoid inconsistent application and disputes about whether certain conduct does or does not violate the policy. Employers are free to define the terms used in their policies in virtually any manner not inconsistent with law or common sense. The definitions included in this guideline are intended for general application and clarity in communication. Employers who decide to include definitions should consider whether different or additional definitions would better suit their particular business and workforce.

(n9)Note 5. Because many employers permit the use of alcoholic beverages in the workplace or during working time, including, for example, at social functions, lunch or dinner meetings, and other events, this guideline, as drafted, limits the prohibited conduct only with respect to alcohol consumption that is unauthorized. If an employer intends to prohibit the use of alcohol completely, the word "unauthorized" should be deleted. See also Note 21.

(n10)Note 6. Some employers contemplating adoption of a drug-free workplace policy may be thinking only in terms of "illegal drugs" or "controlled substances." Indeed, both the DFWA and CDFWA require that employers notify employees that the "unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance" is prohibited [ *41 U.S.C. §§ 701(a)(1)(A)* , *702(a)(1)(A)*; *Gov. Code § 8355(a)(1)* (emphasis added)] and define "controlled substances" as those listed "in schedules I through V of section 202 of the Controlled Substances Act ( *21 U.S.C. § 812* )." *41 U.S.C. § 706(3)* ; see also *Gov. Code § 8351(c)* . If, however, an employer wishes to provide counseling or rehabilitation, or to discipline or discharge employees who abuse legal drugs (e.g., consume excess quantities of a legally-prescribed pain medication containing narcotics), this provision should be included in the employer's policy. See also Note 8.

(n11)Note 7. This guideline, as drafted, is intended to make clear that employees will be subject to discipline for "dealing" in legal prescription drugs, as well as for abusing such drugs.

(n12)Note 8. With respect to conduct that is prohibited, this guideline, as drafted, draws a distinction between employees who abuse legal drugs [see Note 6] and those who work while impaired by the use of legal drugs (e.g., operating dangerous equipment while taking drugs that are accompanied by warnings about drowsiness). This guideline presumes that most employers will want to deal more harshly with those who are abusing drugs than with those who may be strictly following their doctor's prescription or the manufacturer's instructions with respect to prescription or over-the-counter drugs, but who nevertheless may be impaired by the drug. Thus, the prohibited conduct with respect to the latter category of employees is limited to the situation where an employee reports to work while impaired by the use of the drug, when doing so might result in adverse consequences.

(n13)Note 9. Both the DFWA and CDFWA require that employees be informed of the penalties that may be imposed for violation of the employer's policy but do not specify what those penalties must be. See *41 U.S.C. §§ 701(a)(1)(B)(iv)* , *702(a)(1)(B)(iv)*; *Gov. Code § 8355(a)(2)(D)* . This guideline presumes that most employers will want to deal more harshly with some violations than with others, i.e., those involving harm or the risk of harm to others, those involving significant damage to property, those involving manufacture or trafficking in drugs, and those involving possession of illegal drugs. In addition, this guideline, as drafted, would result in the immediate discharge of an employee who was working while impaired by the use of a drug, including a legal drug, if such impairment resulted in the consequences described in the guideline. See Notes 6, 7, and 8. It would not, however, result in immediate discharge solely because of an employee's failure to disclose his or her use of legal drugs. If the employer does not wish to impose automatic discharge for a first violation of the policy, or does not wish to do so for the particular situations described in this guideline, consideration should be given to other alternatives, such as mandatory suspension for a specified period of time or for a stepped disciplinary procedure, such as that set forth in Section 2.12 of this Guide. The employer's policy should specify the discipline that will be imposed for any subsequent violations, in the event the first violation does not result in immediate discharge.

(n26)Note 10. This guideline, as drafted, would impose immediate discharge on an employee whose violation involved the possession, distribution, or dispensation of any illegal drug, no matter how small the quantity. If an employer wishes to include alcohol, or wishes to limit automatic discharge for a first offense to situations involving quantities of drugs (or alcohol) in amounts greater than for personal use, the optional bracketed provisions in Section IV A (4) should be included.

(n27)Note 11. This guideline, as drafted, presumes that most employers will not wish to extend a second chance to employees who have not completed their introductory period [see § 2.04 of this Guide] or who are casual, seasonal, or temporary employees [see § 2.20 of this Guide]. This is a policy choice for the employer to make when considering adoption of a drug-free workplace policy.

(n28)Note 12. *Lab. Code § 1025* requires that private employers with 25 or more employees provide reasonable accommodation to any employee who voluntarily chooses to enter and participate in a drug or alcohol rehabilitation program, so long as the reasonable accommodation does not impose an undue hardship on the employer. See also Notes

24, 25. The provision relating to participation in a rehabilitation program is considered optional because there is no requirement that employers notify employees of the provisions of *Labor Code section 1025*. The provision should, however, be included by those employers who want to encourage rehabilitation for employees with substance abuse problems. Nothing in the language of *Labor Code section 1025* precludes an employer from taking disciplinary action against an employee for violation of the employer's policies, and the statute expressly permits an employer to discharge an employee who, because of the employee's current use of alcohol or drugs, is unable to perform his or her job duties or to do so in a manner that would not endanger the health or safety of the employee or others. See *Gosvener v. Coastal Corp.* (1996) 51 Cal. App. 4th 805, 815-16, 59 Cal. Rptr. 2d 339, overruled in part on other grounds, *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal. 4th 1019 (concluding that *Labor Code section 1025* does not prevent an employer from discharging an employee whose current use of alcohol adversely affects the employee's work performance); but see *Pettus v. Cole* (1996) 49 Cal. App. 4th 402, 460 n.42, 57 Cal. Rptr. 2d 46 (noting that an employer may terminate an employee who fails to maintain a satisfactory level of performance after the employee has been given the required notice and an opportunity to address the problem). Following these two cases, this guideline allows an employer to discharge an employee after the employee is given notice of his or her violation and an opportunity to address the alcohol or drug problem by completing an approved program. For a discussion of employers' obligations concerning drug and alcohol rehabilitation for employees, see *Wilcox, California Employment Law*, §§ 50.43[3], 51.11 (Matthew Bender). For a discussion of state and federal requirements regarding accommodation of disabled employees, see *Wilcox, California Employment Law*, § 41.51 (Matthew Bender). With respect to employees who are convicted under a criminal drug statute for a violation occurring in the workplace, the DFWA requires that employers either impose sanctions or require satisfactory participation in an approved drug abuse assistance or rehabilitation program. See 41 U.S.C. §§ 701(a)(1)(F), 702(a)(1)(F). Such action must be taken within 30 days of the employer's receipt of notice of the conviction. See 41 U.S.C. § 703.

(n29)Note 13. If the employer has its own employee assistance program, reference to that program should be included. This provision is considered optional because there is no requirement that employers develop or pay for employee assistance programs. See also Notes 12 and 26. For a model guideline concerning employee assistance programs, see § 2.34 of this Guide.

(n30)Note 14. This provision is intended to cover the possibility that an employee's conviction under a criminal drug statute for a violation occurring in the workplace might be based on conduct that is not otherwise prohibited by this guideline. See also Notes 12 and 18.

(n31)Note 15. This guideline, as drafted, presumes that most employers will not want to rehire employees who have previously been discharged for a violation of the employer's drug-free workplace policy. Once again, this is a policy choice for the employer to make when considering adoption of a drug-free workplace policy. If the employer intends not to rehire employees previously discharged for a violation of this policy, it is recommended that employees be put on notice of that eventuality by including this statement in the policy.

(n32)Note 16. Both the DFWA and CDFWA require that employers establish a drug-free awareness program to inform employees about (1) the dangers of drug abuse in the workplace; (2) the employer's policy of maintaining a drug-free workplace; (3) any drug counseling, rehabilitation, and employee assistance programs that are available to employees; and (4) the penalties that may be imposed on employees for drug abuse violations. See 41 U.S.C. §§ 701(a)(1)(B), 702(a)(1)(B); *Gov. Code* § 8355(a)(2). Although neither the DFWA nor the CDFWA specifies what form the program must take, the legislative history of the DFWA suggests that Congress envisioned either periodic meetings with or periodic written communications to employees, in addition to the delivery and publication of the employer's drug-free workplace statement. See Note 1. This guideline, as drafted, assumes that periodic meetings will be held.

(n33)Note 17. The DFWA requires that employers make good-faith efforts to continue to maintain a drug-free workplace. See 41 U.S.C. §§ 701(a)(1)(G), 702(a)(1)(G). Accordingly, it is recommended that a drug-free workplace policy contain a statement urging managers and supervisors to monitor compliance and deal promptly with violations.

An employer should consider whether to adopt a policy of drug testing certain categories of employees about whom managers have a reasonable suspicion of on-the-job impairment due to illegal drug use. See Note 29.

(n34)Note 18. The DFWA requires employers to inform employees of their obligation to notify their employer of any conviction under a criminal drug statute for a violation occurring in the workplace no later than 5 days after such conviction. See *41 U.S.C. §§ 701(a)(1)(D)(ii), 702(a)(1)(D)(ii)*. The DFWA also requires that employers notify the federal agencies with whom they have contracts (or grants) of any employee who has been convicted under a criminal drug statute for a violation occurring in the workplace. See *41 U.S.C. §§ 701(a)(1)(E), 702(a)(1)(E)*. Such notice by the employer must be given within 10 days of the time the employer learns of the conviction. See *41 U.S.C. §§ 701(a)(1)(E), 702(a)(1)(E)*. This guideline, as drafted, goes beyond the requirements of the DFWA because it obligates employees to inform the employer of convictions for violations occurring during employer-related activities, whether or not those occur in the workplace. The employer is, however, only required by the DFWA to report convictions for violations that occur in the workplace.

(n35)Note 19. Since employees may occasionally be prescribed legal drugs that, even when taken appropriately, may result in their impairment, it is recommended that the employer include a provision that notifies employees of their responsibilities under these circumstances. This guideline states that employees who are impaired by the use of legal drugs must not report to work and may use accrued paid time off, when appropriate, to account for their absence. If an employee is using a legal drug that causes impairment because of a serious health condition, the employee may be eligible for an unpaid medical leave. For a discussion of family care and medical leaves, see § 2.09 of this Guide. Note that an employee's use of legal drugs may also be associated with a disability. Employers covered by the Americans with Disabilities Act of 1990 (ADA), *42 U.S.C. § 12101 et seq.*, the Fair Employment and Housing Act (FEHA), *Gov. Code § 12900 et seq.*, or the Rehabilitation Act of 1973, *29 U.S.C. § 701 et seq.* may have a duty to provide reasonable accommodations to such employees. These employers should include a provision that emphasizes their intent not to discriminate against the disabled and to provide reasonable accommodations to those qualified disabled employees who, because of their disabilities, must use legal drugs that result in their impairment. However, the California Supreme Court has ruled that the duty to accommodate a disability under the Fair Employment and Housing Act does not require the employer to accommodate use of medical marijuana and does not prohibit the employer from terminating an employee for off-duty, off-premises use of medical marijuana, even if such use is recommended by the employee's physician pursuant to the California Compassionate Use Act of 1996. *Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal. 4th 920, 931, 70 Cal. Rptr. 3d 382, 174 P.3d 200 .

Employers also should be aware that disclosures by employees concerning their use of legal drugs may constitute disclosure of constitutionally protected private information. Employers, however, have a legitimate interest in ensuring that employees not work while impaired by the use of drugs when doing so might endanger someone, pose a risk of significant damage, or substantially interfere with an employee's performance. This interest may outweigh the employee's privacy interest. Inquiries of employees or disclosures by employees concerning an employee's use of legal drugs may implicate a number of other legal issues as well, including, for example, disability discrimination issues under the ADA, the FEHA, or the Rehabilitation Act of 1973, and employee-patient rights under the California Confidentiality of Medical Information Act *Civ. Code § 56 et seq.* Employers should thus make certain that officials who are designated to receive drug-use information from employees understand the importance of maintaining confidentiality and of assuring employees that the information will be treated in a highly confidential manner. Such officials should not disclose an employee's medical condition or the drugs an employee may be taking, even to the employee's supervisor or manager, unless it is necessary to do so. See also Note 22. For a discussion of limitations on an employer's collection and use of private information about employees, see *Wilcox, California Employment Law*, Chs. 50, 51 (Matthew Bender). For a discussion of alcoholism and drug abuse as disabilities, see *Wilcox, California Employment Law*, § 41.32[3][a] (Matthew Bender). For a discussion of state and federal requirements regarding accommodation of disabled employees, see *Wilcox, California Employment Law*, § 41.51 (Matthew Bender).

(n36)Note 20. This guideline, as drafted, does not apply to the customary, ordinary, and lawful use of

over-the-counter drugs. It also is not intended to regulate off-the-job behavior or conduct by employees. However, employers who have sound business reasons for regulating off-the-job use of alcohol or drugs, for example, those who regularly have employees on-call to report to jobs involving substantial risk to their own safety or the safety of others, may wish to incorporate the bracketed provisions in Section VII (B) or otherwise tailor this guideline to meet their own particular requirements.

(n100)Note 21. This guideline, as drafted, recognizes that some employers regularly permit the use of alcoholic beverages during certain social functions or business meetings. Each employer should consider whether the language in this guideline should be modified to meet the particular employer's needs and practices, and what form of communication to employees will most effectively inform them of what has been authorized by the employer. See also Notes 5, 6.

(n101)Note 22. Employers should be aware of their obligations under the California Confidentiality of Medical Information Act, *Civ. Code* § 56 *et seq.*, as well as employees' rights to privacy under *Cal. Const., Art. I, § 1*. In addition, any unnecessary disclosure by the employer concerning an employee's use of drugs may give rise to various tort claims by the employee, including, for example, invasion of privacy and infliction of emotional distress. For a discussion of employers' obligations to treat such information confidentially, see *Wilcox, California Employment Law, Ch. 51* (Matthew Bender).

In light of these obligations, managers and supervisors should restrict communications concerning possible violations of this Guideline to persons who have an important work-related reason to know. In addition, managers and supervisors should not disclose the fact of an employee's participation in any existing employee assistance program or any drug or alcohol counseling or rehabilitation program. Similarly, communications between employees and Employee Assistance should be treated confidentially. See also § 2.34[3] of this Guide, Note 18.

(n102)Note 23. *Labor Code Section 1026* requires employers to make "reasonable efforts" to safeguard the privacy of the employee regarding the fact of enrollment in an alcohol or drug rehabilitation program. The term "reasonable efforts" is not defined and has not yet been interpreted by the courts.

(n103)Note 24. Private employers who regularly employ 25 or more employees are required to reasonably accommodate any employee who wishes voluntarily to participate in an alcohol or drug rehabilitation program, so long as the reasonable accommodation does not impose an undue hardship on the employer. See *Labor Code Section 1025*. The terms "reasonable accommodation" and "undue hardship" are not defined. The only California case interpreting the "reasonable accommodation" requirement of *Labor Code Section 1025* concluded that an employer satisfies its obligation to provide a reasonable accommodation by allowing the affected employee time off from work to participate in an alcohol or drug rehabilitation program, so long as the employer can provide such accommodation "without undue disruption of its business." *Pettus v. Cole* (1996) 49 Cal. App. 4th 402, 459, 57 Cal. Rptr. 2d 46; see also *Gosvener v. Coastal Corp.* (1996) 51 Cal. App. 4th 805, 815-16, 59 Cal. Rptr. 2d 339, overruled in part on other grounds, *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal. 4th 1019 (noting that "sick leave is for sickness, not drinking, and an employer need not resort to the unreasonable accommodation of allowing an employee to use up his sick leave by abusing alcohol"). Reasonable accommodation does not include paid time off, but does require that employees be permitted to use accrued sick leave. See *Lab. Code* § 1027. This provision is considered optional because there is no requirement that employers notify employees of the provisions of *Labor Code Section 1025*. For a discussion of employers' obligations concerning drug and alcohol rehabilitation for employees, see *Wilcox, California Employment Law, §§ 50.43[3], 51.11* (Matthew Bender).

(n104)Note 25. Nothing in the language of *Labor Code Section 1025* precludes an employer from taking disciplinary action against an employee for violation of the employer's policies. In fact, the statute expressly permits an employer to discharge an employee who, because of the employee's current use of alcohol or drugs, is unable to perform his or her job duties or to do so in a manner that would not endanger the health and safety of the employee or others. See *Gosvener v. Coastal Corp.* (1996) 51 Cal. App. 4th 805, 815-16, 59 Cal. Rptr. 2d 339, overruled in part on other

grounds, *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal. 4th 1019 (concluding that *Labor Code Section 1025* does not prevent an employer from discharging an employee whose current use of alcohol adversely affects the employee's work performance); *Pettus v. Cole* (1996) 49 Cal. App. 4th 402, 460 n.42, 57 Cal. Rptr. 2d 46 (noting that an employer may terminate an employee who fails to maintain a satisfactory level of performance after the employee has been given the required notice and an opportunity to address the problem).

(n105)Note 26. The DFWA and CDFWA require that employees be informed about "any available drug counseling, rehabilitation, and employee assistance programs." See 41 U.S.C. §§ 701(a)(1)(B)(iii), 702(a)(1)(B)(iii); *Gov. Code* § 8355(a)(2)(C). This provision is considered optional because there is no requirement under federal or state law that requires employers to develop or maintain their own employee assistance programs or pay for outside counseling or rehabilitation for employees. Nevertheless, employers who do have in-house employee assistance programs, or who pay for outside counseling or treatment, should include in their drug-free workplace policy appropriate references to such programs. Employers must do so if they are covered by the DFWA or the CDFWA. For a model guideline concerning employee assistance programs, see § 2.31 of this Guide.

(n106)Note 27. Many employers--even those who choose to or are required to have a drug-free workplace policy--do not need a drug-testing policy. Basing personnel decisions on performance rather than test results is always less intrusive and is often more probative of on-the-job impairment. In addition, many employers will not be able to legally justify suspicionless or random drug testing of current employees, since the employer must show that it has a "substantial" interest that outweighs the employee's constitutional right to privacy. See *Loder v. City of Glendale* (1997) 14 Cal. 4th 846, 898, 59 Cal. Rptr. 2d 696, 927 P.2d 1200; *Smith v. Fresno Irrigation Dist.* (1999) 72 Cal. App. 4th 147, 158-59, 84 Cal. Rptr. 2d 775 (employer must establish "legitimate" reason for its drug-testing program). On the other hand, the California Supreme Court has held that suspicionless drug testing of all job applicants, administered as part of a lawful preemployment medical examination, does not violate an applicant's federal or state constitutional right to privacy. See *Loder v. City of Glendale* (1997) 14 Cal. 4th 846, 898, 59 Cal. Rptr. 2d 696, 927 P.2d 1200. But see *Lanier v. City of Woodburn* (9th Cir. 2008) 518 F.3d 1147, 1149-1152 (City's requirement of pre-employment drug and alcohol screening for all prospective applicants was unconstitutional as applied to an applicant for library page position where no evidence of drug problem among library pages and the library pages were not involved in high-risk, safety-sensitive tasks). This guideline as drafted provides for testing only of applicants for and employees in safety-sensitive positions. If an employer wishes to administer drug tests to all applicants, the language referring to safety-sensitive positions in Section X (A) should be deleted.

(n107)Note 28. Employers should not be overzealous in declaring a job to be "safety-sensitive" for the purpose of drug testing. There should be a direct nexus between the employee's job duties and the employer's asserted safety interest. See *Loder v. City of Glendale* (1997) 14 Cal. 4th 846, 880-81, 59 Cal. Rptr. 2d 696; *Luck v. Southern Pacific Transportation Co.* (1990) 218 Cal. App. 3d 1, 24, 267 Cal. Rptr. 618. For example, the California Supreme Court has held that an employer's interest in maintaining a drug-free workplace or in avoiding the problems of diminished efficiency, increased absenteeism, and added health expenses was not sufficient to support across-the-board testing of current employees seeking promotion. See *Loder v. City of Glendale* (1997) 14 Cal. 4th 846, 880-81, 59 Cal. Rptr. 2d 696; see also *Luck v. Southern Pacific Transportation Co.* (1990) 218 Cal. App. 3d 1, 24, 267 Cal. Rptr. 618.

(n108)Note 29. Because the current use of illegal drugs is not protected by either the ADA or the FEHA, these Acts should not affect an employer's right to test on a regular basis for the presence of illegal drugs. See 42 U.S.C. § 12114(d)(2); 2 Cal. Code Reg. § 7293.6(d). If, however, reasonable suspicion testing is implemented, it may have a disparate impact on disabled persons whose use of legal drugs affects their on-the-job behavior. It is therefore recommended that, before instituting drug testing, the employer identify and document the nature and extent of any problem that drug testing is intended to address and that the employer tailor the drug testing program closely to address the problem identified. See *Wilcox, California Employment Law*, § 50.43[1][a] (Matthew Bender). Moreover, before testing an employee under a suspicion-based drug testing policy, an employer must be certain that there is an objectively reasonable basis for testing the employee. See *Kraslawsky v. Upper Deck Co.* (1997) 56 Cal. App. 4th 179, 187-92 (holding that employer may have violated employee's constitutional right to privacy if it did not have

objectively reasonable basis for believing that employee was under the influence of intoxicants). Because the law in this area is changing rapidly, employers considering adoption of drug-testing policies should consult with counsel to ensure that the policy is defensible in light of the particular employer's circumstances.

(n109)Note 30. Although no California or federal statutes prohibit employers from drug testing employees, some localities have enacted ordinances that prohibit employers from drug testing employees under certain circumstances. See, e.g., San Francisco Police Code § 3300A.5 (prohibiting employer from demanding, requiring, or requesting that employees submit to a blood, urine, or encephalographic test as a condition of continued employment unless the employer has "reasonable grounds to believe that an employee's faculties are impaired on the job"; the "employee is in a position where such impairment presents a clear and present danger to the physical safety of the employee, another employee or to a member of the public"; and the "employer provides the employee, at the employer's expense, the opportunity to have the sample tested or evaluated by State licensed independent laboratory/testing facility and provides the employee with a reasonable opportunity to rebut or explain the results"). Accordingly, employers must be sure to comply with local ordinances when adopting a drug-testing policy.

(n110)Note 31. Having an independent clinic or laboratory conduct the test minimizes the employer's intrusion into individual privacy. And since courts may find that a reliable test more clearly advances the employer's interest, the testing should be done by a NIDA-certified laboratory. In arranging testing procedures with the independent laboratory, the employer should keep in mind that minimizing the intrusiveness of the test reduces the risk of litigation. See *Semore v. Pool* (1990) 217 Cal. App. 3d 1087, 1098-1100, 266 Cal. Rptr. 280. For instance, the clinic or laboratory should not observe the collection of samples, nor conduct extraneous tests such as pregnancy tests. See *Norman-Bloodsaw v. Lawrence Berkeley Lab.* (9th Cir. 1998) 135 F.3d 1260, 1268-74 (holding that employer may have violated applicants' constitutional right to privacy, as well as federal and state anti-discrimination laws, by testing applicants' blood and urine samples during mandatory entrance examination for "intimate, personal matters involving [their] health," including syphilis, sickle cell trait, and pregnancy). To avoid a potential claim of disability discrimination, laboratories should inquire as to any legal medication the test subject may be taking.

(n111)Note 32. Because a urinalysis can lead to false positive test results, the testing procedure should provide for confirmation of initial positive results with a more reliable test such as gas chromatography/mass spectrometry. For further information as to the types of tests available, see L. Larson, *Employment Screening*, § 4.03 (Matthew Bender). Having the testing facility report only in "pass" or "fail" terms may lessen the intrusion into an employee's privacy. See *Wilkinson v. Times Mirror Corp.* (1989) 215 Cal. App. 3d 1034, 1049, 264 Cal. Rptr. 194. In fact, if the employer requires a physical examination of all applicants to whom an offer of employment is made, and intends to test those applicants for illegal drugs, the best practice is to incorporate the drug test into the overall physical examination and have the testing facility report only whether the applicant is suitable for employment. See *Wilkinson v. Times Mirror Corp.* (1989) 215 Cal. App. 3d 1034, 1049, 264 Cal. Rptr. 194.

(n112)Note 33. An employer wishing to test employees in certain positions for drugs should notify them of the testing requirement in pre-employment documents and/or before an employee moves (i.e., by promotion or transfer) into a position requiring testing. Advance notice of the testing policy lessens the intrusion into the employee's reasonable expectation of privacy. See *National Treasury Employees Union v. Von Raab* (1989) 489 U.S. 656, 672 n.2, 109 S. Ct. 1384, 103 L. Ed. 2d 685 (cited in *Wilkinson v. Times Mirror Corp.* (1989) 215 Cal. App. 3d 1034, 1049, 264 Cal. Rptr. 194).

(n113)Note 34. An employer should obtain written consent from any employee who may be subject to drug testing. To be effective, the consent must be voluntary. See *Wilcox, California Employment Law*, § 50.43[1][a] (Matthew Bender). If the employer intends to administer drug tests to applicants, consent should be obtained from the applicant and should be broad enough to cover testing done after the applicant has become an employee. The authorization for release of medical records should likewise cover any drug testing done under the Company's policy, and should comply with *Civil Code Section 56.21* (size of type, etc.). See *Wilcox, California Employment Law*, § 51.13[2][c] (Matthew Bender).

(n114)Note 35. Because employee medical records are afforded specific statutory protection from disclosure, employers are advised to keep drug test results and related employee medical information separate from other personnel records, under lock and key if possible. Only supervisors with a clear business reason to know the contents of such medical files should be allowed access. See *Civ. Code § 56 et seq.* ; see also *Wilcox, California Employment Law, § 50.43[1][a]* (Matthew Bender).



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California Employer's Guide to Employee Handbooks and Personnel Policy Manuals

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DIVISION 2 EMPLOYEE HANDBOOKS AND PERSONNEL POLICY MANUALS

Part B. OPTIONAL GUIDELINES

*1-2 CA Guide to Employee Handbooks § 2.34*

## § 2.34 EMPLOYEE ASSISTANCE PROGRAM

### [1] Model Guideline

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#### EMPLOYEE ASSISTANCE PROGRAM

##### I. Purpose Of Guideline

The Company recognizes that personal problems may have a negative impact on an employee's attendance, job performance, or behavior at work. The Company also recognizes that everyone may occasionally benefit from professional assistance with personal problems. Accordingly, the Company provides an employee assistance program (EAP) for employees. **[See Note n1]** This program is administered by \_\_\_\_\_ *[specify whether administered by an inside group or an outside firm, and identify the group or firm]*. **[See Note n2]** The EAP provides confidential and professional counseling and when appropriate, referral to other services to deal with personal problems, such as chemical dependency, marital or family conflict, and emotional problems. **[See Note n3]** The EAP is offered to enhance personal well-being and as a means of improving individual attendance, performance, and productivity. **[See Note n4]**

All counseling through this program is on a voluntary basis. Employees who suspect they may have an alcohol, drug, emotional, marital, family, or other personal problem, even in the early stages, should contact the EAP, seek a diagnosis, and follow through with the program as prescribed by qualified professionals. Although employees are encouraged to use the EAP, participation in the program does not relieve employees of their obligation to perform their work in a satisfactory manner and to comply with other Company rules and guidelines [including the Company's Drug-Free Workplace guideline]. **[See Note n5]**

##### II. Eligibility

The EAP is offered to all employees [See Note n6] [and members of their immediate families]. [For purposes of this Guideline, the phrase "members of their immediate families" means the employee's spouse, registered domestic partner, dependent children and stepchildren, and adult children living at home.] [See Note n7]

### III. Counseling And Referral Services

The EAP program provides for \_\_\_\_\_ [specify, e.g., up to five] paid EAP sessions per problem per year, as clinically appropriate, [See Note n8] for employees [and members of their immediate families]. [See Note n7] These sessions include problem assessment, professional consultation, counseling, information, and/or referral. EAP counseling is typically a three-stage process that includes: (1) clarifying the problem; (2) identifying the possible solutions; and (3) developing an action plan. [See Note n9] If the action plan calls for treatment by another resource, participating employees will be responsible for paying those fees. [See Note n10] [To determine whether the Company's group health plan may cover some of those costs, employees should contact \_\_\_\_\_ (specify, e.g., the Personnel Manager).] [See Note n11] EAP brochures that describe the program in more detail are available through supervisors, \_\_\_\_\_ [specify, e.g., the Personnel Department], or by calling \_\_\_\_\_ [specify name and/or telephone number]. [See Note n12]

### IV. Use of the EAP

Employees should make every effort to schedule EAP appointments before or after working hours, or during meal periods. EAP appointments scheduled during working hours will be treated the same as medical appointments and may be charged against sick leave. [See Note n13] [In order to protect the confidentiality of the program, employees may refer to EAP appointments as "medical appointments" when filling out time cards or obtaining permission to be absent.] [See Note n14]

### V. Self-Referral

Any employee [or member of their immediate family] [See Note n7] who desires confidential assistance for a personal problem should call \_\_\_\_\_ [specify name and/or telephone number]. Assistance is available \_\_\_\_\_ [specify, e.g., seven days a week, 24 hours per day]. The EAP will arrange for a counselor to see the individual for confidential consultation, or will provide limited counseling by telephone.

### VI. Supervisor Referral

Supervisors may refer employees to the EAP when they believe that an attendance, behavior, or work performance problem may be the result of a personal problem. [See Note n15] Even in this situation, all counseling through the EAP is on a voluntary basis. The Company may take such steps as it deems appropriate in response to the underlying attendance, behavior, or work performance problem.] [See Note n16]

### VII. Confidentiality

All EAP records and services are treated as confidential. The EAP will not share information concerning an individual's involvement in the program without the individual's written permission unless life, safety, or national security is seriously threatened or disclosure is otherwise required by law. [See Note n17]

[If an employee is referred to the EAP by the employee's supervisor because of an attendance, behavior, or work performance problem, the EAP will confidentially inform the supervisor whether the employee attends the EAP session(s) and cooperates with the counseling plan. However, no further information will be shared by the EAP without the employee's written permission.] **[See Note n18]**

### **VIII. Questions Regarding EAP Program**

Questions regarding EAP services should be directed to \_\_\_\_\_ [*specify, e.g., the Personnel Manager*] or the individual designated as a Company EAP contact in other locations. **[See Note n19]**

**[2] Drafting Checklist** \_\_\_\_\_

#### **RECOMMENDED PROVISIONS**

1. A statement setting forth the employer's reasons for adopting the guideline and describing the types of problems the EAP program is intended to address **[See Notes n1,n3,n4]**;
2. A statement informing employees which internal department or which external firm administers the EAP program **[See Note n2]**;
3. A statement informing employees that participation in the EAP program is voluntary and encouraging employees to avail themselves of the benefits of the program **[See Notes n1,n5]**;
4. Notice to employees that participation in the EAP program does not relieve them of their obligation to perform their jobs satisfactorily or to comply with the employer's rules **[See Notes n5,n16]**;
5. A description of eligible employees **[See Note n6]**;
6. A statement that informs employees whether they will be responsible for payment of any fees for participating in the EAP program **[See Note n8]**;
7. A section that describes the benefits available and the nature of the services provided by the EAP program, and that informs employees where they may obtain more detailed information **[See Notes n9,n12]**;
8. A statement that informs employees if they will be responsible for payment of any fees incurred as a result of their participation in any treatment or other program to which they are referred by an EAP counselor **[See Note n10]**;
9. Notice to employees concerning the scheduling of EAP appointments **[See Note n13]**;
10. A statement informing employees how to contact the EAP on their own, on a confidential basis **[See Notes n2,n5,n19]**;
11. Notice to employees that the employer has reserved the right to take appropriate disciplinary action in response to an underlying attendance, behavior, or job performance problem **[See Notes n2,n5,n16]**;

12. A statement assuring employees that EAP records and services are treated confidentially, and that information about their involvement in the program will not be revealed without their consent [**See Note n17**];
13. Notice to employees that in the case of supervisor referrals, the EAP will inform the supervisor whether the employee attends the EAP session and cooperates with the EAP recommendations [**See Note n18**]; and
14. A statement informing employees of the identity of the person to whom questions about the EAP should be directed [**See Note n19**].

### OPTIONAL PROVISIONS

1. A statement informing employees if members of their families are eligible to participate in the program, and if so, identifying with particularity those who are eligible [**See Note n7**];
2. Notice to employees that the employer's group health plan may cover some of the costs incurred by employees who participate in treatment programs [**See Note n11**];
3. A provision that permits employees to designate EAP appointments as "medical appointments" when requesting time off to attend them or when filling out time sheets [**See Note n14**]; and
4. Notice to employees of the circumstances under which they may be referred to the EAP program by their supervisor [**See Note n15**].

### [3] Notes

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law  
Employee Privacy  
General Overview  
Labor & Employment Law  
Employee Privacy  
Constitutional Protections  
Labor & Employment Law  
Leaves of Absence  
Short-Term Leave  
Labor & Employment Law  
Wrongful Termination  
Breach of Contract  
Employer Handbooks

#### FOOTNOTES:

(n1)Note 1. There is no legal requirement that employers develop or pay for EAPs. However, employers who wish to encourage employees with substance abuse or other personal problems to seek professional help may wish to adopt such a program. Neither the federal Drug-Free Workplace Act of 1988 (*41 U.S.C. § 701 et seq.*), nor the California Drug-Free Workplace Act of 1990 (*Gov. Code § 8350 et seq.*), obligates employers to adopt EAPs. Both acts, however, require that covered employers inform their employees if such programs are available. See *41 U.S.C. §§ 701(a)(1)(B)(iii)*, *702(a)(1)(B)(iii)*; *Gov. Code § 8355(a)(2)(C)*. Employers should also be aware that *California Labor Code Section 1025* requires that private employers with 25 or more employees provide reasonable accommodation to any employee who voluntarily chooses to participate in a rehabilitation program. For a discussion of employers' obligations concerning drug and alcohol rehabilitation for employees, see *Wilcox, California Employment Law*, §§ 50.43[3], 51.11 (Matthew Bender).

(n2)Note 2. This guideline, as drafted, presumes that the employer has contracted with an outside firm to provide the counseling, referral, and other services that are typically available through an EAP. Some large employers administer their programs through an in-house group, such as an Employee Assistance Department, staffed with

qualified professionals who have the requisite training and experience. Alternatively, an EAP may be a combination of an in-house and outside program, in which qualified in-house professionals refer employees to appropriate outside treatment. In any case, the guideline should clearly identify the group or firm that administers the program.

(n3)Note 3. EAPs are typically designed to identify and deal primarily with such personal problems as drug and alcohol abuse, marital or family conflict, and emotional problems. Some programs are more expansive, and provide counseling for financial and other types of problems as well. The guideline should inform employees of the types of problems for which assistance is available.

(n4)Note 4. This guideline, as drafted, is intended to demonstrate the employer's legitimate business interest in the employees' personal well-being.

(n9)Note 5. This guideline, as drafted, is intended to assure employees that participation in the EAP is voluntary and to encourage them to seek assistance at an early time. This guideline is also intended to inform employees that their participation in the program will not necessarily insulate them from disciplinary action for unacceptable job performance or for infraction of the employer's rules or guidelines. *Labor Code Section 1025* provides that even an employee who is voluntarily participating in a rehabilitation program can be terminated if, due to the employee's current alcohol or drug use, the employee is unable to perform his or her job duties or cannot perform the duties in a manner that would not endanger his or her safety or the health and safety of others. *See also Lamke v. Sunstate Equip. Co., (N.D. Cal. 2004) 387 F. Supp. 2d 1044, 1053* (*Labor Code Section 1025* does not express a "substantial and fundamental" public policy against termination of employment). *See also Note 16.* For a model guideline on termination, discipline, and rules of conduct, see § 2.12 of this Guide. If the employer has adopted a drug-free workplace guideline, reference to that guideline should be included in this section. For a model drug-free workplace guideline, see § 2.33 of this Guide.

(n10)Note 6. This guideline, as drafted, presumes that the EAP will be available to all employees. If the employer intends to limit the program to certain classifications of employees (e.g., "regular, full-time employees"), care should be taken to specify such limitations in the eligibility section. For a model guideline on employee classifications, see § 2.20 of this Guide.

(n11)Note 7. This guideline, as drafted, contains an optional provision extending the benefits of the EAP to certain members of an employee's family. Because there is likely to be a "per-session" cost to the employer, regardless of whether the program is administered internally or externally, if the program is available to persons other than the employees themselves, the guideline should specify who is included.

(n12)Note 8. This guideline, as drafted, presumes that the employer is providing the EAP benefit at no cost to the employee for the initial counseling and referral services, as specified. If a different result is intended, the guideline should be revised accordingly.

(n13)Note 9. This guideline, as drafted, reflects the type and extent of services offered in a typical EAP. The guideline that is actually adopted should, of course, describe the basic features of the employer's particular EAP including, for example, the number of counseling or referral sessions available within specified times and what is included in the counseling sessions.

(n26)Note 10. Most EAPs are designed only to identify the nature of the employee's problem, provide initial counseling, as appropriate, and refer employees to appropriate "outside" services, such as drug or alcohol rehabilitation programs. This guideline, as drafted, presumes that employees will be responsible for the cost of any such "outside" services or programs.

(n27)Note 11. The optional language should not be used unless the particular employer has a group health plan and intends to continue to provide that benefit. The optional language is also intended to avoid making a commitment to continue providing coverage in the future, in the event the particular employer, at the time an EAP is adopted, has a

group health plan that provides coverage for the types of services contemplated by this guideline.

(n28)Note 12. Private firms that contract to provide EAPs typically provide printed brochures that describe the services in more detail and that are designed for distribution to employees.

(n29)Note 13. This guideline, as drafted, presumes the employer has a sick leave guideline that permits employees to use accrued sick leave for medical appointments. For a model guideline on sick leave, see § 2.08 of this Guide.

(n30)Note 14. This provision is treated as optional because some employers require verification from licensed medical practitioners for absences due to "medical appointments." Employers who do have such a requirement should consider whether they are able to offer the protection of confidentiality contemplated by this optional provision. Employers who do not require verification for medical appointments (as opposed to verification for absences due to illness) should include the optional language.

(n31)Note 15. Employers who adopt an EAP that provides for supervisor referral should conduct appropriate training for supervisors. Because supervisors generally are not trained or otherwise qualified to diagnose or form professional opinions about employees' personal problems, their referrals should be based on objective and observable facts that can be described, such as a decline in the particular employee's job performance, poor attendance, or certain behavior or conduct at work. In addition, when referring employees to EAP, supervisors should refrain from suggesting or implying that the referral is tantamount to discipline or punishment, but rather should emphasize that the EAP is designed to benefit employees. See also Note 16.

(n32)Note 16. This guideline, as drafted, presumes that the employer will not impose discipline upon an employee simply because the employee elects not to participate in EAP counseling when referred to EAP by his or her supervisor. However, just as employees who elect to participate in EAP counseling are not excused from their obligation to perform satisfactorily, employees who elect not to participate, even when referred by their supervisors, should understand that the employer will respond to underlying attendance, behavior, or work performance problems that are not corrected.

The Ninth Circuit Court of Appeals has held that an employer may have "regarded" its employee as disabled under the Americans With Disabilities Act because the employer, among other things, referred the employee to its EAP after the employer received a number of complaints about the employee. *Holihan v. Lucky Stores, Inc.* (9th Cir. 1996) 87 F.3d 362, 364-66, cert. denied, 520 U.S. 1162, 117 S. Ct. 1349, 137 L. Ed. 2d 506. Thus, rather than face this potential liability, many employers may simply choose to discipline employees for work-related problems rather than refer them to the EAP.

(n33)Note 17. Employers should be aware that the type of information that is likely to be disclosed to EAP counselors by employees is also the type of information that would be regarded as "confidential," "private," or "medical information" under one or more laws that may restrict disclosure by those counselors. See, e.g., *Civ. Code § 56 et seq.* (confidentiality of medical information); *Cal. Const., Art. I, § 1* (constitutional right of privacy); *Lab. Code § 1026* (employee right of privacy as to fact of enrollment in alcohol or drug rehabilitation program). For discussion of limitations on an employer's collection and use of private information about employees generally, see *Wilcox, California Employment Law*, Chs. 50, 51 (Matthew Bender). See also notes accompanying §§ 2.29 and 2.30 of this Guide.

(n34)Note 18. By limiting information shared by the EAP to whether the employee attended an EAP session and whether the employee cooperated with a recommended plan (but without disclosing what plan was recommended), an employer should be able to argue that information shared by the EAP was not the type of information subject to protection as "confidential," "private," or "medical information." See Note 17. Nevertheless, those who administer EAP programs, and employers who hire or retain them, should be aware of the legal risks they may face for any unauthorized use or disclosure of "private" information about employees. Employers who intend to request that employees provide written permission for the disclosure of further information (or who accept such written permission offered by

employees) should consult with counsel to devise forms that most likely will be defensible. For general discussion of employer's liability for improper disclosure of information about employees, see *Wilcox, California Employment Law*, Ch. 51 (Matthew Bender).

(n35)Note 19. In order to promote consistency and to assure appropriate responses to potentially sensitive or highly personal matters, employers should encourage questions about the employee assistance program to be directed to one person or department.



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DIVISION 2 EMPLOYEE HANDBOOKS AND PERSONNEL POLICY MANUALS

Part B. OPTIONAL GUIDELINES

*1-2 CA Guide to Employee Handbooks § 2.35*

## § 2.35 EXTERNAL COMMUNICATIONS

### [1] Model Guideline

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#### EXTERNAL COMMUNICATIONS

Occasionally, employees may be contacted by outside sources requesting information about Company matters, including information regarding current or former employees, Company projects, or other workplace issues. In order to avoid providing inaccurate or incomplete information to outside sources, [and the possible negative exposure that may result from providing information about the Company to outside sources,] any employee contacted by any outside source regarding the Company should immediately contact the appropriate Company official, as detailed below.

[Employees violating this policy may be subject to discipline, up to and including termination of employment.] **[See Note n1]**

##### A. Media Contacts

If an employee is contacted by a representative from any media organization (e.g., television, radio, or newspaper reporters), the employee should immediately refer the media representative to \_\_\_\_\_ [*specify, e.g., the Public Relations Department*]. No employee may communicate with media agents regarding the Company without prior authorization from \_\_\_\_\_ [*specify, e.g., the Manager of Public Relations*].

##### B. Outside Attorneys and Investigators

If an employee is contacted by an outside attorney or investigator regarding Company business, including information regarding current or former employees, Company projects, or other workplace issues, the employee should immediately

obtain the individual's name and telephone number without disclosing any information to the individual. The individual's name and telephone number should then be provided to \_\_\_\_\_ [*specify, e.g., the General Counsel or the Human Resources Department*]. **[See Note n2]**

### C. Employment References and Verifications

Employees contacted by outside sources requesting an employment reference or employment verification for a current or former employee should not provide any information to the requesting individual or organization. Instead, employees should refer the requesting individual or organization to \_\_\_\_\_ [*specify, e.g., the Human Resources Department*]. No employee, [other than the Director of Human Resources,] is authorized to provide employment references or employment verifications for any current or former employee. **[See Note n3]** [Employees wishing to receive either an employment reference or an employment verification should provide written authorization to the Company.]

**[2] Drafting Checklist** \_\_\_\_\_

#### RECOMMENDED PROVISIONS

1. A provision addressing how employees should respond to communications from media sources;
2. A provision addressing how employees should respond to communications from outside attorneys and investigators **[See Note n2]**; and
3. A provision addressing how employees should respond to communications from outside sources requesting information about current or former employees of the Company **[See Note n3]**.

#### OPTIONAL PROVISIONS

1. A statement that the employee may be disciplined for violating the policy **[See Note n1]**; and
2. Detailed steps for responding to each type of inquiry.

#### **[3] Notes**

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Labor & Employment Law Collective Bargaining & Labor Relations Unfair Labor Practices Interference With Protected Activities Labor & Employment Law Discrimination Retaliation General Overview Labor & Employment Law Discrimination Retaliation Statutory Application General Overview Labor & Employment Law Discrimination Title VII of the Civil Rights Act of 1964 General Overview

#### **FOOTNOTES:**

(n1) Note 1. Employers should keep in mind that under both federal and state law, employers may not retaliate against employees who have opposed unlawful employment practices or who have assisted or participated in employment discrimination investigations, proceedings, or hearings. See *42 U.S.C. § 12203(a) (ADA)*; *29 U.S.C. § 623(d) (ADEA)*; *42 U.S.C. § 2000e-3(a) (Title VII)*; *Gov. Code § 12940(h) (FEHA)*. Thus, an employer should carefully consider whether an offending employee's conduct is protected activity before disciplining the employee for a violation of this policy. For further discussion regarding retaliation issues, see *Wilcox, California Employment Law, § 41.130*

-41.132 (Matthew Bender).

(n2)Note 2. California courts have held that attorneys and investigators for a former employee contemplating a lawsuit against a former employer may interview current employees of the employer before filing the lawsuit without first obtaining the employer's consent. See e.g., *Snider v. Superior Court* (2003) 113 Cal. App. 4th 1187, 1211-13, 7 Cal. Rptr. 3d 119 ; *Jorgensen v. Taco Bell Corp.* (1996) 50 Cal. App. 4th 1398, 1401-04, 58 Cal. Rptr. 2d 178, 180-182 . The Jorgeson court noted, however, that employers who wish to avoid having their employees interviewed have a number of options, including instructing their employees not to speak with investigators. *Jorgenson*, 50 Cal. App. 4th at 1403 ; see also *Snider*, 113 Cal. App. 4th at 1212-13 . This section of the policy is designed to instruct employees that they should not speak to outside attorneys or investigators. As discussed in Note 1, however, employers may not retaliate against employees who oppose unlawful employment practices or who assist or participate in employment discrimination investigations, proceedings, or hearings.

(n3)Note 3. In California, employers are generally protected from liability for disclosing information regarding a current or former employee's job history to a prospective employer, as well as whether or not the employer would rehire a current or former employee. See *Civ. Code* § 47(c) (protecting employers from liability for communications with prospective employer regarding current or former employee so long as communication is made without malice, and authorizing employer to communicate whether or not employer would rehire a current or former employee). Nonetheless, many employers have adopted policies prohibiting references for current and former employees for fear of the potential exposure to liability for references that are unfavorable. For example, employees who receive unfavorable references may bring claims for defamation or retaliation. See, e.g., *Neal v. Gatlin* (1973) 35 Cal. App. 3d 871, 877, 111 Cal. Rptr. 117, 121 (holding that employer's communications with prospective employer were privileged, but noting that former employee may overcome privilege by demonstrating that employer acted with malice in disclosing allegedly false information to prospective employer); *Robinson v. Shell Oil Co.* (1997) 519 U.S. 337, 345-46, 117 S. Ct. 843, 848-49, 136 L. Ed. 2d 808, 816-17 (former employee may bring Title VII retaliation claim based on employer's negative job reference); *Hashimoto v. Dalton* (9th Cir. 1997) 118 F.3d 671, 676 (holding that negative job reference to potential employer constituted adverse employment action because "it was a 'personnel action' motivated by retaliatory animus"). Moreover, employers who provide only positive information regarding an employee without revealing negative job history may incur liability. See, e.g., *Randi W. v. Muroc Joint Unified School Dist.* (1997) 14 Cal. 4th 1066, 1081, 60 Cal. Rptr. 2d. 263, 272, 929 P.2d 582 (former employers who provide references to prospective employers owe a duty to the prospective employers and third parties not to misrepresent the employees' employment histories if the misrepresentations pose "a substantial, foreseeable risk of physical injury to the third persons"). Because of the potential risks associated with providing job references, employers should adopt a policy prohibiting job references, except by authorized individuals.



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DIVISION 2 EMPLOYEE HANDBOOKS AND PERSONNEL POLICY MANUALS

Part B. OPTIONAL GUIDELINES

*1-2 CA Guide to Employee Handbooks § 2.36*

## § 2.36 UNIONS

### [1] Model Guideline

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UNIONS [See Note 1]

Our Company has always been and wishes to remain a union-free company. [See Note n2,n3] There is, however, always a chance in the future that a labor union organizer will try to persuade some of our employees to sign union authorization cards. For this reason, it is important that employees understand the Company's philosophy concerning unions. [See Note n4, n5]

It is the Company's belief that remaining union-free has significant advantages for both the Company and the employees. The Company is convinced that the best way to achieve the Company's goals, outperform competitors, and meet difficult challenges is for employees and Company management to work together directly in a spirit of cooperation and teamwork, rather than through an outside labor union. In this regard, the Company encourages employees to express their job-related concerns directly to management, and all managers are committed to listening to the employees and responding to their needs. The Company also believes that direct participation by employees in the Company, rather than through an outside labor union, fosters a closer working relationship between employees and Company management, to their mutual benefit. [See Note n6]

[Additionally, it is the Company's view that there are many drawbacks associated with being represented by a labor union. First, union employees typically must pay union initiation fees, union dues, and union assessments. Second, labor unions frequently establish a structural framework that can hinder teamwork and create antagonistic relationships between employees and management. Third, employees and their families may face financial hardship due to strikes. Finally, employees should not have to play union politics, comply with union rules, and fear union discipline and fines.]

For these reasons, the Company believes that the interests of employees and the Company are interrelated and, therefore, best achieved without third party interference. Ultimately, however, employees have the legal right to decide

whether or not to join a labor union, and the Company will respect each employee's right. [And, while the Company strongly believes that labor unions at our workplace are unnecessary,] employees who disagree with the Company's philosophy will not be disciplined or subject to other reprisals for joining a labor union. Similarly, the Company will not discriminate against employees based on their membership or lack of membership in a labor union. [See Note n7]

[In deciding whether or not to join a labor union, employees should bear in mind that a union authorization card is a legally binding document that grants a union the right to speak on their behalf. Therefore, if you are asked to sign a union authorization card, the Company asks that you say "no."] [See Note n8]

## [2] Drafting Checklist \_\_\_\_\_

### RECOMMENDED PROVISIONS

1. A statement telling the employees that they have the legal right to join a union [See Note n7];
2. A statement telling the employees that the company will respect the employee's right to join a union [See Note n7];
3. A description of the company's position concerning unions [See Note n4];
4. A statement that the employer will not discriminate against employees based on their membership or lack of membership in a union [See Note n7].

### OPTIONAL PROVISIONS

1. A statement that the company is union free or non-union;
2. A statement that employees are not required to abide by the employer's position and will not be disciplined for joining a union [See Note 7];
3. A statement reiterating the company's open door policy [See Note n8];
4. A statement describing the effect of a union authorization card; and
5. A statement asking the employees not to sign a union authorization card.

## [3] Notes

### Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law Collective Bargaining & Labor Relations Discipline, Layoff & Termination Labor & Employment Law Collective Bargaining & Labor Relations Right to Organize Labor & Employment Law Collective Bargaining & Labor Relations Strikes & Work Stoppages Labor & Employment Law Collective Bargaining & Labor Relations Unfair Labor Practices General Overview Labor & Employment Law Collective Bargaining & Labor Relations Unfair Labor Practices Interference With Protected Activities Labor & Employment Law Collective Bargaining & Labor Relations Unfair Labor Practices Organizing & Voting

### FOOTNOTES:

(n1) Note 1. Before deciding to include a union avoidance policy in an employee handbook, it is prudent to review the

acknowledgment of receipt of the handbook that employees are asked or required to sign. If the handbook acknowledgment requires employees to agree to abide by the terms and policies contained in the handbook, maintaining a union avoidance policy in the handbook has been found by the National Labor Relations Board, in certain circumstances, to be an unfair labor practice. See, e.g., *Heck's Inc.* (1989) 293 N.L.R.B. 1111, 1119-1121 (holding that employer "acted unlawfully not in publishing its antiunion policy in the employee handbook, but rather in requesting that its employees promise in writing to be bound by that policy"); see also, *Leather Center Inc.* (1993) 312 N.L.R.B. 521, 528-529; *Matheson Fast Freight, Inc.* (1989) 297 N.L.R.B. 63, 63, n.1, 74-75; *La Quinta Motor Inns, Inc.* (1989) 293 N.L.R.B. 57, 61. Employers may still maintain an anti-union policy outside of a handbook that has such an acknowledgment, or make clear that the employee acknowledgement of the handbook does not apply to the anti-union policy.

(n2)Note 2. Under the federal National Labor Relations Act, an employer cannot require its employees to remain union-free. See 29 U.S.C. § 158(a)(1). An employer may, however, disseminate its "views, argument, or opinion" on the subject, as long as the employer does not make any "threat of reprisal or force or promise of benefit." See 29 U.S.C. § 158(c). The employer should nonetheless be cautious when disseminating an anti-union policy to employees because it will violate the NLRA if employees "could reasonably assume that they are subject to discipline" for violating the employer's anti-union policy. See, e.g., *Heck's Inc.* (1989) 293 N.L.R.B. 1111, 1119-1121 (employer violated NLRA by "requesting that its employees promise in writing [in a handbook acknowledgment] to be bound by" policies contained in employee handbook, which contained anti-union policy). In addition, if a union represents part of an employer's workforce, employees to agree in writing to an anti-union policy "tends to undermine the status of the Union as the designated and recognized collective-bargaining representative." See, e.g., *Heck's Inc.* (1989) 293 N.L.R.B. 1111, 1120.

One factor an employer should consider when deciding whether or not to adopt a union avoidance policy is whether the policy will evidence the employer's opposition to unionization. See, e.g., *Adco Electric Inc.* (1992) 307 N.L.R.B. 1113, 1115, 1117, enforced, (5th Cir 1993) 6 F.3d 1110, 1113 (discussing how employer was "adamantly anti-union" based on the union-free policy in the employee handbook). If an employee charges an employer with unfair labor practices, such as discrimination against employees who are union members, a union avoidance policy can be used to demonstrate the employer's disapproval of unions on its premises. The National Labor Relations Board ("N.L.R.B.") may consider the promulgation of an anti-union policy as relevant background evidence of anti-union animus. See e.g., *Tim Foley Plumbing Service, Inc.*, (2001) 337 N.L.R.B. 328, 329; *Overnite Transportation Co.* (2001) 335 N.L.R.B. 372, 375, n.15 (finding that employer's corporate-wide policy in its employee handbook stating that it "values union-free working conditions" is indicative of anti-union animus, despite the policy itself being lawful); *NLRB v. Vemco* (6th Cir. 1993) 989 F.2d 1468, 1473-74, 1477 (finding the N.L.R.B. "may appropriately consider under Section 8(c) the anti-union policy expressed in Vemco's personnel handbook as background evidence of animus); but see *Brown & Root, Inc.* (5th Cir. 2003) 333 F.3d 628, 639, n.7 (disagreeing with NLRB precedent that lawful statements by an employer regarding unions can be used as evidence of anti-union animus); *NLRB v. Lampi LLC* (11th Cir. 2001) 240 F.3d 931, 936, n.6 (finding that employer's policy on unionization was not coercive, did not contain threats or promises and therefore could not be the basis of an inference of anti-union animus). Nonetheless, an employer's stated preference to remain union-free will not by itself establish discriminatory bias against union members or constitute an unfair labor practice. In fact, an employer's position concerning unions is a political belief that is protected by the NLRA and the United States Constitution. See 29 U.S.C. § 158(c); *N.L.R.B. v. Gissel Packing Co.* (1969) 395 U.S. 575, 617, 89 S. Ct. 1918, 23 L. Ed. 2d 547. An employer's conduct becomes unlawful only when it interferes with, restrains, or coerces employees in their exercise of Section 7 rights under the Act or discriminates against employees or applicants with different views. See 29 U.S.C. § 158(a)(1),(3).

(n3)Note 3. Employers should be aware that even when a union avoidance policy is lawful on its face, improper use of the policy may unlawfully suggest that an applicant or employee is required to abide by the policy. This is particularly true when the policy is shown to job applicants. See *Adco Electric Inc.* (1992) 307 N.L.R.B. 1113, 1116-1117 (holding that employer committed an unfair labor practice by showing union avoidance policy to applicant

who had been a union member and asking applicant questions about his position on unions because employer's conduct suggested that "no union supporter [would] be hired" by the employer); see also *Tech Electric, Inc. (Div. of Judges Dec. 5, 1997)* 1997 NLRB LEXIS 980 \*17-18 (finding employer committed unfair labor practice by requiring applicants to answer two questions on job application: (1) do you understand that the company is a non-union employer? and (2) do you agree to abide by policies set forth above?, where employees would be subject to discipline if they failed to comply with the anti-union policy); *United L-N Glass (1989)* 297 N.L.R.B. 329, 329 n.1 (recognizing that a job applicant "may understandably fear that any answer he might give to questions about union sentiments posed in a job interview may well affect his job prospects"). Thus, an employer should train its supervisors, particularly those who interview applicants, so that they know that the union avoidance policy is the employer's position, not a required work rule.

(n4)Note 4. A union avoidance policy is different from other policies in an employee handbook because it cannot contain rules that an employee must follow. See 29 U.S.C. § 158(a)(1). Rather, it generally contains only the employer's position concerning union membership, which the employees are encouraged--but not required--to follow. The N.L.R.B. has repeatedly held union avoidance policies to be an unfair labor practice when the employee handbook (including employee acknowledgment) suggests either that an employee is required to adhere to the employer's anti-union policy or that an employee may be disciplined for violating the anti-union policy. See, e.g., *Leather Center Inc. (1993)* 312 N.L.R.B. 521, 528-529; *Matheson Fast Freight, Inc. (1989)* 297 N.L.R.B. 63, 74-75; *La Quinta Motor Inns, Inc. (1989)* 293 N.L.R.B. 57, 61; *Heck's Inc. (1989)* 293 N.L.R.B. 1111, 1120-1121. Usually, it is not the policy itself that contains the unlawful suggestion, but the employee acknowledgment or a policy concerning discipline or rules of conduct that requires the employee to abide by *all* policies and procedures in the employee handbook, including the anti-union policy. The remedy imposed has been to rescind the policy and notify the employees that they do not need to comply with the policy.

The N.L.R.B. has concluded, however, that a policy that plainly states that the employee has the legal right to join a union and to organize but asks the employee not to do so is a lawful expression of the employer's views. *Noah's New York Bagels, Inc. (1997)* 324 N.L.R.B. 266, 272-273 (also noting that handbook acknowledgment only required that employees be familiar with the policy and does not imply that employees would be disciplined for violating the anti-union policy); see also *Ballou Brick Co. v. N.L.R.B. (8th Cir. 1986)* 798 F.2d 339, 346 (holding that anti-union rule did not have coercive effect on employees, even though it requested that employees not join a union, because the rule advised employees of their legal right to join a union). Additionally, the provisions of the model policy stating that the employees are not required to abide by the employer's position on unions and that employees will not be disciplined for joining a union should provide further protection from liability for unfair labor practices. Finally, an employer should ensure that nothing in its other policies contradicts the employee's right to join a union, because any ambiguity will be resolved against the employer. See *La Quinta Motor Inns, Inc. (1989)* 293 N.L.R.B. 57, 61.

(n9)Note 5. If an employer is a federal contractor, or becomes a federal contractor, it will be subject to several new requirements under the Executive Orders issued by President Obama on January 30, 2009. One such Order requires federal contractors to post notices informing employees of their rights under federal labor laws (including the National Labor Relations Act); the content of the notice shall be promulgated by the Secretary of Labor. Thus, employers who are federal contractors will need to ensure that any anti-union or union avoidance policy in the employee handbook does not conflict with or undermine such notice. See Executive Order 13496 (dated 1/30/2009).

(n10)Note 6. The provision explaining the employer's views on unions should be tailored to reflect the opinions of the specific employer. The model policy, as drafted, includes some opinions that are commonly held by union-free employers. It does not, however, include some of the more controversial opinions held by many employers (e.g., that unions foster turmoil in the workplace, that unions are hypocritical and self-interested, and that unions have been associated with mob violence and organized crime), and it does not discuss the impact that unionization could have on the specific employer's practices concerning compensation, stock options, profit-sharing plans or other benefits.

Frequently, employers implement union avoidance policies when they first observe signs of unionization. In such

cases, an employer should consider including a discussion of the employer's track record (e.g., "The Company has never laid off employees in the past" or "we have never lowered wages."). As long as the employer's position is factually accurate, noncoercive, and does not promise benefits or threaten reprisals, the employer is allowed to express its opinion. See *29 U.S.C. § 158(c)*. Nonetheless, employers should be careful about what they say in their policies because "[t]he character of threats or promises found unlawful [by the N.L.R.B.] spans the range of human expression." Higgins, *The Developing Labor Law*, p. 95 (5th ed. 2006). This is particularly true with regard to including open-door communication language in a union avoidance policy that an employer did not have in place prior to a union organizing drive. Such language may be deemed a promise of benefits, or the solicitation of employee grievances and complaints and promising to remedy them for purposes of dissuading employees from supporting a union and may constitute a violation of the Act.

(n11)Note 7. The NLRA generally prohibits "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." *29 U.S.C. § 158(a)(3)*. The NLRA also prohibits discrimination because an employee has "filed charges or given testimony" under the NLRA. See *29 U.S.C. § 158(a)(4)*.

(n12)Note 8. Although union authorization cards can give a union the right to represent employees who have signed the cards, an employer has a right to test the union's majority status by insisting on a secret-ballot election, provided the employer has neither committed independent unfair labor practices nor agreed to determine majority status by means other than an election. See *Linden Lumber Div. v. N.L.R.B.* (1974) 419 U.S. 301, 309-310, 95 S. Ct. 429, 42 L. Ed. 2d 465 (noting that the Court did not address the situation where an employer breaches an agreement to permit majority status to be determined by means other than a NLRB election). Thus, even if the union claims that a majority of employees in a bargaining unit have signed union authorization cards, the employer generally has the right to persuade its employees to vote against the union during an election campaign. There is, however, one important caveat to this rule: an employer may inadvertently waive its right to an election by unilaterally attempting to confirm the majority status of the union in some manner other than a secret ballot election (e.g., by reviewing union authorization cards, polling its employees, or verifying the accuracy of the union's claim in some other manner). See Higgins, *The Developing Labor Law*, p. 779-83 (5th ed. 2006). Therefore, if a union claims to be the bargaining representative for a majority of employees in a bargaining unit and the employer wants the opportunity to campaign against the union, the employer should simply insist on an election without looking at any union authorization cards or verifying the union's claim in any way.

In addition, employers should be careful about including any language in a union avoidance policy that requests or suggests that employees should report, to a supervisor, if other employees "should interfere or try to coerce you into signing a union authorization card" and that "such harassment shall be stopped immediately." The N.L.R.B. and the Seventh Circuit found such a policy to be unlawful, where the employer also expressed in the same policy that it wants to remain union-free, and the policy was not promulgated in response to employees being threatened. See *Brandeis Machinery & Supply v. NLRB* (7th Cir. 2005) 412 F.3d 822; but see *S.E. Nichols, Inc.* (1987) 284 NLRB 556, 557 (finding provision in handbook lawful where it stated "Remember, do not sign a card because you are threatened, tell us and we will protect you. It is your right to have a union. It is your right not to have a union. Our company will try to see to it that your rights are preserved no matter how you choose. Tell us if someone is trying to stop your freedom of choice"), *enforced* (2d Cir. 1988) 862 F.2d 952.



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DIVISION 3 POSTING OBLIGATIONS

*1-3 CA Guide to Employee Handbooks 3.syn*

**§ 3.syn Synopsis to Chapter 3: POSTING OBLIGATIONS**

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## DIVISION 3 POSTING OBLIGATIONS

### Part A. INTRODUCTION

#### *1-3 CA Guide to Employee Handbooks § 3.01*

### **§ 3.01 INTRODUCTION TO POSTING OBLIGATIONS**

California employers are subject to multiple laws regulating the workplace. Many of these laws require employers to display posters or notices informing employees of specific rights and responsibilities. We have prepared this guide in response to frequent questions from clients about the employment-related notices that the laws require California employers to post. It is designed to inform California employers of their posting obligations under various state and federal laws, and to assist employers in complying with these obligations.

This guide is organized poster-by-poster, first the posters required by California law and then the posters required by federal law. The contents of each posted notice are described and a copy of the poster (or the first page of the poster if it is more than one page) is reprinted on the subsequent page. Information on obtaining copies of each poster is also included. Most posters are issued by government agencies, and telephone numbers and addresses of these agencies are provided so that you may order these posters directly. For the few posters not available from government agencies, we have provided sample posters, reprints of which are available from the Paul Hastings offices listed in § 3.28. Additionally, the California Chamber of Commerce, in conjunction with various state and federal agencies, has compiled twelve of the most commonly required posters onto two large posters. To order, contact the California Chamber of Commerce, Customer Service and Support, 1332 North Market, Sacramento, CA 95434, or call (800) 331-8877, or visit the Chamber of Commerce's online store at [www.calchamber.com/store](http://www.calchamber.com/store).

Laws requiring posted notices generally prescribe the posting location, and we have provided this information for each poster. In general, posting must be in a conspicuous location in the workplace, where the notice may easily be seen by employees and, in some instances, by applicants for employment. We recommend that all posters be posted in a central and accessible location that is frequented by all employees in the facility. Additionally, posters that must be conspicuous to applicants should be prominently displayed in a place through which all applicants pass, such as the personnel office. In multi-facility companies, notices should be posted in each facility. In multi-floor facilities, employers should consider posting at several central locations, if not on each floor.

Employers should treat these posting requirements as significant legal obligations for several reasons. First, because the posters notify all levels of personnel of employer responsibilities and employee rights, they not only discourage unlawful practices but also assist in the consistent application of formal personnel policies. Second, nearly all of the posting requirements carry criminal penalties or civil money penalties, or both, for noncompliance. Third, failure to post

some posters may disadvantage employers in defending against legal claims by employees. For example, some courts in discrimination cases have allowed employees to sue after the statutory limitations period has expired when the employer failed to post the required notice regarding the antidiscrimination laws. Accordingly, we recommend that employers use this guide as an audit device to ensure that they are in full compliance with their posting obligations.

We have designed this Guide to be comprehensive with regard to posting requirements applicable to the "average" California employer, but it is not exhaustive. Employers engaged in any government-regulated activity may have special posting requirements. This handbook does not, for example, cover posting requirements for employers who use or store pesticides or various other toxic, carcinogenic, or hazardous materials; who use certain hazardous equipment or industrial vehicles; or who engage in hazardous work. In addition, agricultural employers, employers engaged in labor disputes, and employers in industries subject to specific Cal/OSHA safety orders or who are investigated by Cal/OSHA may have special posting obligations. Employers must also comply with a variety of municipal ordinances and other local regulations that may impose additional posting or notice requirements. If you have questions concerning these specialized posting requirements, please contact any of our offices.

Finally, although this Guide is current as of the date it went to press, new laws imposing additional posting requirements may be enacted or existing laws amended. Subsequent editions of this Guide will reflect these changes, but care should be taken in the interim to be watchful for new and amended laws that may affect posting obligations.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Labor & Employment Law Occupational Safety & Health Compliance & Defenses Labor & Employment  
Law Occupational Safety & Health Criminal Penalties Labor & Employment Law Occupational Safety & Health Duties &  
Rights Labor & Employment Law Posting & Recordkeeping



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DIVISION 3 POSTING OBLIGATIONS  
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*1-3 CA Guide to Employee Handbooks § 3.02*

**§ 3.02 NOTICE TO EMPLOYEES--INJURIES CAUSED BY WORK**

<b>Name of Statute:</b>	California Workers' Compensation Act.
<b>Title of Posting:</b>	Notice to Employees--Injuries Caused By Work.
<b>Who Must Post:</b>	All employers.
<b>What to Post:</b>	DWC Form 7, describing workers' compensation benefits and the steps to be taken by an employee who is injured on the job, revised August 1, 2004.
<b>Where to Post:</b>	In a conspicuous location frequented by employees during the workday.
<b>When to Post:</b>	Permanently.
<b>Where to Find Copies:</b>	This poster can be downloaded from the website of the Division of Workers' Compensation at <a href="http://www.dir.ca.gov/dwc/NoticePoster.pdf">http://www.dir.ca.gov/dwc/NoticePoster.pdf</a> . Forms also may be obtained from:  California Workers' Compensation Institute 1111 Broadway Suite 2350 Oakland, California 94607 (510) 251-9470 <a href="http://www.cwci.org">www.cwci.org</a>
<b>Penalty for Failure to Post:</b>	This poster is included in the composite poster set published by the Chamber of Commerce. Forms also may be obtained through an employer's insurance carrier; these forms may not meet all the legal requirements.  Failure to keep the notice conspicuously posted is a misdemeanor and is <i>prima facie</i> evidence that the employer is not insured; it also automatically permits an employee to be treated by his or her personal physician (rather than one designated by the employer) for an injury occurring during work hours.

**Citation to Posting Obligation:** Cal. Lab. Code § 3550; 8 Cal. Code Regs. § 9881.

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*1-3 CA Guide to Employee Handbooks § 3.03*

**§ 3.03 NOTICE TO EMPLOYEES--UNEMPLOYMENT AND DISABILITY INSURANCE; PAID FAMILY LEAVE**

<b>Name of Statute:</b>	California Unemployment Insurance Law.
<b>Title of Posting:</b>	Notice To Employees.
<b>Who Must Post:</b>	All employers.
<b>What to Post:</b>	Form DE 1857A, (Rev. 39 (11/08)), describing unemployment and disability insurance, and paid family leave insurance benefits rights.
<b>Where to Post:</b>	In places readily accessible to all employees.
<b>When to Post:</b>	Permanently.
<b>Where to Find Copies:</b>	This poster may be downloaded from or ordered on the website of the California Employment Development Department at <a href="http://www.edd.ca.gov/pdf_pub_ctr/de1857a.pdf">http://www.edd.ca.gov/pdf_pub_ctr/de1857a.pdf</a> or by calling the EDD Forms Warehouse at (916) 322-2835. This poster is included in the composite poster set published by the California Chamber of Commerce.
<b>Penalty for Failure to Post:</b>	Failure to post a notice of unemployment insurance is a misdemeanor, punishable by imprisonment of up to 6 months and/or a \$1,000 fine. See Cal. Lab. Code §§ 23, 3550. There is no statutory penalty for failing to post a notice of disability benefits.
<b>Citation to Posting Obligation:</b>	Unemp. Ins. Code §§ 1089, 2706; 22 Cal. Code Reg. § 1089-1(b)(1), (b)(2), (c). The EDD also publishes two posters (Forms DE 1857D and DE 1858) for employers subject to unemployment insurance obligations only (DE 1857D) or to disability insurance, paid family leave obligations only (DE 1858). Because the majority of private employers are covered by both state unemployment insurance law and state disability insurance law, we have reproduced only Form DE 1857A.

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*1-3 CA Guide to Employee Handbooks § 3.04*

**§ 3.04 DISCRIMINATION AND HARASSMENT IN EMPLOYMENT ARE PROHIBITED BY LAW**

<b>Name of Statute:</b>	California Fair Employment and Housing Act.
<b>Title of Posting:</b>	Discrimination and Harassment in Employment are Prohibited by Law.
<b>Who Must Post:</b>	All employers.
<b>What to Post:</b>	DFEH-162 (Rev. 5/06), a poster issued by the California Department of Fair Employment and Housing regarding unlawful discrimination, which includes information specifically relating to the illegality of sexual harassment. Employers whose workforce is composed of not less than 10% non-English speaking persons at any facility or establishment must also post this notice in the appropriate foreign language(s).
<b>Where to Post:</b>	In a prominent and accessible location in the workplace.
<b>When to Post:</b>	Permanently.
<b>Where to Find Copies:</b>	This poster can be downloaded from the Department of Fair Employment & Housing's website at <a href="http://www.dfeh.ca.gov/DFEH/Publications/PublicationDocs/DFEH-162.pdf">http://www.dfeh.ca.gov/DFEH/Publications/PublicationDocs/DFEH-162.pdf</a> , or ordered by calling the DFEH Communication Center at (916) 227-0551 or (800) 884-1684. This poster is also included in the composite poster set published by the California Chamber of Commerce.
<b>Penalty for Failure to Post:</b>	The Fair Employment and Housing Commission is required to issue an order to an employer failing to post the notice requiring compliance with the posting requirement. Willful failure to obey such an order is a misdemeanor, punishable by up to six months in jail or by a fine not exceeding \$1,000, or both. Cal. Gov. Code §§ 12950(e), 12975.
<b>Citation to Posting Obligation:</b>	Cal. Gov. Code § 12950(a); 2 Cal. Code Reg. § 7287.0(d).

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*1-3 CA Guide to Employee Handbooks § 3.05*

**§ 3.05 FAMILY CARE AND MEDICAL LEAVE (CFRA LEAVE) AND PREGNANCY DISABILITY LEAVE**

<b>Name of Statute:</b>	California Family Rights Act.
<b>Title of Posting:</b>	Family Care and Medical Leave (CFRA Leave) and Pregnancy Disability Leave.
<b>Who Must Post:</b>	Employers subject to the California Family Rights Act (in general, those who employ 50 or more employees within California) and all public agencies.
<b>What to Post:</b>	DFEH-100-21 (Notice B) (01/00), a poster the California Department of Fair Employment and Housing issues, which provides employees notice of their right to request CFRA leave under the California Family Rights Act. Employers whose work force at any facility or establishment contains 10% or more of persons who speak a language other than English as their primary language must translate this notice into the appropriate language(s).
<b>Where to Post:</b>	In a "conspicuous place or places where employees tend to congregate."
<b>When to Post:</b>	Permanently.
<b>Where to Find Copies:</b>	This poster can be downloaded from or ordered on the website of the California Department of Fair Employment and Housing at <a href="http://www.dfeh.ca.gov/DFEH/Publications/PublicationDocs/DFEH-100-21.pdf">http://www.dfeh.ca.gov/DFEH/Publications/PublicationDocs/DFEH-100-21.pdf</a> , or ordered by calling the DFEH Communication Center at (916) 227-0551 or (800) 884-1684. This notice is also included in the composite poster set published by the California Chamber of Commerce.
<b>Penalty for Failure to Post:</b>	The remedy for a failure to provide notice is an order that the employer provide the required notice. Willful failure to obey such an order is a misdemeanor, punishable by up to six months

in jail or a fine not exceeding \$1,000, or both. *See* Gov. Code § 12975.

**Citation to Posting Obligation:**

2 Cal. Code Reg. § 7297.9.

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*1-3 CA Guide to Employee Handbooks § 3.06*

**§ 3.06 SAN FRANCISCO PAID SICK LEAVE**

<b>Name of Statute:</b>	San Francisco Paid Sick Leave Ordinance.
<b>Title of Posting:</b>	San Francisco Paid Sick Leave.
<b>Who Must Post:</b>	All San Francisco employers.
<b>What to Post:</b>	San Francisco Paid Sick Leave Ordinance poster. The notice must be posted in English, Spanish, Chinese, and any language spoken by at least 5% of the employees at the workplace or job site.
<b>Where to Post:</b>	In a conspicuous location frequented by employees during the workday.
<b>When to Post:</b>	Permanently.
<b>Where to Find Copies:</b>	This poster can be downloaded from the website of the San Francisco Office of Labor Standards Enforcement: ht- <a href="http://www.sfgov.org/site/uploadedfiles/olse/SickLeaveOrdinance/2009_Paid_Sick_Leave_Poster.pdf">tp://www.sfgov.org/site/uploadedfiles/olse/SickLeaveOrdinance/2009_Paid_Sick_Leave_Poster.pdf</a> Forms also may be obtained from: Office of Labor Standards Enforcement City Hall, Room 430 1 Dr. Carlton B. Goodlett Place San Francisco, CA 94102
<b>Penalty for Failure to Post:</b>	There is no stated penalty for failure to post this notice.
<b>Citation to Posting Obligation:</b>	San Francisco Admin. Code Ch. 12W.5.

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*1-3 CA Guide to Employee Handbooks § 3.07*

**§ 3.07 PREGNANCY DISABILITY LEAVE**

<b>Name of Statute:</b>	California Fair Employment and Housing Act.
<b>Title of Posting:</b>	Pregnancy Disability Leave.
<b>Who Must Post:</b>	Generally, employers with 5 to 49 employees.
<b>What to Post:</b>	DFEH-100-20 ("Notice A") (01/00), a poster the California Department of Fair Employment and Housing issues, which provides employees notice of their right to request pregnancy disability leave, transfer or reasonable accommodation under the Fair Employment and Housing Act. Employers whose work force at any facility or establishment contains 10% or more of persons who speak a language other than English as their primary language must translate this notice into the appropriate language(s).
<b>Where to Post:</b>	In a "conspicuous place or places where employees tend to congregate."
<b>When to Post:</b>	Permanently.
<b>Where to Find Copies:</b>	This poster can be downloaded from or ordered on the website of the Department of Fair Employment & Housing at <a href="http://www.dfeh.ca.gov/DFEH/Publications/PublicationDocs/DFEH-100-20.pdf">http://www.dfeh.ca.gov/DFEH/Publications/PublicationDocs/DFEH-100-20.pdf</a> , or ordered by calling the DFEH Communication Center at (916) 227-0551 or (800) 884-1684. This notice is also included in the composite poster set published by the California Chamber of Commerce.
<b>Penalty for Failure to Post:</b>	The remedy for failure to provide notice is an order that the employer provide the required notice. Willful failure to obey such an order is a misdemeanor, punishable by up to six months in jail or a fine not exceeding \$1,000, or both. See Cal. Gov. Code § 12975.
<b>Citation to Posting Obligation:</b>	2 Cal. Code Reg. § 7291.16.

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*1-3 CA Guide to Employee Handbooks § 3.08*

**§ 3.08 TIME OFF TO VOTE**

<b>Name of Statute:</b>	California Elections Code.
<b>Title of Posting:</b>	Time Off to Vote.
<b>Who Must Post:</b>	All employers.
<b>What to Post:</b>	A notice setting forth the provisions of Election Code Section 14000, which mandates that employees who have insufficient time outside of working hours be given up to two hours of time off to vote in statewide elections. See the sample on the following page.
<b>Where to Post:</b>	Must be posted conspicuously at the place of work, if practicable, or otherwise where it can be seen as employees enter or exit their place of work.
<b>When to Post:</b>	Notice must be posted at least 10 days before each statewide election through election day.
<b>Where to Find Copies:</b>	This notice may be downloaded from the website of the California Secretary of State at <a href="http://www.sos.ca.gov/elections/tov_final.pdf">http://www.sos.ca.gov/elections/tov_final.pdf</a> , or ordered by calling the Elections Division at (916) 657-2166.
<b>Penalty for Failure to Post:</b>	Willfully neglecting to post the notice is a felony, punishable by a fine not exceeding \$1,000 and/or by imprisonment for 16 months, two years, or three years. <i>See</i> Cal. Elec. Code § 18002.
<b>Citation to Posting Obligation:</b>	Cal. Elec. Code § 14001.

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*1-3 CA Guide to Employee Handbooks § 3.09*

**§ 3.09 PAY DAY NOTICE**

<b>Name of Statute:</b>	California Wage and Hour Laws.
<b>Title of Posting:</b>	Pay Day Notice.
<b>Who Must Post:</b>	All employers.
<b>What to Post:</b>	A notice of the regular pay days for employees, and the time and place of payment.
<b>Where to Post:</b>	Must be posted conspicuously at the place of work, if practicable, or otherwise where it can be seen as employees enter or exit their places of work, or at the office or nearest agency for payment kept by the employer.
<b>When to Post:</b>	Permanently.
<b>Where to Find Copies:</b>	Employers may obtain a preprinted form (DLSE 8(Rev. 06-02)) from the Department of Industrial Relations:  Department of Industrial Relations 455 Golden Gate Avenue San Francisco, CA 94102 (415) 703-5070 (For a list of regional offices, see § 3.29)  The preprinted form (DLSE 8 (Rev. 06-02)) can be downloaded from or ordered on the website of the California Department of Industrial Relations, <a href="http://www.dir.ca.gov/dlse/PaydayNotice.pdf">http://www.dir.ca.gov/dlse/PaydayNotice.pdf</a> , or ordered by calling the DIR at (415) 703-5070. (For a list of regional offices, see § 3.29 of this Guide). The preprinted form is also included in the composite poster set published by the California Chamber of Commerce. Note that the statute requires employers to post the place of payment in addition to the days of payment, but the state's preprinted form has space only to specify pay days. While using the state's own form should not present legal problems, we

have revised the form slightly to include a space for the place of payment. See sample on the following page. Reprints of this sample are available from Paul, Hastings, Janofsky & Walker, LLP. See the listing of our offices in § 3.31 of this Guide.

**Penalty for Failure to Post:**

Failure to post the Pay Day Notice is *prima facie* evidence of a violation of Cal. Lab. Code §§ 201.3, 204, 204b, 205, 207, 208, 209, or 212, which relate to the payment of wages. See Cal. Lab. Code § 215. Failure to post the Payday Notice is also a misdemeanor, punishable by up to six months in jail or a fine not to exceed \$1,000, or both. An employer convicted of this violation may be required to post a bond in a sum to be determined by the Labor Commissioner. See Cal. Lab. Code § 240.

**Citation to Posting Obligation:**

Cal. Lab. Code § 207.

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*1-3 CA Guide to Employee Handbooks § 3.10*

**§ 3.10 WHISTLEBLOWERS ARE PROTECTED**

<b>Name of Statute:</b>	California Labor Code, relating to employee whistle-blowers.
<b>Title of Posting:</b>	Whistleblowers Are Protected.
<b>Who Must Post:</b>	All employers.
<b>What to Post:</b>	In lettering larger than size 14 pica type, a list of employees' rights and responsibilities under the whistleblower laws, including the telephone number of the California State Attorney General's Whistleblower Hotline: (800) 952-5225.
<b>Where to Post:</b>	In a prominent and accessible location in the workplace.
<b>When to Post:</b>	Permanently.
<b>Where to Find Copies:</b>	A poster can be downloaded from or ordered on the website of the California Department of Labor Standards Enforcement at <a href="http://www.dir.ca.gov/dlse/WhistleblowersNotice.pdf">http://www.dir.ca.gov/dlse/WhistleblowersNotice.pdf</a> . A poster is also included in the composite poster set published by the California Chamber of Commerce.
<b>Penalty for Failure to Post:</b>	Failure to post this notice is a misdemeanor punishable, in the case of an individual, by imprisonment in the county jail not to exceed one year, and/or a fine of not to exceed \$1000 and, in the case of a corporation, by a [Ligature fi]ne of not to exceed \$5000. <i>See</i> Cal. Lab. Code § 1103.
<b>Citation to Posting Obligation:</b>	Cal. Lab. Code § 1102.8.

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*1-3 CA Guide to Employee Handbooks § 3.11*

**§ 3.11 OFFICIAL NOTICE CALIFORNIA MINIMUM WAGE MW-2007**

<b>Name of Statute:</b>	California Wage and Hour Laws.
<b>Title of Posting:</b>	Official Notice California Minimum Wage MW-2007.
<b>Who Must Post:</b>	All Employers.  Note: Employers whose employees are fully covered by Wage Order 15-2001 (Household Occupations) need not post Wage Order MW-2007, but must keep a copy of the order and make it available to employees upon request.
<b>What to Post:</b>	Industrial Welfare Commission Wage Order MW-2001.
<b>Where to Post:</b>	Notice must be posted in a conspicuous place "in the building in which employees affected by the order are employed," next to any other applicable Industrial Welfare Commission Order.
<b>When to Post:</b>	Permanently.
<b>Where to Find Copies:</b>	This poster can be downloaded from the website of the California Department of Industrial Relations at <a href="http://www.dir.ca.gov/IWC/Minwage2007.pdf">http://www.dir.ca.gov/IWC/Minwage2007.pdf</a> , or ordered by calling the DIR at (415) 703-5070. (For list of regional offices, see § 3.29 of this Guide). This poster is also included in the composite poster set published by the California Chamber of Commerce.
<b>Penalty for Failure to Post:</b>	Failure to post this poster is a misdemeanor which is punishable by a fine of at least \$100 or by imprisonment for not less than 30 days, or both. Cal. Labor Code § 1199(c).
<b>Citation to Posting Obligation:</b>	Cal. Lab. Code § 1183; 8 Cal. Code Reg. § 11000.

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*1-3 CA Guide to Employee Handbooks § 3.12*

**§ 3.12 WAGES, HOURS, AND WORKING CONDITIONS [IN SPECIFIC INDUSTRIES AND OCCUPATIONS]**

**[1] Generally**

**Name of Statute:**

California Wage and Hour Laws.

**Title of Posting:**

Wages, Hours, and Working Conditions in Specific Industries and Occupations.

**NOTE ON WAGE ORDER POSTERS**

In addition to the minimum wage order applicable to all employers (see preceding page), the California Industrial Welfare Commission (the "IWC") has issued 17 wage orders governing wages, hours, and working conditions in specified industries and occupations.

Although the employers who must post each wage order vary according to the particular industry or occupation covered by each order, the following information pertains to every wage order.

**Where to Post:**

The applicable wage order must be posted "in an area frequented by employees where it may be easily read during the work day. Where the location of the work or other conditions make this impractical," the employer must keep a copy of the order "and make it available to every employee upon request."

**When to Post:**

Permanently.

**Where to Find Copies:**

Department of Industrial Relations  
455 Golden Gate Avenue  
San Francisco, California 94102  
(415) 703-5070

Copies of the most current wage orders also may be downloaded from the website of the California Division of Labor Standards

at <http://www.dir.ca.gov/Iwc/WageOrderIndustries.htm>. The copies of Wage Orders 1 through 17 in this book were obtained from the DLSE in March 2009.

- Penalty for Failure to Post:** Misdemeanor punishable by a fine of at least \$100 or by imprisonment for not less than 30 days, or both. Cal. Lab. Code § 1199(c).
- Citation to Posting Obligation:** Cal. Lab. Code § 1183, 8 Cal. Reg. §§ 11000-11538.

Order 1-2001 Manufacturing Industry

Order 2-2001 Personal Service Industry

Order 3-2001 Canning, Freezing, and Preserving Industry

Order 4-2001 Professional, Technical, Clerical, Mechanical, and Similar Occupations

Order 5-2001 Public Housekeeping Industry

Order 6-2001 Laundry, Linen Supply, Dry Cleaning, and Dyeing Industry

Order 7-2001 Mercantile Industry

Order 8-2001 Industries Handling Products After Harvest

Order 9-2001 Transportation Industry

Order 10-2001 Amusement and Recreation Industry

Order 11-2001 Broadcasting Industry

Order 12-2001 Motion Picture Industry

Order 13-2001 Industries Preparing Agricultural Products for the Market, On the Farm

Order 14-2001 Agricultural Occupations

Order 15-2001 Household Occupations

Order 16-2001 Certain On-Site Occupations in the Construction, Drilling, Logging, and Mining Industries

Order 17-2001 Miscellaneous Employees

**NOTE REGARDING THE WAGE ORDERS:** As of September 2009, wage orders that contain changes effective after January 1, 2007, were not available on the website of the Industrial Welfare Commission (<http://www.dir.ca.gov/IWC/WageOrderIndustries.htm>).

See *Cal. Lab. Code § 515.5*, as amended **effective September 30, 2008**. **Note that these changes are not reflected in the wage orders in this book.** California Labor Code § 515.5

Exemption for computer software employee; Exceptions

(a) Except as provided in subdivision (b), an employee in the computer software field shall be exempt from the requirement that an overtime rate of compensation be paid pursuant to Section 510 if all of the following apply:

(1) The employee is primarily engaged in work that is intellectual or creative and that requires the exercise of discretion and independent judgment.

(2) The employee is primarily engaged in duties that consist of one or more of the following:

(A) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications.

(B) 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.

(C) The documentation, testing, creation, or modification of computer programs related to the design of software or hardware for computer operating systems.

(3) The employee is highly skilled and is proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, or software engineering. A job title shall not be determinative of the applicability of this exemption.

(4) The employee's hourly rate of pay is not less than thirty-six dollars (\$36.00) or, if the employee is paid on a salaried basis, the employee earns an annual salary of not less than seventy-five thousand dollars (\$75,000) for full-time employment, which is paid at least once a month and in a monthly amount of not less than six thousand two hundred fifty dollars (\$6,250). **The Division of Labor Statistics and Research shall adjust both the hourly pay rate and the salary level described in this paragraph on October 1 of each year to be effective on January 1 of the following year by an amount equal to the percentage increase in the California Consumer Price Index for Urban Wage Earners and Clerical Workers.**

(b) The exemption provided in subdivision (a) does not apply to an employee if any of the following apply:

(1) The employee is a trainee or employee in an entry-level position who is learning to become proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering.

(2) The employee is in a computer-related occupation but has not attained the level of skill and expertise necessary to work independently and without close supervision.

(3) The employee is engaged in the operation of computers or in the manufacture, repair, or maintenance of computer hardware and related equipment.

(4) The employee is 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 engaged in computer systems analysis, programming, or any other similarly skilled computer-related occupation.

(5) The employee is 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.

(6) The employee is engaged in any of the activities set forth in subdivision (a) for the purpose of creating imagery for effects used in the motion picture, television, or theatrical industry.

**NOTE:** See the Department of Industrial Relations Memorandum dated November 3, 2009, stating that the 2010 minimum pay exemption rates, which are the same as the 2009 rates, are as follows: hourly, \$37.94; monthly, \$6,587.50, and yearly, \$79,05.00. This memorandum is available at <http://www.dir.ca.gov/dlsr/ComputerSoftware.pdf>.

**[2] Manufacturing Industry (Wage Order No. 1)**

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**[3] Personal Service Industry (Wage Order No. 2)**

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**[4] Canning, Freezing, and Preserving Industry (Wage Order No. 3)**

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**[5] Professional, Technical, Clerical, Mechanical, and Similar Occupations (Wage Order No. 4)**

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**[6] Public Housekeeping Industry (Wage Order No. 5)**

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**[7] Laundry, Linen Supply, Dry Cleaning, and Dyeing Industry (Wage Order No. 6)**

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**[8] Mercantile Industry (Wage Order No. 7)**

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**[9] Industries Handling Products After Harvest (Wage Order No. 8)**

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**[10] Transportation Industry (Wage Order No. 9)**

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**[11] Amusement and Recreation Industry (Wage Order No. 10)**

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**[12] Broadcasting Industry (Wage Order No. 11)**

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**[13] Motion Picture Industry (Wage Order No. 12)**

[Click here to view image.](#)

**[14] Industries Preparing Agricultural Products for Market, on the Farm (Wage Order No. 13)**

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**[15] Agricultural Occupations (Wage Order No. 14)**

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**[16] Household Occupations (Wage Order No. 15)**

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**[17] Certain On-Site Occupations In The Construction, Drilling, Logging and Mining Industries (Wage Order No. 16)**

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**[18] Miscellaneous Employees (Wage Order No. 17)**

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DIVISION 3 POSTING OBLIGATIONS  
Part B. STATE OF CALIFORNIA POSTERS

*1-3 CA Guide to Employee Handbooks § 3.13*

**§ 3.13 SAN FRANCISCO MINIMUM WAGE**

<b>Name of Statute:</b>	San Francisco Minimum Wage Order.
<b>Title of Posting:</b>	San Francisco Minimum Wage.
<b>Who Must Post:</b>	All San Francisco employers.
<b>What to Post:</b>	San Francisco Minimum Wage Ordinance poster. The notice must be posted in English, Spanish, Chinese, and any language spoken by at least 5% of the employees at the workplace or job site.
<b>Where to Post:</b>	In a conspicuous location frequented by employees during the workday.
<b>When to Post:</b>	Permanently.
<b>Where to Find Copies:</b>	This poster can be downloaded from the website of the San Francisco Office of Labor Standards Enforcement: <a href="http://www.sfgov.org/site/olse_index.asp?id=27605">http://www.sfgov.org/site/olse_index.asp?id=27605</a> Forms also may be obtained from: Office of Labor Standards Enforcement City Hall, Room 430 1 Dr Carlton B. Goodlett Place San Francisco, CA 94102
<b>Penalty for Failure to Post:</b>	There is no stated penalty for failure to post this notice.
<b>Citation to Posting Obligation:</b>	San Francisco Admin. Code Ch. 12R.5

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DIVISION 3 POSTING OBLIGATIONS  
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*1-3 CA Guide to Employee Handbooks § 3.14*

**§ 3.14 SAFETY AND HEALTH PROTECTION ON THE JOB**

<b>Name of Statute:</b>	California Occupational Safety and Health Act of 1973.
<b>Title of Posting:</b>	Safety and Health Protection on the Job.
<b>Who Must Post:</b>	All employers.
<b>What to Post:</b>	Safety and Health Protection on the Job (February 2006) poster prepared by Division of Occupational Safety & Health with information regarding safety rules and regulations and giving notice of employee protections and obligations. The poster must also provide the address and telephone number of the nearest division office.
<b>Where to Post:</b>	At least one poster must be posted in each "establishment" in a conspicuous place where notices to employees are customarily posted. "Establishment" means a single physical location where business is conducted or where services or industrial operations are performed. If employees are engaged in activities that are physically dispersed, such as construction or transportation, the notice must be posted at each location to which employees report each day. If employees do not usually work at, or report to, a single establishment, the notice or notices must be posted at the location or locations from which the employees operate to carry out their activities.
<b>When to Post:</b>	Permanently.
<b>Where to Find Copies:</b>	The poster can be downloaded from or ordered on the website of the California Division of Occupational Safety & Health at <a href="http://www.dir.ca.gov/dosh/dosh_publications/shpstreng012000.pdf">http://www.dir.ca.gov/dosh/dosh_publications/shpstreng012000.pdf</a>
<b>Penalty for Failure to Post:</b>	Failure to display this poster may result in a civil penalty up to \$7,000 for each violation. <i>See</i> Cal. Lab. Code § 6431; 8 Cal. Code Reg. § 340.

**Citation to Posting Obligation:** Cal. Lab. Code §§ 6328; 8 Cal. Code Reg. § 340.

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*1-3 CA Guide to Employee Handbooks § 3.15*

**§ 3.15 ANNUAL SUMMARY OF INJURIES AND ILLNESSES**

<b>Name of Statute:</b>	California Occupational Safety and Health Act of 1973.
<b>Title of Posting:</b>	Annual Summary of Injuries and Illnesses.
<b>Who Must Post:</b>	Employers with 11 or more employees in the previous calendar year, except those employers in certain low-hazard establishments in the retail, services, finance, and real estate and other sectors. If a company has several establishments engaged in different classes of activities, some of the company's establishments may be required to post the summary, while others may be exempt.
<b>What To Post:</b>	Cal/OSHA Form 300A (Rev. 4/04), an annual summary of work-related injuries and illnesses for the previous calendar year. See the sample on the following page. Alternatively, Fed/OSHA Form 200 may be used. Employers with no injuries or illnesses in the previous year should post the form 300A with zeroes on the totals line. Multi-establishment employers who have closed down operations in some establishments during the calendar year need not post summaries for closed establishments. Employers must ensure that the Form 300A is not altered, defaced, or covered by other material.
<b>Where To Post:</b>	The form must be displayed in a conspicuous place or places and where notices to employees are customarily posted. Additionally, the form must be mailed or provided to any employees who normally do not report at least weekly to a location where the annual summary for their workplace is located.
<b>When To Post:</b>	The annual summary covering the previous calendar year must be posted from February 1st to April 30th of the year following the year covered by the summary.
<b>Where to Find Copies:</b>	The forms can be downloaded from ht-

[tp://www.dir.ca.gov/dosh/dosh\\_publications/oshalog300A.pdf](http://www.dir.ca.gov/dosh/dosh_publications/oshalog300A.pdf)  
or ordered on the website of the California Division of Occupational Safety and Health at <http://www.dir.ca.gov/puborder.asp>.

**Penalty for Failure to Post:**

Failure to post this form may result in a civil penalty of up to \$7,000 for each violation. *See* Cal. Lab. Code § 6431.

**Citation to Posting Obligation:**

8 Cal. Code Reg. §§ 14300, 14300.1, 14300.2, 14300.29, 14300.32, 14300.29(b)(4).

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*1-3 CA Guide to Employee Handbooks § 3.16*

**§ 3.16 OCCUPATIONAL EXPOSURE NOTICE FOR TOBACCO SMOKE**

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*1-3 CA Guide to Employee Handbooks § 3.17*

**§ 3.17 PROHIBITION OF SMOKING IN THE WORKPLACE NOTICE**

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DIVISION 3 POSTING OBLIGATIONS

Part C. FEDERAL POSTERS

*1-3 CA Guide to Employee Handbooks § 3.18*

**§ 3.18 EQUAL EMPLOYMENT OPPORTUNITY IS THE LAW**

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DIVISION 3 POSTING OBLIGATIONS

Part C. FEDERAL POSTERS

*1-3 CA Guide to Employee Handbooks § 3.19*

**§ 3.19 AFFIRMATIVE ACTION NOTICES OF FEDERAL CONTRACTORS**

**Name of Statute:**

Section 503 of the Rehabilitation Act of 1973 ("Rehabilitation Act"); Executive Order No. 11246; Vietnam Era Veterans Readjustment Assistance Act of 1974 ("VEVRAA"); and Jobs for Veterans Act of 2002 ("JVA"), which amends certain provisions of the VEVRAA to expand covered veterans beyond those serving in the Vietnam era.

**Title of Posting:**

Equal Employment Opportunity for Disabled Veterans, Recently Separated Veterans and other Protected Veterans, and for Workers with Disabilities--Invitation to Self-Identify.

**Who Must Post:**

**Rehabilitation Act of 1973.** Contractors with contracts of \$10,000 or more with any department or agency of the United States for the purchase, sale, or use of personal property or non-personal services (including construction) must post the notice of obligations and rights. The remaining posting obligations only apply to contractors and subcontractors with contracts of \$50,000 or more and having 50 or more employees. VEVRAA, as amended by JVA. Contractors and subcontractors with contracts of \$100,000 or more. Contractors and subcontractors with contracts of \$25,000 or more entered into before December 1, 2003, must still comply with the posting obligations provided under VEVRAA.

**What to Post:**

A notice to employees and applicants of the contractor's obligations to take affirmative action and the rights of applicants and employees. A notice specifying the location and hours during which the contractor's full AAP may be obtained for inspection by employees and applicants. A notice inviting applicants and employees to self-identify. After making an offer of employment to a job applicant and before the applicant begins his or her employment duties, the contractor must invite applicants to in-

form the contractor whether the applicant believes that he or she may be covered by the Rehabilitation Act and/or by VEVRAA, and wishes to benefit under the affirmative action program. The contractor's policy on equal employment contained in its AAP.

**\*Note:** All of these items may be included in a single notice.

**\*Note:** When an invitation to self-identify is extended prior to an offer of employment, as permitted under limited circumstances, the bracketed language of the sample poster, relating to identification of reasonable accommodations, should be omitted to avoid any potential conflict with the EEOC's Americans With Disabilities Act Guidance, which generally precludes pre-offer inquiries regarding potential reasonable accommodations.

**Where to Post:**

The notices must be posted in "conspicuous places, available to employees and applicants for employment" at "each establishment" or "each facility." The contractor's policy on equal employment should be posted on company bulletin boards. The contractor must ensure that applicants or employees who are special disabled veterans or with disabilities are informed of the contents of the notices (*e.g.*, the contractor may have the notice read to a visually disabled individual, or may lower the posted notice so that it might be read by a person in a wheelchair).

**When to Post:**

Permanently.

**Where to Find Copies:**

The contracting agency or officer will provide the notice of the contractor's obligations to take affirmative action and the rights of applicants and employees. Contractors must prepare their own invitations to self-identify, which also should specify the location and hours during which the employer's AAP may be obtained for inspection by employees and applicants. The regulations provide an acceptable form for such an invitation at 41 C.F.R. § 60-250, Appendix B (VEVRAA); 41 C.F.R. § 60-300, Appendix B (VEVRAA, as amended by JVP) and 41 C.F.R. § 60-741, Appendix B (Rehabilitation Act). Please note that employers using a version of the sample notices provided by the regulations should insert the location and hours during which the contractor's full APP may be obtained for inspection by employees and applicants. When an invitation to self-identify is extended prior to an offer of employment, as permitted under limited circumstances, the sample invitations contain instructions for modification to be made if it is used at the pre-offer stage. For the sample invitation provided here, the bracketed language relating to identification of reasonable accommodations should be omitted if used at the pre-offer stage.

Contractors must prepare their own AAP, which includes their policy on equal employment.

**Penalty for Failure to Post:**

No specified penalties for failure to post. However, sanctions and penalties for violations generally can include withholding progress payments, termination of the contract, or disbarment from receiving future contracts. *See* 41 C.F.R. §§ 60-250.66,

**Citation to Posting Obligation:** 60-300.66, 60-741.66; Exec. Order No. 11246 §§ 209-212.  
VEVRAA: 38 U.S.C. § 4212(a); 41 C.F.R. §§ 60250.1(b),  
60-250.5(a)(9), 60-250.40(a), 60-250.41, 60250.44(a),  
60-250.42, 60-300.5(a)(9), 60-300.42.  
Rehabilitation Act: 29 U.S.C. § 793; 41 C.F.R. §§ 60741.1(b),  
60-741.40(a), 60-741.5(a)(4), 60-741.41, 60741.42,  
60-741.44(a), 60-741.44.  
Executive Order No. 11246: Exec. Order No. 11246 § 202.

**EQUAL EMPLOYMENT OPPORTUNITY FOR  
DISABLED VETERANS AND VETERANS OF THE VIETNAM ERA  
AND FOR WORKERS WITH DISABILITIES**

**Invitation to Self-Identify**

**[For appropriate text, see the following:**

***41 C.F.R. Part 60-250, Appendix B;***

***41 C.F.R. Part 60-300, Appendix B; or***

***41 C.F.R. Part 60-741, Appendix B]***



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DIVISION 3 POSTING OBLIGATIONS

Part C. FEDERAL POSTERS

*1-3 CA Guide to Employee Handbooks § 3.20*

**§ 3.20 EMPLOYEE RIGHTS AND RESPONSIBILITIES UNDER THE FAMILY AND MEDICAL LEAVE ACT**

<b>Name of Statute:</b>	Family and Medical Leave Act of 1993 (FMLA).
<b>Title of Posting:</b>	Employee Rights and Responsibilities Under the Family and Medical Leave Act.
<b>Who Must Post:</b>	Public agencies (including state, local, and federal employers), public and private elementary and secondary schools, employers covered by the FMLA (in general those with 50 or more employees and who are engaged in commerce or any industry or activity affecting commerce), and joint employers or successors of covered entities. The notice must be posted whether or not the employers have employees eligible for FMLA leave.
<b>What to Post:</b>	WH Publication No. 1420 (Rev. 1/2009) is a notice explaining the provisions of the FMLA, providing information about the procedures for filing complaints, and providing additional information regarding the newly enacted expansion of FMLA leave rights. Where an employer's workforce is comprised of a significant portion of workers who cannot read English, the employer must provide the required information to such workers in a language they can read.
<b>Where to Post:</b>	In conspicuous places on the premises of the employer where notices to employees and applicants for employment are customarily posted, where it can be readily seen by employees and applicants for employment.
<b>When to Post:</b>	Permanently.
<b>Where to Find Copies:</b>	The posters can be downloaded from or ordered on the website of the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division at ht-

[tp://www.dol.gov/esa/whd/regs/compliance/posters/fmlaen.pdf](http://www.dol.gov/esa/whd/regs/compliance/posters/fmlaen.pdf).

Copies also can be obtained from the local offices of the Wage and Hour Division of the U.S. Department of Labor, Employment Standards Administration (for a list of local offices, see § 3.30 of this Guide). This poster also is included in the composite poster set published by the California Chamber of Commerce.

**Penalty for Failure to Post:**

A willful violation of the posting requirement may result in a civil penalty not to exceed \$100 for each separate offense. In addition, an employer who fails to post the required notice may not take any adverse action against an employee, including denying FMLA leave, who fails to give the employer advance notice of his or her need to take FMLA leave.

**Citation to Posting Obligation:**

*29 U.S.C. § 2619; 29 C.F.R. § 825.300.*

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DIVISION 3 POSTING OBLIGATIONS  
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*1-3 CA Guide to Employee Handbooks § 3.21*

**§ 3.21 EMPLOYEE RIGHTS UNDER THE FAIR LABOR STANDARDS ACT FEDERAL MINIMUM WAGE**

<b>Name of Statute:</b>	Fair Labor Standards Act (FLSA).
<b>Title of Posting:</b>	Employee Rights Under the Fair Labor Standards Act--Federal Minimum Wage.
<b>Who Must Post:</b>	Private employers engaged in or producing goods for interstate commerce and public employers.
<b>What to Post:</b>	WH Publication No. 1088, (Rev 6/2007) giving notice of federal minimum wages, overtime pay provision, and child labor laws. See the sample on the following page.
<b>Where to Post:</b>	In conspicuous places in every establishment where employees subject to the minimum wage are employed so as to permit them to observe readily a copy of the poster.
<b>When to Post:</b>	Permanently.
<b>Where to Find Copies:</b>	This poster can be downloaded from or ordered on the website of the U.S. Department of Labor at <a href="https://www.dol.gov/esa/whd/regs/compliance/posters/minwagebw.pdf">https://www.dol.gov/esa/whd/regs/compliance/posters/minwagebw.pdf</a> . Copies also can be obtained from the local offices of the Wage and Hour Division of the U.S. Department of Labor, Employment Standards Administration (for a list of local offices, see § 3.30 of this Guide). This poster is also included in the composite poster set published by the California Chamber of Commerce.
<b>Penalty for Failure to Post:</b>	No stated penalty, but failure to post may extend statutory period for filing claims under the FLSA.
<b>Citation to Posting Obligation:</b>	29 C.F.R. § 516.4.

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*1-3 CA Guide to Employee Handbooks § 3.22*

**§ 3.22 EMPLOYEE POLYGRAPH PROTECTION NOTICE**

<b>Name of Statute:</b>	Employee Polygraph Protection Act.
<b>Title of Posting:</b>	Notice: Employee Polygraph Protection Act.
<b>Who Must Post:</b>	Private employers engaged in or affecting interstate commerce or in the production of goods for interstate commerce.
<b>What to Post:</b>	WH Publication 1462, a notice advising employees of their rights under the Employee Polygraph Protection Act, <i>29 U.S.C. § 2001</i> et seq. See the sample on the following page.
<b>Where to Post:</b>	In a prominent and conspicuous place in every establishment of the employer where the poster can readily be observed by employees and applicants for employment and where notices to employees and applicants for employment are customarily posted.
<b>When to Post:</b>	Permanently.
<b>Where to Find Copies:</b>	This poster can be downloaded from or ordered on the website of the U.S. Department of Labor at <a href="http://www.dol.gov/esa/ofccp/regs/compliance/posters/pdf/eppabw.pdf">http://www.dol.gov/esa/ofccp/regs/compliance/posters/pdf/eppabw.pdf</a> . Copies also can be obtained from the local offices of the Wage and Hour Division of the U.S. Department of Labor, Employment Standards Administration (for a list of local offices, see § 3.30 of this Guide). This poster is also included in the composite poster set published by the California Chamber of Commerce.
<b>Penalty for Failure to Post:</b>	Civil penalty of up to \$10,000 for each violation. The Secretary of Labor can bring court actions and assess civil penalties for failing to post.
<b>Citation to Posting Obligation:</b>	<i>29 U.S.C. § 2003</i> ; <i>29 C.F.R. § 801.6</i> .

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*1-3 CA Guide to Employee Handbooks § 3.23*

**§ 3.23 EMPLOYEE RIGHTS ON GOVERNMENT CONTRACTS**

<b>Name of Statutes:</b>	McNamara-O'Hara Service Contract Act ("Service Contract Act"); Walsh-Healey Public Contracts Act ("Walsh-Healey Act").
<b>Title of Posting:</b>	Employee Rights on Government Contracts.
<b>Who Must Post:</b>	Under the Service Contract Act, employers with contracts with the United States in excess of \$2,500 the principle purpose of which is to furnish services through the use of service employees. Under the Walsh-Healey Act, employers with contracts in excess of \$10,000 with an agency or instrumentality of the United States, or with any corporation beneficially owned by the United States, for the manufacturing or furnishing of materials, supplies, articles, or equipment.
<b>What to Post:</b>	WH Publication 1313 (Rev. January 2007), describing employee rights regarding minimum wages, fringe benefits, overtime pay, and safety and health.  *Note: A contractor or subcontractor [subject to the Service Contract Act, in addition to posting this notice,] is required to notify each employee of the compensation due or attach to the poster any applicable wage determination specified in the contract listing all minimum monetary wages and fringe benefits to be paid or furnished to the classes of service employees performing on the contract. 29 C.F.R. § 4.184.
<b>Where to Post:</b>	In a prominent and readily accessible place at the site of the contract work. If the work is performed at more than one site, the employer should display the poster at each site in order to assure that it is seen by all employees. See 29 C.F.R. § 4.184.
<b>When to Post:</b>	Permanently.
<b>Where to Find Copies:</b>	This notice can be downloaded from the website of the U.S. De-

partment of Labor, Employment Standards Administration, Wage and Hour Division at <http://www.dol.gov/esa/whd/regs/compliance/posters/govbw.pdf> or ordered by contacting the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division. (For a list of local offices, see § 3.30 of this Guide.)

**Penalty for Failure to Post:**

No specified citations or penalties for failure to post. However, the employer's federal contract may be canceled.

**Citation to Posting Obligation:**

Service Contract Act: *41 U.S.C. § 351(a)(4)*; 41 C.F.R. § 50-201.3; 29 C.F.R. §§ 4.6(e), 4.184. Walsh-Healey Act: 41 C.F.R. § 50-201.3(f). Information on prevailing wage rates can be downloaded from the website of the U.S. Department of Labor at <http://www.dol.gov/esa/whd/contracts/dbra.htm>.

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*1-3 CA Guide to Employee Handbooks § 3.24*

**§ 3.24 NOTICE TO ALL EMPLOYEES WORKING ON FEDERAL OR FEDERALLY FINANCED CONSTRUCTION PROJECTS**

<b>Name of Statute:</b>	Davis-Bacon Act.
<b>Title of Posting:</b>	Notice to All Employees Working on Federal or Federally Financed Construction Projects.
<b>Who Must Post:</b>	Employers with contracts over \$2,000 for the financed construction, alteration or repair (including painting or decorating) of public buildings or public works of the United States.
<b>What to Post:</b>	WH Publication 1321 (Rev.1/1986), summarizing wage provisions of the Davis-Bacon Act, and a copy of the applicable prevailing wage rates determined by the Secretary of Labor.
<b>Where to Post:</b>	In a prominent and easily accessible place at the work site where the notice can be easily seen by the workers.
<b>When to Post:</b>	At all times for the duration of the contract.
<b>Where to Find Copies:</b>	This notice can be downloaded from the website of the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division at <a href="http://www.dol.gov/esa/whd/regs/compliance/posters/fedprojc.pdf">http://www.dol.gov/esa/whd/regs/compliance/posters/fedprojc.pdf</a> or ordered by contacting the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division. (For a list of local offices, see § 3.30 of this Guide.)
<b>Penalty for Failure to Post:</b>	The contracting federal agency may suspend the payment, advance or guarantee of funds until compliance with the posting requirement is achieved.
<b>Citation to Posting Obligation:</b>	<i>40 U.S.C. § 3142(a); 29 C.F.R. § 5.5(a)(1)(i).</i>

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Part C. FEDERAL POSTERS

*1-3 CA Guide to Employee Handbooks § 3.25*

**§ 3.25 YOUR RIGHTS UNDER USERRA**

<b>Name of Statute:</b>	Uniformed Services Employment and Reemployment Act ("USERRA").
<b>Title of Posting:</b>	Your Rights Under USERRA.
<b>Who Must Post:</b>	All employers.
<b>What to Post:</b>	Your Rights Under USERRA, which provides notice of the rights, benefits, and obligations of employers and employees under USERRA.
<b>Where to Post:</b>	Where employee notices are customarily placed. Employers are free to provide the notice to employees in other ways that will minimize costs while ensuring that the full text of the notice is provided (e.g., by handing or mailing out the notice, or distributing the notice via electronic mail).
<b>When to Post:</b>	Permanently.
<b>Where to Find Copies:</b>	This poster can be downloaded from the website of the Veterans' Employment and Training Service of the United States Department of Labor at <a href="http://www.dol.gov/vets/programs/userra/USERRA_Poster.pdf">http://www.dol.gov/vets/programs/userra/USERRA_Poster.pdf</a> (Rev. January 2006). This poster is also included in the composite poster set published by the California Chamber of Commerce.
<b>Penalty for Failure to Post:</b>	There is no statutory penalty for failing to post this notice. An individual could ask the U.S. Department of Labor to investigate and seek compliance, or file a private enforcement action to require the employer to provide the notice to employees.
<b>Citation to Posting Obligation:</b>	<i>38 U.S.C § 4334</i> ; Interim Final Rule, effective January 18, 2006 at 20 C.F.R. Part 1002; 41 C.F.R. Part 60-300.

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DIVISION 3 POSTING OBLIGATIONS

Part C. FEDERAL POSTERS

*1-3 CA Guide to Employee Handbooks § 3.26*

**§ 3.26 NOTIFICATION OF EMPLOYEE RIGHTS UNDER FEDERAL LABOR LAWS**

<b>Name of Statute:</b>	Executive Order 13496.
<b>Title of Posting:</b>	Notification of Employee Rights under Federal Labor Laws.
<b>Who Must Post:</b>	Federal contractors.
<b>What to Post:</b>	Federal contractors must post a notice advising employees of their rights to organize under the National Labor Relations Act. The specific content has not yet been proscribed, but the Department of Labor is expected to promulgate rules and regulations about the specific requirements.
<b>Where to Post:</b>	In a conspicuous place.
<b>When to Post:</b>	Not yet determined.
<b>Where to Find Copies:</b>	Not yet available.
<b>Penalty for Failure to Post:</b>	Not yet determined.
<b>Citation to Posting Obligation:</b>	Executive Order 13496.



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DIVISION 3 POSTING OBLIGATIONS

Part D. MISCELLANEOUS

*1-3 CA Guide to Employee Handbooks § 3.27*

**§ 3.27 EMERGENCY PHONE NUMBERS**

<b>Name Of Regulation:</b>	California Department of Industrial Relations, General Industry Safety Orders and Construction Safety Orders.
<b>Title of Posting:</b>	Emergency Phone Numbers.
<b>Who Must Post:</b>	All employers.
<b>What to Post:</b>	Emergency poster (S-500 March 1990) with the telephone numbers of a physician and at least one alternate if available; hospital; ambulance services; and fire-protection services.
<b>Where to Post:</b>	Near the job telephone, telephone switchboard, or otherwise made available to the employees where no job site telephone exists.
<b>When to Post:</b>	Permanently.
<b>Where to Find Copies:</b>	When the method chosen by the employer for reporting emergencies is by telephone, the emergency telephone numbers "shall be conspicuously posted nearby." 8 Cal. Code Reg. § 6184(5).  This poster can be downloaded from or ordered on the website of the California Department of Industrial Relations at <a href="http://www.dir.ca.gov/dosh/dosh_publications/s500pstr.pdf">http://www.dir.ca.gov/dosh/dosh_publications/s500pstr.pdf</a> or by calling the Department of Industrial Relations at (415) 703-5070. (For a list of regional offices, see § 3.29 of this Guide.) The poster is also included in the composite poster set published by the California Chamber of Commerce.
<b>Penalty for Failure to Post:</b>	None specified.
<b>Citation to Posting Obligation:</b>	8 Cal. Code Reg. §§ 1512(e), 6184.

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DIVISION 3 POSTING OBLIGATIONS

Part D. MISCELLANEOUS

*1-3 CA Guide to Employee Handbooks § 3.28*

**§ 3.28 EXIT SIGN**

<b>Name of Statute:</b>	California Department of Industrial Relations, General Industry Safety Orders.
<b>Title of Posting:</b>	Exit Sign.
<b>Who Must Post:</b>	All employers.
<b>What to Post:</b>	Exit and direction signs with block letters at least six inches in height with a stroke of not less than 3/4 inch. (Existing signs may have the word "EXIT" in lettering at least of 5 inches with strokes of at least 1/2 inch wide.) The letters must strongly contrast with the background of the sign. Arrows or other directional symbols must be equally visible as these letters. The luminance on the face of the sign must be at least 50 lux. Where the sign depends for its luminance on electric illumination, it must be lighted with two electrical lamps, either one of which must be sufficient alone to provide the required luminance on the face of the sign.
<b>Where to Post:</b>	At "every exit door, at the intersection of corridors, at exit stairways or ramps and at such other locations and intervals as are necessary to provide the occupants with knowledge of the various means of egress available." Signs need not be posted, however, in any room or building with an occupant load of 50 or less or at main exterior doors which are obviously identifiable as exits.
<b>When to Post:</b>	Permanently.
<b>Where to Find Copies:</b>	Commercial sign companies, office supply companies, building suppliers.
<b>Penalty for Failure to Post:</b>	Cal/OSHA citation.
<b>Citation to Posting Obligation:</b>	8 Cal. Code Reg. § 3216.

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DIVISION 3 POSTING OBLIGATIONS  
Part D. MISCELLANEOUS

*1-3 CA Guide to Employee Handbooks § 3.29*

**§ 3.29 CALIFORNIA STATE AGENCIES**

**THE STATE OF CALIFORNIA DEPARTMENT OF FAIR EMPLOYMENT  
AND HOUSING HEADQUARTERS**

2218 Kausen Drive, Suite 100  
Elk Grove, CA 95758-7115  
(800) 884-1684  
(916) 227-0551  
[www.dfeh.ca.gov](http://www.dfeh.ca.gov)

**BAKERSFIELD**

4800 Stockdale Hwy, Suite 215  
Bakersfield, CA 93309  
(661) 395-2729

**LOS ANGELES**

611 West 6th Street, Suite 1500  
Los Angeles, CA 90017  
(213) 439-6799

**SACRAMENTO**

2000 O Street, Suite 120  
Sacramento, CA 95814  
(916) 445-5523

**SAN DIEGO**

1350 Front St., Suite 3005  
San Diego, CA 92101  
(619) 645-2681

**SAN JOSE**

2570 North First Street, Suite 480  
San Jose, CA 95131-1102

**FRESNO**

1320 E. Shaw Avenue, Suite 150  
Fresno, CA 93710  
(559) 244-4760

**OAKLAND**

1515 Clay St., Suite 701  
Oakland, CA 94612  
(510) 622-2941

**SAN FRANCISCO**

1515 Clay St., Suite 701  
Oakland, CA 94612  
(510) 622-2973

**SANTA ANA**

2101 East 4th Street, Suite 255-B  
Santa Ana, CA 92705  
(714) 558-4266

(408) 325-0344

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DIVISION 3 POSTING OBLIGATIONS

Part D. MISCELLANEOUS

*1-3 CA Guide to Employee Handbooks § 3.30*

**§ 3.30 FEDERAL AGENCIES**

**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

**COMMISSION HEADQUARTERS**

1801 L Street N.W.

Washington, D.C. 20507

(202) 663-4900

[www.eeoc.gov](http://www.eeoc.gov)

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(800) 669-3362

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**Part D. MISCELLANEOUS**

*1-3 CA Guide to Employee Handbooks § 3.31*

**§ 3.31 PAUL, HASTINGS, JANOFSKY & WALKER OFFICES**

**California**

**Los Angeles**

515 S. Flower Street  
Los Angeles, CA 90071  
Telephone: +1 213 683 6000  
Facsimile: +1 213 627 0705

**Palo Alto**

1117 S. California Avenue  
Palo Alto, California 94304  
Telephone: +1 650 320 1800  
Facsimile : +1 650 320 1900

**San Francisco**

55 Second Street, 24th Floor  
San Francisco, CA 94105 3441  
Telephone: +1 415 856 7000  
Facsimile: +1 415 856 7100

**Orange County**

695 Town Center Drive  
Costa Mesa, CA 92626  
Telephone: +1 714 668 6200  
Facsimile: +1 714 979 1921

**San Diego**

4747 Executive Dr.  
San Diego, CA 92121  
Telephone: +1 858 458 3000  
Facsimile: +1 858 720 3005