



1 of 9 DOCUMENTS

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2 of 9 DOCUMENTS

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3 of 9 DOCUMENTS

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4 of 9 DOCUMENTS

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5 of 9 DOCUMENTS

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6 of 9 DOCUMENTS

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7 of 9 DOCUMENTS

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Chapter 34D, Ground Leases
Chapter 34E, Shopping Centers: Leasing and Operation
Chapter 35A, Assignment and Sublease of Leasehold Interests
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8 of 9 DOCUMENTS

California Legal Forms--Transaction Guide

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INDEX

1 California Legal Forms--Transaction Guide Index

Index

1 California Legal Forms--Transaction Guide Index Index



9 of 9 DOCUMENTS

California Legal Forms--Transaction Guide

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What's New

1 California Legal Forms--Transaction Guide Scope

Scope

HIGHLIGHTS

Release 132 April 2010

Credit Card and Other Open-End Credit Transactions:

New Credit Card Rules. Chapter 46, Credit Card and Other Open-End Credit Transactions, has been updated with discussion of the Credit Card Accountability Responsibility and Disclosure Act of 2009. The Act primarily amends the Truth in Lending Act, Section 127 (15 U.S.C. § 1637) and establishes new substantive and disclosure requirements intended to eliminate many predatory practices in the credit industry pertaining to open-end consumer credit plans. *See* Chapter 46, Credit Card and Other Open-End Credit Transactions, §§ 46.35--46.38.

Service Contracts:

Debt Collection Practices -- Litigation Privilege Cannot Shield Violations of Rosenthal Fair Debt Collection Practices Act. In *Komarova v. National Credit Acceptance, Inc.* (2009) 175 Cal. App. 4th 324, the court addressed an issue not previously discussed in any reported California state court case, but addressed by a number of federal district courts, and concluded, in accord with a majority of the federal courts, that the litigation privilege [*see* Civ. Code § 47 (communications in judicial proceedings are privileged)] cannot be used to shield violations of the Rosenthal Fair Debt Collection Practices Act [Civ. Code § 1788 et seq.]. For discussion of the practices that are prohibited by the act, some of which were implicated in that case, *see* Chapter 92, Service Contracts, § 92.83[2][d] and [e].

Foreign Corporations and Associations:

Franchise Taxes -- Definition of "Doing Business." Corp. Code § 23101 has been amended [Stats. 2009, ch. 17 X3, § 7] to provide new criteria under which a taxpayer is considered to be "doing business" in California for taxable years beginning on or after January 1, 2011. *See* Chapter 12B, Foreign Corporations and Associations, § 12B.31[1].

This release of California Legal Forms contains numerous text revisions and updates. Highlights of this release include the following:

Commercial Transactions

Automatic Purchase Renewals and Continuous Service Offers. Chapter 50, Advertising and Promotion, includes coverage of Bus. & Prof. Code § 17600 et seq., effective December 1, 2010, intended to end the practice of ongoing charging of consumer credit or debit cards or third party payment accounts without the consumers' explicit consent for ongoing product shipments or ongoing deliveries of service. *See* Chapter 50, Advertising and Promotion, § 50.11[13].

Performance of Services

Talent Services Contracts. Chapter 87, Entertainment Contracts, has been updated with new provisions of the Labor Code (Labor Code § 1701 et seq.) relating to advance-fee talent representation services and additional disclosures and contract requirements. Revised forms include: DLSE Form 351, (Application for Talent Agent License), DLSE Form 301-A (Affidavit of Character), and DLSE Form 301-B (Personal Record). *See* Chapter 87, Entertainment Contracts, §§ 87.21, 87.240[2], 87.241[2], 87.242[2].

Representations by Business Contracting with Federal Government. Chapter 90B, Federal Government Contracts, has been updated throughout to reflect changes to the implementing regulations (19 C.F.R. §§ 301-1, 301-2, 301-3) governing representations by a contractor regarding its size status as a small business, or other than a small business. *See* Chapter 90, Federal Government Contracts, §§ 90B.103, 90B.113.

Personal Transactions

Closure of Continuing Care Retirement Community. Chapter 105, Nursing Homes and Care for the Elderly, has been updated to include coverage of new Health and Safety Code § 1793.80 et seq. provisions describing how a continuing care community provider will proceed in the event of a closure. The continuing care contract form has also been revised to include these new provisions. *See* Chapter 105, Nursing Homes and Care for the Elderly, §§ 105.123, 105.230[2].

Additional Information Required in Skilled Nursing Facility Contract. The skilled nursing facility contract form contained in Chapter 105, Nursing Homes and Care for the Elderly, has been revised to include new, required disclosures under Health & Safety Code § 1599.64(c). *See* Chapter 105, Nursing Homes and Care for the Elderly, §§ 105.200[1][b], 105.200[2].

Real Estate Transactions

Residential Mortgage Loans. Legislation in 2009 added numerous provisions concerning residential mortgage loans and lenders' practices. Among them:

- Stats. 2009, ch. 630, added Bus. & Prof. Code §§ 10085.6 and 10147.6 and Civ. Code §§ 2944.6 and 2944.7, which regulate real estate licensees and other persons, particularly attorneys, who offer to provide loan modification services to homeowners, for compensation. For discussion, *see* Chapter 21, Agreements With Brokers, § 21.16.

- Stats. 2009, ch. 264, added Civ. Code § 1103.20 et seq., titled the Buyer's Choice Act, to provide that a mortgagee or trust deed beneficiary, after acquiring title to residential property at a foreclosure sale, may not require, directly or indirectly, as a condition of selling the property to another purchaser, that title insurance or escrow services must be obtained by the purchaser from a particular title insurer or escrow agent. For discussion, *see* Chapter 23, Real Property Sales Agreements, § 23.11[7].

- Stats. 2009, ch. 160, added provisions in the Real Estate Law, in the Finance Lenders Law, and in the Residential Mortgage Lending Act, to bring California law into conformity with the Secure and Fair Enforcement for Mortgage Licensing Act of 2008, 12 U.S.C. § 5101 et seq., added by Pub. L. No. 110-289, § 1501 et seq. (July 30, 2008), also known as the S.A.F.E. Mortgage Licensing Act, which requires all states to license and register mortgage

loan originators through the Nationwide Mortgage Licensing System and Registry. For discussion, *see* Chapter 25, Real Estate Loans, § 25.12[6].

- Stats. 2009, ch. 629, added Fin. Code § 4995 et seq., imposing restrictions on higher-priced mortgage loans, and added Civ. Code § 2923.1, specifying fiduciary duties of mortgage brokers. For discussion, *see* Chapter 25, Real Estate Loans, §§ 25.17A and 25.17B.

- Stats. 2009, ch. 43, amended Civ. Code § 2943 to enable escrow agents to obtain valid payoff statements in short sale transactions, which can occur often when deeds of trust or mortgages have to be foreclosed in a distressed real estate market. For discussion, *see* Chapter 25, Real Estate Loans, §§ 25.253[1][a].

- Stats. 2009, ch. 43, amended Civ. Code §§ 2923.5, 2923.6, and 2924.8, to enhance protections for homeowners whose homes are subject to mortgages and deeds of trust recorded from January 1, 2003, to December 31, 2007, inclusive. For discussion, *see* Chapter 25D, Foreclosure, § 25D.31[2]-[4].

- Stats. 2009, 2d Ex. Sess., ch. 5, added Civ. Code §§ 2923.52-2923.55, tacking a temporary 90-day extension onto the normal three-period after a default under a mortgage or deed of trust (that was recorded from January 1, 2003, to January 1, 2008, inclusive), in which a homeowner can attempt to cure the default. The purpose of the extension is to allow the parties to pursue a loan modification so as to prevent the impending foreclosure. For discussion, *see* Chapter 25D, Foreclosure, § 25D.206[1][c][vii].

In addition to the revisions described above, the publication has also been updated for recent judicial decisions, including the following:

Business and Nonprofit Organizations

Alcoholic Beverages--Effect of Zoning Ordinance on Business Transfer. In *SP Star Enters., Inc. v. City of Los Angeles* (2009) 173 Cal. App. 4th 459, the court held that an initial application for a conditional use permit to sell alcohol for on site consumption does not involve a fundamental vested right. Therefore, if the application were denied, a court reviewing that denial would not use its independent judgment to weigh the evidence but would apply the substantial evidence test. For a procedural guide to preliminary determinations relevant to a business-transfer transaction in which that issue could arise, *see* Chapter 18, Buying and Selling a Retail Alcoholic Beverage License and Business, § 18.110.

FEHA Employment Discrimination and Harassment Claims May Be Based on Same Conduct. The California Supreme Court has held that although harassment and discrimination are separate wrongs under the Fair Employment and Housing Act, they are sometimes closely interrelated and even overlapping. Thus, if the hostile message that constitutes the harassment is conveyed through official employment actions, those actions can give rise to a discrimination claim as well as a harassment claim. *See Roby v. McKesson Corp.* (Nov. 30, 2009) 2009 Cal. LEXIS 12374, now discussed in Chapter 1C, Regulation of Employers, § 1C.13[3][a].

Employees Have Reasonable Expectation of Privacy from Employer Surveillance. The California Supreme Court has held that employees have a reasonable expectation under widely held social norms that their employer will not install video equipment capable of monitoring and recording their activities--personal and work-related--behind closed doors without their knowledge or consent. Under the circumstances of the particular case, however, the Court found that the intrusion was not sufficiently serious to constitute a privacy violation. *See Hernandez v. Hillside, Inc.* (2009) 47 Cal. 4th 272, now covered in Chapter 1C, Regulation of Employers, § 1C.21[7].

Employee's Forfeiture of Unvested Stock Received Under Incentive Compensation Plan Does Not Violate Labor Code Wage Requirements. The California Supreme Court has held that an employee incentive compensation plan under which an employee can elect to receive, in lieu of a portion of his or her compensation, shares of company stock with restricted rights during a vesting period, with forfeiture of the restricted stock on the employee's resignation

or termination for cause before the stock fully vests, does not violate Lab. Code §§ 201 and 202, which require payment of earned, unpaid wages on termination or resignation. *See* *Schachter v. Citigroup, Inc.* (2009) 47 Cal. 4th 610, now covered in Chapter 1C, Regulation of Employers, § 1C.32[1], and Chapter 85, Employment Agreements, §§ 85.12[2][a], 85.531[1][a].

Personal Transactions

Birth and Death - Court Has Authority to Adjudicate Facts Concerning Biological Relationship. In *Wynn v. Superior Court* (2009) 176 Cal. App. 4th 346, 350; 98 Cal. Rptr. 3d 86 the California Court of Appeals held that where a plaintiff has filed a petition seeking an order to correct her original birth certificate so it would state the actual names of her birth parents, rather than the fictitious names her mother used when the original certificate was prepared, a trial court has the authority to adjudicate the facts concerning a possible biological relationship. Additionally, the court held that if a court determines a plaintiff's original birth certificate is not accurate, then the court is obligated to order the issuance of a new birth certificate. For additional information, *see* Chapter 99, Birth and Death, §§ 99.12[1], 99.22.

Receipt of Child into Home and Openly Holding Out Child as One's Own May Give Rise to Presumption of Parenthood Despite Short Duration of Relationship. A California Court of Appeal has held that under Family Code § 7611(d), which creates a presumption of a parent-child relationship when a person receives a child into his or her home and openly holds the child out as his or her natural child, the receipt of the child need not continue for any specific duration. In that case, the court found thirteen weeks to be sufficient, given that the receipt of the child was sufficiently unambiguous as to constitute a clear declaration regarding the nature of the relationship. *See* *Charisma R. v. Kristina S.* (2009) 175 Cal. App. 4th 361, now discussed in Chapter 100, Control, Custody, and Support of Minors, § 100.11[3][a].

Statute Authorizing Court To Award Child Custody to Nonparent Is Held Constitutional. A California Court of Appeal has upheld Family Code § 3041 against a constitutional challenge. Section 3041 authorizes a court to grant custody of a child to a nonparent if clear and convincing evidence establishes that granting custody to a parent would be detrimental to the child. The requisite clear and convincing proof of detriment may consist of a showing that the child has been in a stable home with a nonparent who has assumed the role of parent for a substantial period of time, a showing that may be made by a preponderance of the evidence. *See* *H.S. v. N.S.* (2009) 173 Cal. App. 4th 1131, now discussed in Chapter 124, Provisions for Child Custody and Visitation, § 124.204[1].

Wills and Trusts

Intestate Succession - Probate Code § 50 Includes All Lineal Descendants. In *Estate of Beckle* (2009) 174 Cal. App. 4th 34, 38, 93 Cal. Rptr. 3d 890, the California Court of Appeals reversed a trial court decision which allowed an administrator to limit the distribution of an intestate decedent's estate to surviving first cousins and the children of predeceased first cousins. In reversing, the court held that distribution of an intestate decedent's estate could not be limited to the surviving first cousins and the children of predeceased first cousins while excluding grandchildren of predeceased first cousins. The court noted that governing statutes, Prob. Code §§ 50, 240, 6402(d), do not limit the surviving issue of a predeceased heir entitled to inherit to the first generation; rather, surviving issue includes all lineal descendants of all generations. The court concluded that decedent's estate must be divided into as many shares as there were first cousins who survived decedent and the first cousins who predeceased the decedent but left surviving issue of any generation. For additional information, *see* Chapter 60, Estate Planning § 60.19[10], Chapter 61, Will Drafting and Complete Will Forms § 61.15[6][d], and Chapter 63, Will Provisions § 63.533[1][d].

Commercial Transactions

Liability on Dishonored Check--Claiming Statutory Damages Precludes Claim for Prejudgment Interest. In *Imperial Merchant Servs., Inc. v. Hunt* (2009) 47 Cal. 4th 381, 2009 Cal. LEXIS 8030, the California Supreme Court answered the question, certified to it by the Ninth Circuit, whether a debt collector recovering on a dishonored check may recover both a service charge under Civ. Code § 1719(a)(1) and prejudgment interest under Civ. Code § 3287. The

court held that the statutory damages prescribed in section 1719 are exclusive; therefore, a payee who recovers a service charge pursuant to section 1719 may not also recover prejudgment interest under section 3287. The case is discussed in comments to a form in Chapter 55, Negotiable Instruments, § 55.341[1][b].

Finally, California Legal Forms includes discussion of recent changes to legislation, including:

Business and Nonprofit Organizations

Nonprofit Corporations-Board of Directors. Corp. Code §§ 5211(c), 7211(c), and 9211(c) have been added [Stats. 2009, ch. 631, §§ 9, 19, 28] to specify that each director present and voting at a meeting has one vote on each matter presented to the board for action, and that no director may vote at a meeting by proxy. *See* Chapter 13, Nonprofit Corporations, § 13.31[5].

Nonprofit Corporations-Chief Financial Officer. Corp. Code §§ 5213(a), 7213(a), 9213(a) have been amended [Stats. 2009, ch. 631, §§ 11, 21, 30] to provide that unless otherwise specified in the articles or bylaws, if there is no chief financial officer, the treasurer is the chief financial officer. *See* Chapter 13, Nonprofit Corporations, § 13.121.

Nonprofit Corporations-Bylaws Requirements. Corp. Code §§ 5151(a), 7151(a), 9151(a) have been amended [Stats. 2009, ch. 631, §§ 8, 18, 27] to require bylaws to state either (1) the number of directors, (2) the method of determining the number of directors, or (3) that the number must be not less than a stated minimum or more than a stated maximum. *See* Chapter 13, Nonprofit Corporations, § 13.21[2].

Tax-Exempt Status of Nonprofit Entities. Rev. & Tax. Code § 23701d has been amended [Stats. 2009, ch. 504, § 2] with respect to Franchise Tax Board tax exemption application requirements and status after revocation. *See* Chapter 13B, Tax-Exempt Status for Nonprofit Entities, §§ 13B.121, 13B.210.

Consumer Cooperative Corporations-Dissolution. Corp. Code § 12630(c) has been added [Stats. 2009, ch. 631, § 49] to set forth voluntary dissolution procedures for bankrupt or inactive religious corporations when the number of directors is less than a quorum. *See* Chapter 14, Consumer Cooperative Corporations, §§ 14.50[1].

Dissolution of Limited Partnerships-Revival. Corp. Code § 15902.09 has been amended [Stats. 2009, ch. 544, § 1] with respect to the filing requirements applicable to a certificate of revival for a limited partnership whose certificate was canceled. *See* Chapter 16A, Dissolution of Limited Partnerships, §§ 16A.311, 16A.430, 16A.451.

Alcoholic Beverage License Transfer-Protests. Bus. & Prof. Code § 24013, setting forth the requirements for protesting a license transfer, has been amended [Stats. 2009, ch. 68, § 1]. *See* Chapter 18, Buying and Selling a Retail Alcoholic Beverage License and Business, § 18.52[2].

Real Estate Transactions

Sales of Real Property--Noncompliant Plumbing Fixtures. Stats. 2009, ch. 587, added Civ. Code §§ 1101.2-1101.4 and 1102.155, mandating that single family residences, if built and available for use before January 1, 1994, must be equipped with water conserving plumbing fixtures on or before January 1, 2017; and after that date, the seller of such a property must disclose whether the property includes any noncompliant plumbing fixtures. For discussion, *see* Chapter 23, Real Property Sales Agreements, § 23.20B.

Wills and Trusts

Gov. Code § 70650: The uniform filing fee for the first petition for letters of administration or letters testamentary, or the first petition for special letters of administration with the power of a general personal representative is three hundred fifty-five dollars (\$355) [Gov. Code § 70650(a)]. The uniform filing fee for the first objections to the probate of any will of codicil under Prob. Code § 8250, or the first petition for revocation of probate of any will or

codicil under Prob. Code § 8270 is three hundred fifty-five dollars (\$355) [Gov. Code § 70650 (b)]. A fee of three hundred fifty-five dollars (\$355) will also be charged for the filing of each subsequent petition or objection in the same proceeding by a person other than the original petitioner or contestant [Gov. Code § 70650(c)]. *See* Chapter 60, Estate Planning.

Probate Code §§ 21310 et seq.: Effective January 1, 2010, existing laws governing no contest clauses, specifically, Prob. Code § 21310 et seq., become inoperative and a revised Prob. Code §§ 21310-21315 will become operative. The new provisions will apply to any instrument whenever executed, that became irrevocable on or after January 1, 2001 [Prob. Code § 21315(a)]. The new provisions will not apply to an instrument that became irrevocable before January 1, 2001 [Prob. Code § 21315(b)]. These new provisions limit the enforceability of a no-contest clause to specific contests, redefine what a direct contest is, and provide that a no-contest clause may be enforced against a direct contest only when it is brought without probable cause. Additionally, the new provisions repeal all provisions allowing a beneficiary to apply for declaratory relief for a determination whether a contest would violate a no-contest clause. *See* Chapter 61, Will Drafting and Complete Will Forms, and Chapter 63, Will Provisions.

Personal Transactions

Code of Civ. Pro §§ 1513 - 1520: Several changes have been made to the escheat statutes in Code of Civ. Pro. §§ 1513-1520. One of the changes is that a deposit or account will not escheat to the state if the owner has owned an individual retirement account or funds held by the banking organization under a retirement plan for self-employed individuals or a similar account or plan [*see* Code Civ. Proc. § 1513]. Additionally, electronic notice is not allowed, provided the owner has consents [*see* Code Civ. Proc. § 1513]. Also, additional formatting requirements for notices have been specified in Code Civ. Proc. §§ 1315.5, 1516(d), 1520(b). *See* Chapter 102C, Lost and Unclaimed Property.

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